IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1256

WILLIAM M. KOPSHO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

NICHOLAS A. WHITTLE
FLORIDA BAR NO. 0549665
ASSISTANT CCRC
whittle@ccmr.state.fl.us

ERIC C. PINKARD
FLORIDA BAR NO. 0651443
ASSISTANT CCRC
PINKARD@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case **Page(s)**

Statutes

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Kopsho lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Kopsho.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are in the form (Vol. I R. 123). References to the trial transcript are in the form (Vol. # T123). References to the postconviction record on appeal are in the form (Vol. I PCR. 123.) Generally, William M. Kopsho is referred to as Mr. Kopsho throughout this brief. The Office of the Capital Collateral Regional Counsel– Middle Region, representing the Appellant, is shortened to "CCRC."

STATEMENT OF THE CASE AND FACTS

Trial Proceedings

Mr. Kopsho was charged by indictment with murder in the first degree and kidnapping while armed. (Vol. I R. 1-2.) The State filed a Notice of Intent to Seek Death Penalty. (Vol. I R13.) Mr. Kopsho was convicted as charged and sentenced to death; however, the Florida Supreme Court reversed the judgment and sentences and remanded for a new trial because the trial court improperly denied a juror challenge for cause. Kopsho v. State, 959 So. 2d 168, 173 (Fla. 2007).

Mr. Kopsho was retried in 2009, and was again convicted as charged. (Vol. XXIII R. 3684-85.) In its Advisory Sentence, the jury recommended a sentence of death by ten to two. (Vol. XXIII R. 3839.) The trial court in its Sentencing Order imposed a sentence of death on count one and a sentence of life imprisonment on count two. (Vol. XIV R. 3962-77.) The trial court found four aggravating circumstances: that at the time of the murder, Mr. Kopsho was on probation; that he had committed a prior violent felony; that the murder was committed during an armed kidnapping; and that the murder was cold calculated and premeditated. The trial court found the existence of fourteen nonstatutory mitigating factors including: that Mr. Kopsho suffered from mental or emotional disturbance at the time of the murder; that he was raised in an unloving home; that he was subjected to emotional and physical abuse as a child; and that he was abandoned by his mother at age

sixteen.

Mr. Kopsho appealed, and the Florida Supreme Court affirmed his judgment and sentences. Kopsho v. State, 84 So. 3d 204 (Fla. 2012). The judgment and sentences, the Kopsho court stated:

> On October 27, 2000, Kopsho shot Lynne [Kopsho] after she fled his moving vehicle. Kopsho held witnesses and bystanders at bay until Lynne expired. Kopsho called 911 himself and confessed. He confessed again during his interview with the police after he turned himself over to authorities. Kopsho explained that he killed Lynne because she told him that she had slept with her former supervisor, Dennis Hisey. He stated that "it was that instant" when he planned to kill her, but that he had to "stay cool" until he had the opportunity to secure a weapon.

The State called six witnesses in the penalty phase, including Helen Little who gave a harrowing account of her prior kidnapping and rape by Mr. Kopsho. Mr. Kopsho called eight witnesses, including two of his siblings who testified to the mental and physical abuse their mother inflicted on her children, particularly Mr. Kopsho. Mr. Kopsho called one expert witness, Dr. Elizabeth McMahon, a clinical neuropsychologist. (Vol. XXXVIII R. 1548-98.) Dr. McMahon testified that Mr. Kopsho "would be termed probably a dependent personality disorder with some borderline features." (Vol. XXXVIII R. 1568.) She further testified that he developed a fearful or ambivalent attachment to the caregiver (his mother), and that anger follows his unmet attachment needs. (Vol. XXXVIII R. 1570.) It was his

upbringing that led him to have an abusive personality and a dependent personality with borderline features, one of the most common personality disorders of people who kill their wives. (Vol. XXXVIII R. 1576.)

Postconviction proceedings

Following this court's mandate in Kopsho, the Office of Capital Collateral Counsel for the Middle Region was appointed to represent Mr. Kopsho. (Vol. I PCR. 40.) On November 19, 2012, Mr. Kopsho filed a demand for additional public records pursuant to Florida Rule of Criminal Procedure 3.852(g), wherein he sought, inter alia, all emails related to the case produced by employees of the Office of the State Attorney who were involved with the case. (Vol. I PCR. 99-100.) On February 18, 2014, following a hearing, the trial court entered the Order Granting Defendant's Demand For Additional Public Records (emails) from The Office Of The State Attorney. (Vol. III PCR. 429-30.) The time frame for the disclosure of the emails was limited to the period from October 27, 2000 to June 25, 2009.

