IN THE SUPREME COURT OF FLORIDA

WILLIAM M. KOPSHO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-1256

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Kopsho." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

The Defendant was originally tried, convicted and sentenced to death in February 2005 for the first degree murder of his wife, Lynne Kopsho. This Court remanded for a new trial because Kopsho had been improperly denied a challenge for cause of a potential juror. *Kopsho v. State*, 959 So. 2d 168, 169 (Fla. 2007). Kopsho was re-tried in 2009 and again convicted and sentenced to death for the murder of his wife, Lynne. In its 2009 direct appeal decision affirming Kopsho's conviction and death sentence, this Court described the facts of the case in the following way:

> Kopsho was initially tried by jury beginning February 23, 2005. The jury heard the story of Lynne's murder primarily in Kopsho's own words through a recording of his 911 call immediately after the shooting and a separate recording of his interview with Sergeant Jeff Owens of the Marion County Sheriff's Office. He was convicted and sentenced to death, but we overturned his conviction because the trial court committed reversible error in the denial of a challenge for cause of a potential juror, and remanded for a new trial. *Kopsho v. State*, 959 So. 2d 168, 169 (Fla. 2007).

The evidence presented at Kopsho's second trial established that Kopsho met Lynne when she was seventeen years old. Lynne moved in with Kopsho when she was eighteen, and they were married on April 24, 1999, when Lynne was nineteen. The Kopshos both worked at Custom Window Systems, but during the summer or fall of 2000, Lynne moved back in with her father and stepmother.

On October 27, 2000, Kopsho shot Lynne 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 day before the murder, Kopsho visited William Steele, who he knew owned a 9 mm. Kopsho asked to see the weapon, pretending to be in the market for one. The next day, Kopsho went to Wal–Mart and purchased a Crossman BB gun that resembled Steele's gun. He returned to Steele's home and switched the Crossman for Steele's gun. Kopsho also withdrew $3000 in one-hundred dollar bills from his account at Florida Credit Union that morning. He explained that he withdrew the money to take with him to prison, "so it wouldn't be tied up in his bank."

After running these errands, Kopsho returned to work and asked Lynne to accompany him to the bank to make a large withdrawal. He told Lynne he needed her signature to make the withdrawal, explaining that he needed the money to go to Ohio to visit his sister. Kopsho parked his truck behind Lynne's so that she would have to ride with him.

Once in the truck, Kopsho told Lynne they were travelling to a different branch on State Road 40 so that she would not question the route he travelled, which was in the opposite direction of their normal bank branch. He actually intended to drive into Ocala National Forest to kill her. Kopsho hid Steele's gun in the driver's door panel and covered the butt so that Lynne would not notice it. Lynne did not

notice that he drove in the opposite direction of the bank, but did comment that she thought they had gone too far once they reached the intersection of State Road 40 and Silver Springs. During the drive, Lynne and Kopsho discussed her coming to get her things from their home.

Eventually, Lynne began discussing wanting "closure." Kopsho replied that he also wanted closure and drew the gun. Lynne tried to jump out of the truck even though Kopsho was still traveling at approximately 60 miles per hour. He applied the brakes and pulled her back by her hair. She grabbed the steering wheel. The truck veered to the side of the road and stopped. Lynne broke free and exited the truck. Kopsho pursued her and shot three times. Witnesses observed Lynne's attempt to escape and heard Kopsho fire the weapon.

Kopsho told a bystander to call the police because he had just shot his wife. He also used his cell phone to call 911. He told the operator, "Yes. I just shot my wife." He refused to give his name, but gave a description of his clothing. He repeatedly told bystanders to stay away "because it's a crime scene." In his statement, he explained that he told the witnesses to stay away because he did not want anyone to help Lynne because he wanted her to die. He cooperated with police once they arrived.

Kopsho never denied guilt: he confessed to the 911 operator and during his interview with the police. He volunteered to police and later stipulated in trial that he literally had Lynne's blood and gunpowder residue on his hand. Kopsho also emphasized that Lynne's murder was planned. He repeatedly referred to the crime as "premeditated" and claimed that confessing was "part of the plan." Kopsho stated that he knew he "was gonna be sitting here talking to [law enforcement] today." When asked if he was "making anything up to make yourself look worse," Kopsho stated that he was not. However, Kopsho also stated that "[w]here this happened at was not planned" and that Lynne "might have—she might have even talked me out of this if she wouldn't have scrambled like she did." At the end of his statement, Kopsho again announced, "I've been honest. I've been open with you. I've got nothing to lie about. I'm not trying to make myself look any worse than what the situation is. I'm not trying to talk my way out of what I did."