Prior to the trial court entering the above order, Mr. Kopsho, on September 26, 2013, filed his initial Motion to Vacate Judgment of Conviction and Sentence pursuant to Florida Rule of Criminal Procedure 3.851. (Vol. II PCR. 268-336.) The State filed its response to the motion on January 8, 2014. (Vols. II, III PCR. 364-400.) On October 1, 2014, the trial court, by written order, granted Mr. Kopsho's oral motion to amend the rule 3.851 motion. . (Vol. III PCR. 435-36.) On October

2, 2014, the trial court entered the Amended Order Granting Defendant's Demand For Additional Public Records (emails) From The Office Of The State Attorney, which narrowed the time period for providing the emails from October 27, 2000 to March 24, 2005. (Vol. III PCR. 437-38) On November 19, 2014, Mr. Kopsho filed an Amended Motion to Vacate Judgment of Conviction and Sentence. (Vol. III PCR. 441-479.) The State filed its response to the motion on December 9, 2014. (Vol. III PCR. 123.) Following a March 9, 2015, case management conference (Vol. XI PCR. 1-13), the trial court entered the Order Denying Motion To Vacate Judgment Of Conviction And Sentence, which summarily denied the claims for which an evidentiary hearing was requested and also denied the claims for which no evidentiary hearing was requested. (Vol. III, IV PCR. 544-689.) Mr. Kopsho's timely motion for rehearing (Vol. IV PCR. 690-703) was denied by order dated April 28, 2015. (Vol. IV PCR. 716-293.) This timely appeal follows.

The Amended Motion to Vacate Judgment of Conviction and Sentence contained five grounds for relief. Mr. Kopsho sought an evidentiary hearing on Claims I and II of the motion. Claim I was divided into three subclaims. In Claim IA, Mr. Kopsho alleged that counsel failed to conduct a reasonably competent mitigation investigation, including the failure to ensure a reasonably competent mental health evaluation. Mr. Kopsho noted that even though trial counsel presented mitigation testimony through Dr. McMahon, counsel failed to present expert

testimony establishing the statutory mental mitigator that the capital felony was committed while Mr. Kopsho was under the influence of extreme mental or emotional disturbance. §921.141(6)(b), Fla. Stat. (2000).

Mr. Kopsho further alleged:

> The mitigation data presented during the penalty phase was geared towards demonstrating that Mr. Kopsho had an abusive childhood and adolescence and that this background was responsible for his behavior in the homicide. However, the mitigation presentation was woefully inadequate in terms of explaining why Mr. Kopsho would engage in the behavior that resulted in the death of Lynn Ann Kopsho. While there was some testimony from Dr. Elizabeth McMahon as to how Mr. Kopsho's history of abuse impacted his mental health, the mitigation presentation failed to bring together the information into a logical and reasonably coherent whole. Counsel was ineffective in failing to present expert testimony that Mr. Kopsho was suffering from mood disorder and a Borderline Personality Disorder (BDP), which was rooted in his abusive childhood and adolescence, and that a common symptom of BPD is frequent inappropriate, intense anger known as rage. Counsel was ineffective in failing to present expert testimony that Mr. Kopsho demonstrated a consistent pattern of behavior that reflects the shame he experienced as a child and his unmet needs for attachment, and that the shame and fear of abandonment he carried from childhood translated into rage when he perceived he was being rejected by his wife and intimate partner, Lynn Ann Kopsho; shame, fear of abandonment, and rage being common symptoms of people with BPD. Counsel was ineffective in failing to present expert testimony that BPD is intimately intertwined with Intimate Partner Violence. Counsel was ineffective in failing to present expert testimony delineating how Mr. Kopsho's developmental history, adult pattern of pathological relationships,

> violence, and mental health intertwined to produce an individual prone to paranoia, severe emotional liability, and rage, culminating in him being under the influence of extreme mental and emotional disturbance at the time of the commission of the capital felony.
>
> At the evidentiary hearing, Dr. William Russell, Ph.D, 1225 Vine Street, Philadelphia, PA. 19107, phone number 215 405-2100, will present testimony in regard to the omissions and deficiencies in the mental health testimony elicited at the penalty phase, and will present the expert mental health testimony that counsel failed to present as outlined above. Dr. Russell will explain how Mr. Kopsho's history of physical, emotional and sexual abuse was connected to his life history and, in particular, his relationship with the victim and his decisions and conduct during the crime; and he will testify that Mr. Kopsho suffered from paranoia and Borderline Personality Disorder and was under the influence of extreme mental or emotional disturbance at the time of the commission of the capital felony.

(Vol. III PCR. 451-2.)

Prior to its amendment, the initial rule 3.851 motion contained a claim that counsel failed to ensure a reasonably competent mental health evaluation, including that counsel failed to present expert testimony establishing the statutory mental mitigators. (Vol. II PCR. 280-82.) In the amended motion, Mr. Kopsho expanded on this claim.

In claim IB, Mr. Kopsho alleged that counsel was ineffective in failing to procure and present expert testimony that Mr. Kopsho had made a positive adjustment to prison and would not pose a problem if sentenced to lifetime

incarceration (lack of future dangerousness). Mr. Kopsho indicated that he would be calling James Aiken, an expert experienced in prison confinement and classifications who would have been available at the time of the retrial to establish this. (Vol. III PCR. 454.) The initial motion also contained a claim that counsel was ineffective in failing to present testimony that Mr. Kopsho had adjusted to prison life and would not be a danger if he was given a life sentence (lack of future dangerousness), and that Mr. Kopsho was prepared to present expert testimony to this effect. (Vol. II PCR. 281-82.)

In Claim IC, Mr. Kopsho alleged that counsel was ineffective in failing to present as mitigation that the State considered making an offer of life imprisonment if the victim's family would agree. Mr. Kopsho also alleged that to allow the victim's family to determine whether the State should seek the death penalty allows for arbitrary, capricious, and/or discriminatory winnowing of crimes punishable by death. (Vol. III PCR. 454-55.) Mr. Kopsho alleged that these claims were not previously raised in the initial motion because they were based on the 2004 emails that were subsequently obtained from the State Attorney's Office.

In Claim II, Mr. Kopsho alleged that the cumulative effect of the combined instances of the ineffective assistance of trial counsel deprived him of a fundamentally fair trial.

In Claim III, Mr. Kopsho alleged that Florida's death penalty statute, which allows for a non-unanimous jury verdict on the issue of life or death is unconstitutional because it violates the Due Process requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Vol. III PCR. 456-69.) Mr. Kopsho also alleged that Florida's death penalty statute violated the evolving standards of decency of an evolving society. Mr. Kopsho did not seek an evidentiary hearing on this claim.

In Claim IV, Mr. Kopsho alleged that his Eighth Amendment right against cruel and unusual punishment will be violated because Florida is unable to maintain a sufficient supply of drugs to administer its lethal injection protocol. (Vol. III PCR. 469-74.) Mr. Kopsho did not seek an evidentiary hearing on this claim.

In Claim V, Mr. Kopsho alleged that his Eight Amendment right against cruel and unusual punishment will be violated because he may be incompetent at the time of the execution. Mr. Kopsho did not seek an evidentiary hearing on this claim.

The State filed a response to the amended motion to vacate on December 9, 2014. (Vol. III PCR. 483-543.) The trial court held a telephonic case management conference on March 9, 2015. (Vol. XI PCR. 1-13.) Postconviction counsel was under the impression that the telephonic conference was a status conference and not a case management conference. (Vol. XI PCR. 9; Vol. IV PCR. 699.) At the case management conference, the trial court stated that it had reviewed the amended

motion to vacate and the State's response and that "the respective positions of the parties was well stated in each of those proceedings." The trial court indicated that it did not believe that it needed to hear oral argument regarding the claims, and postconviction counsel did not request to be heard. (Vol. XI PCR. 5-6.) On March 24, 2015, the trial court entered the Order Denying Motion to Vacate Judgment of Conviction and Sentence, which summarily denied said motion. (Vol. III, IV PCR. 544-689.) Mr. Kopsho filed the timely Motion for Rehearing on April 1, 2015. (Vol. IV PCR. 690-703.) The State filed the Response to Motion for Rehearing on April 17, 2005. (Vol. IV PCR. 704-07.) The trial court entered the Order Denying Motion for Rehearing on April 28, 2015. (Vol. IV PCR. 716-29.)

In summarily denying Claim IA of the Amended Motion to Vacate Judgment of Conviction and Sentence, the trial court found that "[t]he mitigation evidence Kopsho claims Counsel was deficient for failing to present to the jury during the penalty phase was nearly all presented through the testimony of lay and expert witnesses during the defense's case-in-chief." (Vol. III PCR. 551.) In the Motion For Rehearing, Mr. Kopsho pointed out that he alleged in the amended postconviction motion that counsel did not present available expert testimony that the capital felony was committed while Mr. Kopsho was under the influence of extreme emotional or mental disturbance, a statutory mitigator. §921.141(6)(b). Mr. Kopsho also noted that he alleged in the amended motion that Dr. McMahon did not

explain to the jury what a Borderline Personality Disorder is and how and why it affected Mr. Kopsho. (Vol. IV PCR. 4-5.)

In summarily denying Claim IB of the amended motion, the trial court found that the claim, as raised, was purely speculative because "[t]he motion does not indicate that this expert from North Carolina has ever met Kopsho, observed him in a prison environment, or prepared any studies, reports, or opinions this expert would have on Kopsho, specifically." (Vol. III PCR. 562.) The trial court also found that the testimony of the expert in prison confinement and classifications would be cumulative to the testimony of Dr. McMahon. (Vol. III PCR. 562-63.) In the Motion For Rehearing, Mr. Kopsho asserted that it was implicit in the pleadings in the amended motion that the expert had met with Mr. Kopsho and studied his jail and prison records in order to enable him to form an opinion about his future dangerousness. However, in an abundance of caution, Mr. Kopsho asked to be able to amend Claim 1B pursuant to Spera v. State, 971 So. 2d 754 (Fla. 2007), to allege that the expert had visited Mr. Kopsho in prison and had reviewed his jail and prison records in forming his opinion. Mr. Kopsho also noted that Dr. McMahon provided no testimony at the penalty phase on whether Mr. Kopsho had adjusted to prison life and whether he would pose any threat if sentenced to lifetime incarceration. (Vol. IV PCR. 692-94.)

In summarily denying Claim 1C, the trial court found that the claim was

insufficiently pleaded because "Kopsho failed to proffer any witness prepared to testify to the content of any email and failed to incorporate or attach the email or emails that this claim is based on." The trial court also found that the claim was meritless because victim's family has a right to be informed, to be present, and to be heard at all crucial stages of criminal proceedings. (Vol. III PCR. 563-64.) In the Motion for Rehearing, Mr. Kopsho noted that at the telephonic case management conference, the trial court advised him that he had thirty days to file a witness list and exhibit list. Mr. Kopsho also sought to amend his claim pursuant to Spera, and listed two witnesses that he intended to call in support of this claim. He also attached two emails that indicated that the State was willing to offer life in prison if the victim's family would agree. (Vol. IV PCR. 695-96.)

The trial court summarily denied Claim II because Mr. Kopsho failed to prove any of the raised errors. (Vol. III PCR. 564-65.) Regarding the claims for which Mr. Kopsho did not seek an evidentiary hearing: the trial court denied Claim III citing Mann v. State, 112 So. 2d 1158, 1162 (Fla. 2013), for the proposition that non-unanimous jury death recommendations are not unconstitutional. (Vol. III PCR. 565.) Mr. Kopsho sought rehearing based on the Supreme Court granting certiorari in Hurst v. State, 147 So. 3d 435 (Fla. 2014), certiorari granted Hurst v. Florida, --U.S.--, 135 S.Ct. 1531, 191 L. Ed.2d 558 (2015). The trial court denied Claim IV based on Muhammad v. State, 132 So. 3d 176, 188-97, 200-04 (Fla. 2013). The trial

court found that Claim V was not yet ripe for review.

SUMMARY OF ARGUMENT

The trial court reversibly erred in denying Claim IA and finding that Dr. Russell's proposed testimony would be cumulative to the testimony of Dr. McMahon where trial counsel failed to present available expert testimony that the capital felony was committed while Mr. Kopsho was under the influence of extreme mental or emotional disturbance and Dr. Russell would explain how Mr. Kopsho's Borderline Personality Disorder rendered him under the influence of extreme mental or emotional disturbance; whereas Dr. McMahon did not adequately explain to the jury what Borderline Personality Disorder is and how and why it affected Mr. Kopsho.

The trial court reversibly erred in denying Claim IB as facially insufficient on the basis that it was not alleged in the amended motion that that Mr. Kopsho's proposed expert witness in prison confinement and classifications, James Aiken, had ever met Mr. Kopsho, observed him in a prison environment, or prepared any studies, reports, etc., on Mr. Kopsho when it is implicit in the allegations that Mr. Aiken would have sufficient knowledge of Mr. Kopsho and his circumstances to render an opinion on his future dangerousness. Alternatively, the trial court reversibly erred in not allowing Mr. Kopsho to amend his motion pursuant to Spera v. State, 971 So. 2d 754 (Fla. 2007), to allege that Mr. Aiken had met with Mr.

Kopsho in prison and had reviewed his jail and prison records. The trial court also reversibly erred in finding that the testimony of Mr. Aiken would be cumulative to the testimony of Dr. McMahon when Dr. McMahon provided no testimony at the penalty phase that Mr. Kopsho had adjusted to prison life and would not pose a problem if sentenced to lifetime incarceration and Dr. McMahon was not qualified as an expert in prison confinement and classifications.

The trial court reversibly erred in denying Claim 1C as facially insufficient without providing Mr. Kopsho with an opportunity to amend the claim pursuant to Spera when he could do so in good faith.

The trial court reversibly erred in denying Claim II on the basis that Mr. Kopsho failed to prove any of the claims raised in Claim I. Mr. Kopsho presented facially sufficient claims in Claim IA and Claim IB. If this court considers that Mr. Kopsho did not present a facially sufficient claim in Claim 1B, the court should allow Mr. Kopsho to amend this claim under Spera.

The trial court reversibly erred in denying Claim III based on case law from the Florida Supreme Court when the United States Supreme Court has granted certiorari in the case of Hurst v. State, 147 So. 3d 435 (Fla. 2014), certiorari granted Hurst v. Florida, -- U.S.--, 135 S.Ct. 1531, 191 L. Ed.2d 558 (2015).

STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), these claims are mixed questions of law and fact requiring *de novo* review.

ARGUMENT

ISSUE I: THE TRIAL COURT REVERSIBLY ERRED IN DENYING CLAIM IA OF THE AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE ON THE GROUND THAT MR. KOPSHO'S PROPOSED EXPERT MENTAL HEALTH TESTIMONY IS CUMULATIVE TO THE TESTIMONY PRESENTED AT THE PENATLY PHASE

The initial rule 3.851 motion contained a claim that counsel was ineffective in failing to ensure a reasonably competent mental health evaluation, including that counsel failed to present expert testimony establishing the statutory mental mitigators (Vol. II PCR. 280-82.) "An ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" Strickland v. Washington, 466 U.S. 668, 687-688(1984) (internal citations omitted). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In the amended motion, Mr. Kopsho expanded on the claim raised in the initial motion, naming the mental health expert he would call at an evidentiary hearing and specifically alleging, inter alia, that the expert, Dr. Russell, would present testimony establishing the statutory mental mitigator that the capital felony was committed while Mr. Kopsho was under the influence of extreme mental or emotional disturbance. §921.141(6)(b), Fla. Stat. (2000). (Vol. III PCR. 450.) This court has held that in a case where the defendant was sentenced to death, the expiration of the limitation period does not preclude enlargement of the issues raised in a timely filed motion for postconviction relief. Rogers v. State, 782 So. 2d 373, 376 n. 7 (Fla. 2001). Thus, it was perfectly proper for Mr. Kopsho to expand on this claim even though it was outside the one-year period.

The trial court, in the order summarily denying the motion to vacate, found that the testimony that Mr. Kopsho seeks to present at the evidentiary hearing in regard to this claim to be cumulative to the testimony presented at the penalty phase. (Vol. III PCR. 551-61.) The trial court specifically found: "Contrary to Kopsho's claim, the [Sentencing] Order specifically noted that the mental mitigator that the capital felony was committed while Kopsho was under the influence of mental or emotional disturbance was proven and given moderate weight." (Vol. III

PCR. 561.) Although the trial court, in its sentencing order, did find that the capital felony was committed while Mr. Kopsho was under the influence "of mental or emotional disturbance" (Vol. XXIV R. 3969), it did not find the statutory mitigator that the capital felony was committed while the defendant was under the influence of *extreme* mental or emotional disturbance. Furthermore, even though the trial court made the above finding it was not supported by the evidence presented at the penalty phase.

Dr. McMahon did not testify that Mr. Kopsho was under the influence of mental or emotional disturbance, let alone *extreme* mental or emotional disturbance. In her direct examination, Dr. McMahon testified that Mr. Kopsho can become angry from unmet attachment needs; that eventually that anger becomes rage; and that being abandoned by a woman triggers rage in Bill Kopsho. (Vol. XXXVIII 1572-73.) However, when asked on cross examination, Dr. McMahon testified that although Mr. Kopsho was in a state of rage when he killed his wife, he was able to control his rage. (Vol. XXXVIII 1572-73.) If, as per Dr. McMahon's testimony, Mr. Kopsho was able to control his emotions at the time of the capital felony, he clearly was not under the influence of extreme mental or emotional disturbance. Furthermore, although Dr. McMahon briefly mentioned Mr. Kopsho suffered from a "dependent personality disorder with some borderline features" (Vol. XXXVIII 1576), it was never explained to the jury what a

Borderline Personality Disorder is and how and when combined with the circumstances in which he found himself, it caused Mr. Kopsho to be under the influence of extreme mental or emotional disturbance at the time of the capital offense.

In the amended motion to vacate, Mr. Kopsho alleged:

> Counsel was ineffective in failing to present expert testimony delineating how Mr. Kopsho's developmental history, adult pattern of pathological relationships, violence, and mental health intertwined to produce an individual prone to paranoia, severe emotional liability, and rage, culminating in him being under the influence of extreme mental and emotional disturbance at the time of the commission of the capital felony.

(Vol. III PCR. 452.) This testimony would not have been cumulative to the testimony presented in the penalty phase, and the trial court erred in denying an evidentiary hearing on this claim. Confidence in the outcome of the penalty phase was undermined by the deficient performance of counsel in failing to ensure a competent mental health evaluation and in failing to present this available testimony. Because of counsel's deficient performance, rather than viewing Mr. Kopsho as being under the influence of extreme mental or emotional disturbance, the jury viewed him as being able to control his emotions at the time of the capital felony. This court has described extreme emotional distress as an important statutory mitigating factor. See Robinson v. State, 913 So. 2d 514, 522 (Fla. 2005); Peede v. State, 748 So. 2d 253, 1060 (Fla. 1999). In Rose v. State, 675 So. 2d 567, 573 (Fla.

1996), this court stated: "[W]e have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." (Internal citations omitted.)

Mr. Kopsho should have been allowed the benefit of an evidentiary hearing to present his claim. "Pursuant to Florida Rule of Criminal Procedure 3.851, a circuit court must hold an evidentiary hearing on an initial motion for postconviction relief whenever the movant makes a facially sufficient claim that requires a factual determination." Troy v. State, 57 So. 2d 828, 833-34 (Fla. 2011). In this instance, Mr. Kopsho pleaded a facially sufficient claim requiring a factual determination, and the trial court reversibly erred in summarily denying the claim. The trial court's failure to allow Mr. Kopsho an opportunity to present evidence in support of this claim violated his right to due process guaranteed by the United States Constitution.

ISSUE II: THE TRIAL COURT REVERSIBLY ERRED IN DENYING CLAIM IB OF THE AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE WHERE MR. KOPSHO ALLEGED A FACIALLY SUFFICIENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND, IN AN ABUNDANCE OF CAUTION, SOUGHT LEAVE TO AMEND THE CLAIM PURSUANT TO SPERA V. STATE, 971 SO. 2D 754 (FLA. 2007)

In claim IB of the amended motion, Mr. Kopsho alleged that he would present testimony from James Aiken, 36 Tsiya Court, Brevard, N. C. 28712, an expert experienced in prison confinement and classifications and that such testimony would

have been available at the time of his re-trial to establish that he could and/or has adjusted well to prison and would not be a danger if given a life sentence. Mr. Kopsho alleged that counsel rendered deficient performance in failing to present such testimony and the failure to do so prejudiced him to the extent that confidence in the outcome of the penalty phase is undermined. (Vol. III PCR. 454.) This is especially true when considered cumulatively with deficiencies in performance alleged in Claims IA and IC. The initial motion contained a claim that counsel was ineffective in failing to present testimony that Mr. Kopsho had adjusted to prison life and would not be a danger if he was given a life sentence, and that Mr. Kopsho was prepared to present expert testimony to this effect. (Vol. II PCR. 281-82.) Mr. Kopsho expanded on this claim in the amended motion. As noted above, the one-year limitation period for filing a rule 3.851 motion does not preclude enlargement of the issues raised in a timely filed motion for postconviction relief. Rogers v. State, 782 So. 2d 373, 376 n. 7 (Fla. 2001).

The trial court summarily denied Claim IB of the amended motion, finding that it was purely speculative because the "*motion does not indicate* that this expert from North Carolina has ever met Kopsho, observed him in a prison environment, or prepared any studies, reports, or opinions this expert would have on Kopsho specifically." (Vol. III PCR. 562, emphasis added.) Thus, the trial court denied this claim as facially insufficient because it failed to contain certain allegations that the

trial court deemed necessary in order to state a facially sufficient claim. Mr. Kopsho considers that it is implicit in his pleadings in claim IB that Mr. Aiken has met with Mr. Kopsho and has studied his prison and jail records in order to enable him to form an opinion about his future dangerousness. Nowhere in Florida jurisprudence is it required that a movant must allege in a rule 3.851 motion that a particular expert met with the defendant. Furthermore, Mr. Aiken is not required to prepare a "study" or a report on Mr. Kopsho; and he has formed an opinion, in that he has come to a conclusion that Mr. Kopsho has adjusted to prison and would not pose a problem if sentenced to lifetime incarceration. Regardless, the case relied on by the trial court, Troy v. State, 948 So. 2d 635, 651 (Fla. 2006), is inapposite.

Troy is a direct appeal from a sentence of death. Troy sought to call Michael Galemore, the assistant warden at Polk County Correctional Institution to testify at his penalty phase that if Troy were sentenced to life imprisonment, he would be in close custody; that Troy would work while in prison; and that he would not easily have access to drugs. Id. The trial court excluded Galemore's testimony as speculative because Galemore had no knowledge of Troy or the case. Id. The Florida Supreme Court, in concluding that the trial court did not abuse its discretion in excluding Galemore's testimony, stated: "Furthermore, Galemore had never met Troy, nor had he ever witnessed Troy during one of his periods of incarceration, making his potential prison sentence regarding Troy's possible prison sentence

entirely speculative." Id. Thus, in Troy, it was *factually established* that Galemore had never met Troy and did not know anything about him or the case. It has not been established in the present case that Mr. Aiken has never met Mr. Kopsho and has no personal knowledge of the case or Mr. Kopsho's situation. Should this have been established prior to the evidentiary hearing, the State could have moved in limine to exclude Mr. Aiken's testimony. Had this information come out at the evidentiary hearing, Mr. Aiken's testimony would have little or no credibility, and the trial court could have properly disregarded it. The claim as raised was a facially sufficient claim. See Ault v. State, 53 So. 3d 175, 190-91 (Fla. 2010) (holding that the possibility of a positive adjustment to life in prison is a mitigating circumstance).

In his motion for rehearing, Mr. Kopsho, in an abundance of caution, sought leave to amend this claim pursuant to Spera v. State, 971 So. 2d 754 (Fla. 2007), to allege, inter alia: that Mr. Aiken visited Mr. Kopsho in prison on December 5, 2013; that he has reviewed Mr. Kopsho's prison and jail records; that his opinion is that because of his age at the time of the retrial, Mr. Kopsho would be able to adjust and/or has adjusted to a structured prison environment; that during the interview, Mr. Aiken provided the opportunity to Mr. Kopsho to be manipulative, but he remained compliant and did not portray himself to be a victim, which indicates he is well adjusted to prison life; that Mr. Aiken considered that the offense arose in a domestic violence context and did not involve drug dealing or gang violence, also

indicating that Mr. Kopsho would be well adjusted to prison life; and that these many factors, among others, form the basis for his opinion. (Vol. IV PCR. 694-65.) If this court determines that the claim as raised is facially insufficient, the trial court then erred in denying Mr. Kopsho leave to amend under Spera. The Spera court held that when a defendant's postconviction claim is determined to be facially insufficient, it must allow at least opportunity to amend, if the defendant can in good faith do so. Id. at 757-62. Here, Mr. Kopsho can amend the motion in good faith as demonstrated by his Motion for Rehearing.

The trial court in summarily denying this claim also found that the testimony of James Aiken was cumulative to the testimony of Dr. McMahon. (Vol. III PCR. 562-63.) However, Dr. McMahon provided no testimony whatsoever at the penalty phase on the issue of whether Mr. Kopsho had adjusted to prison life and whether he would pose a problem if sentenced to lifetime incarceration. Although trial counsel argued in his sentencing memorandum that society would be protected by a life sentence, it was not based on any testimony, expert or otherwise, presented at the penalty phase; rather, counsel "bootstrapped in" Dr. McMahon's testimony that Mr. Kopsho's emotional problems surface in the context of a domestic or spousal relationship into his sentencing memorandum. (Vol. XXV R. 4037-38.)

The trial court reversibly erred in denying the claim as speculative because it was lacking certain allegations. The claim was facially sufficient as alleged.

Furthermore, the trial court essentially denied the claim as facially insufficient. The trial court reversibly erred in doing so without providing an opportunity to amend under Spera. As shown in the Motion for Rehearing, the claim could have been amended in good faith. Finally, the trial court reversibly erred in determining that Mr. Aiken's expert testimony would be cumulative to the testimony presented in the penalty phase. The trial court's failure to allow Mr. Kopsho an opportunity to present evidence in support of the claim violated his right to due process guaranteed by the United States Constitution.

ISSUE III: THE TRIAL COURT REVERSIBLY ERRED IN DENYING CLAIM IC OF THE AMENDED MOTION AS FACIALLY INSUFFICIENT WITHOUT PROVIDING THE OPPORTUNITY TO AMEND UNDER SPERA

In Claim IC, Mr. Kopsho alleged:

> Trial counsel failed to ensure a reasonably competent mitigation investigation in that he failed to present as mitigation in the penalty phase at trial that the State Attorney's Office considered making an offer of life imprisonment to Mr. Kopsho if the victim's family would agree. Mr. Kopsho also raises a separate constitutional claim that to allow the victim's family to effectively make the decision whether the State should seek the death penalty fails to assure that death penalty cases in Florida are treated alike and allows for arbitrary, capricious, and/or discriminatory winnowing of defendants convicted of crimes punishable by death.

(Vol. III PCR. 454.) Mr. Kopsho further alleged that had counsel presented as mitigation that the State was agreeable to him pleading to a life sentence, the outcome of the penalty phase probably would have been different.

The trial court denied this claim as insufficiently pleaded because "Kopsho failed to proffer any witnesses prepared to testify to the content of any email and failed to incorporate or attach the email or emails that this claim is based on." (Vol. III PCR. 563-64.) At the March 9, 2015, telephonic hearing, postconviction counsel advised the trial court that he thought the hearing was a status conference and not a case management conference. The trial court advised that Mr. Kopsho had thirty days to file a witness list and an exhibit list. (Vol. XI PCR. T11-12.) Mr. Kopsho was prepared to list the witnesses and exhibits in support of this claim within thirty days.

In his Motion for Rehearing, Mr. Kopsho sought leave to amend this claim and list the witnesses as Richard Ridgway, Esquire, Office of the State Attorney, 110 NW 1st Avenue, suite 5000, Ocala, FL 34475, and William Miller, Esquire, Office of the Public Defender, 204 NW 3rd Avenue, Ocala, FL 34475. The emails supporting the claim were attached to the motion as exhibit 2. The emails are self-explanatory and indicate that the State, and Assistant State Attorney Richard Ridgway in particular, were willing to offer life in prison if the victim's family would agree.

The trial court erred in denying this claim as facially insufficient without providing Mr. Kopsho the chance to amend this claim pursuant to Spera. As demonstrated in the Motion for Rehearing, the claim could be amended in good faith. The Supreme Court has not yet decided whether a prosecutor's offer to allow a defendant to plead to life imprisonment in return for a guilty plea is a mitigating circumstance. Hitchcock v. Sec'y, Fla. Dep't of Corr., 745 F.3d 476, 483 (11th Cir. 2014). The Hitchcock court held that evidence of a rejected offer of life imprisonment is not a mitigating circumstance, but noted that the Ninth Circuit in Scott v. Schirro, 567 F.3d 573, 584 (9th Cir. 2009), held to the contrary when it stated, "The plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case." The trial court reversibly erred in denying this claim without providing an opportunity to amend.

Mr. Kopsho's secondary claim in Claim IC is that the victim's family should not be allowed to make the ultimate decision as to whether Mr. Kopsho would be offered life imprisonment. Mr. Kopsho is not contending that the victim's family should not be consulted as required by section 921.141(7), which is how the trial court misinterpreted this claim in its order of summary denial. (Vol. III PCR. 564.) The trial court reversibly erred in summarily denying Claim IC. The trial court's failure to allow Mr. Kopsho an opportunity to amend the claim and to present

evidence in support of it claim violated his right to due process guaranteed by the United States Constitution.

ISSUE IV: THE TRIAL COURT REVERSIBLY ERRED IN DENYING IN SUMMARILY DENYING CLAIM II OF THE AMENDED MOTION WHEREIN MR. KOPSHO ALLEGED THAT THE COMBINED INSTANCES OF INEFFECTIVENESS OF TRIAL COUNSEL DEPRIVED HIM OF A FAIR TRIAL

In Claim II of the amended motion, Mr. Kopsho alleged that the combined instances of prosecutorial misconduct deprived him of a fundamentally fair trial guaranteed under the Sixth, Eighth and Fourteenth Amendments and that he was prejudiced by the cumulative effect of counsel's deficient performance. (Vol. III PCR. 465.) The trial court denied this claim, finding that Mr. Kopsho "failed to prove any of the raised errors." (Vol. III PCR. 564-65.) This was reversible error. Mr. Kopsho presented a facially sufficient claim in Claim IA that warranted an evidentiary hearing. Claim IB was also facially sufficient, and also warranted an evidentiary hearing. Even if the claim were facially insufficient, Mr. Kopsho should have been provided with the opportunity to amend the claim. Lastly, Mr. Kopsho should also have been provided with the opportunity to amend Claim IC. The trial court's failure to allow Mr. Kopsho an opportunity to present evidence in support of the above claim violated his right to due process guaranteed by the United States Constitution.

ISSUE V: THE TRIAL COURT REVERSIBLY ERRED IN DENYING CLAIM III OF THE AMENDED MOTION WHEREIN MR. KOPSHO ALLEGED THAT FLORIDA'S DEATH PENALTY STATUTE VIOLATED FEDERAL CONSTITUTIONAL PROCEDURAL DUE PROCESS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE IT ALLOWS FOR A NON-UNANIMOUS JURY VERDICT AT SENTENCING

In Claim III, Mr. Kopsho alleged that Florida's death penalty statute, which allows for a non-unanimous verdict violates the due process requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (Vol. III PCR. 456-69.) Mr. Kopsho did not seek an evidentiary hearing on this claim. The trial court denied this claim based on case law from the Florida Supreme Court. The trial court erred in denying this claim subsequent to the Supreme Court's granting of certiorari in Hurst v. State, 147 So. 3d 435 (Fla. 2014), certiorari granted in part by Hurst v. Florida, U.S.--, 135 S.Ct. 1531, 191 L. Ed.2d 558 (2015), wherein it will review Florida's unique non-unanimous death penalty sentencing scheme.

CONCLUSION

Mr. Kopsho requests that this court reverse the summary denial of Claim IA and allow him an evidentiary hearing on this claim. He requests that this court reverse the summary denial of claim IB and either allow him an evidentiary hearing or an opportunity to amend if the court considers that the claim is facially insufficient. Mr. Kopsho further requests that this court reverse the summary denial of Claim IC and allow him an opportunity to amend the claim. Mr. Kopsho also

requests that this court reverse the summary denial of Claim II. Finally, Mr. Kopsho requests that this court reverse the denial of Claim III pending the Supreme Court's resolution of Hurst.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Initial Brief of Appellant** has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Stacey Kircher, Assistant Attorney General stacey.kircher@myfloridalegal.com, capapp@myfloridalegal.com; William Gladson, Assistant State Attorney, bgladson@sao5.org eservicemarion@sao5.org, the Honorable Judge David Eddy, mksicki@circuit5.org and by U.S. Mail to William Kopsho, DOC# 122787, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this 25th day of September, 2015.

/s/Nicholas A. Whittle
Nicholas A. Whittle
Florida Bar No. 549665
Assistant CCRC
Capital Collateral Regional Counsel - Middle
Whittle@ccmr.state.fl.us
Support@ccmr.state.fl.us

/s/ Eric C. Pinkard
Eric C. Pinkard
Florida Bar No. 651443
Chief Assistant CCRC
Capital Collateral Regional Counsel - Middle
3801 Corporex Park Drive, Suite 210

Tampa, Florida 33619-1136
Pinkard@ccmr.state.fl.us
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210

/s/Nicholas A. Whittle
Nicholas A. Whittle
Florida Bar No. 549665
Assistant CCRC
Capital Collateral Regional Counsel - Middle
Whittle@ccmr.state.fl.us

/s/ Eric C. Pinkard
Eric C. Pinkard
Florida Bar No. 651443
Chief Assistant CCRC
Capital Collateral Regional Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
Pinkard@ccmr.state.fl.us
Counsel for Appellant