Dr. Susan Ignacio confirmed that Lynne's death was caused by eight gunshot wounds, but that the wounds were likely caused by three shots.

Upon this evidence, on May 22, 2009, the jury found Kopsho guilty.

Penalty Phase

During the penalty phase, the State called six witnesses and two witnesses in rebuttal. The witnesses testified regarding Kopsho's behavior after Lynne was shot; established that Kopsho was serving probation at the time of the murder; provided victim impact statements; and presented testimony from Helen Little, who was presented to establish Kopsho's prior conviction for kidnapping and sexual assault. The State's rebuttal witnesses responded to Kopsho's characterization of his emotional development.

The defense presented eight witnesses who provided information regarding Kopsho's strict upbringing; described Kopsho's work ethic; provided information relating to the deplorable conditions at the Indiana Boys' School, where Kopsho spent some time; and presented testimony relating to Kopsho's emotional development.

Sentencing Order

Kopsho was sentenced to death on July 2, 2009. The trial judge found four aggravating circumstances: (1) that at the time of the murder Kopsho was under a sentence of imprisonment or on felony probation (minimal weight); (2) that Kopsho had committed a prior violent felony (great weight); (3) that the murder was committed during an armed kidnapping (moderate weight); and (4) that the murder was cold, calculated, and premeditated (great weight).

The trial judge found no statutory mitigating circumstances and the following nonstatutory mitigating circumstances: (1) that Kopsho suffered from mental or emotional disturbance (moderate weight); (2) was reared in an unloving home (little weight); (3) was subjected to emotional and physical abuse as a child (little weight); (4) was abandoned by his mother at age sixteen (little weight); (5) was sent to

> juvenile detention at age sixteen (little weight); (6) was housed with violent criminals for eight months at age eighteen (little weight); (7) was beaten while at juvenile detention (little weight); (8) was a good brother (little weight); (9) was a good father (little weight); (10) that society would be protected by a life sentence (little weight); (11) that Kopsho made voluntary statements and was cooperative (little weight); (12) that he did not flee and assisted in his arrest (little weight); (13) that the murder occurred in the context of marital discord (little weight); (14) that Kopsho was a knowledgeable and helpful employee, was dependable and performed excellent work, and attended bible studies (little weight).

Kopsho v. State, 84 So. 3d 204, 209-11 (Fla. 2012). This Court described the issues raised on appeal as follows:

> On appeal, Kopsho raises eight issues: (1) whether the trial court erred in permitting evidence of Kopsho's prior bad acts; (2) whether the trial court erred in finding that the murders were committed in a cold, calculated, and premeditated Manner without any pretense of moral or legal justification; (3) whether the jury's recommendation at the penalty phase was tainted by improper victim impact evidence; (4) whether the trial court erred in overruling Kopsho's objections and allowing introduction of evidence of his extramarital sexual relationship; (5) whether the trial court erred in denying Kopsho's motion for judgment of acquittal on the kidnapping charge; (6) whether the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravator; (7) whether his death sentence is proportional; and (8) whether the trial court erred in sentencing Kopsho to death because section 921.141, *Florida Statutes* (2009), unconstitutionally allows the trial court to proceed without, among other things, a unanimous death recommendation from the jury in contravention of the sixth amendment. The State raises two claims on cross-appeal: (1) whether the trial court erred in failing to find the heinous, atrocious, or cruel (HAC) aggravator; and (2) whether the trial court erred in denying the State's Motion *in Limine* regarding the testimony of Dr. Elizabeth McMahon. Additionally, we review for sufficiency of the evidence to uphold Kopsho's convictions and sentence. For the following reasons, we affirm.

Kopsho v. State, supra.

Kopsho's petition for writ of certiorari was denied by the United States Supreme Court on October 1, 2012. *Kopsho v. Florida*, 133 S.Ct. 190 (2012).

Kopsho's amended postconviction motion was filed on November 19, 2014. (V3, R441-79).[1] Kopsho raised the following issues:

> I. Ineffective assistance of counsel at the penalty phase-a) failure to ensure a reasonably competent mental health evaluation; b) failure to present testimony that Kopsho made a positive adjustment to prison and would not pose a problem if sentenced to life; and c) failure to present as mitigation that the State Attorney's Office considered making an offer of life in prison and that taking the victim's family's wishes into consideration allows for arbitrary and capricious imposition of the death penalty;
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> II. Cumulative error of ineffective assistance of counsel;
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> III. Non-Unanimous Death Penalty recommendation/"Newly Discovered Evidence"/Ineffective Assistance of Counsel;
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> IV. Lethal Injection Protocol is cruel and unusual punishment; and
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> V. Competency to be executed at the time of execution.

The State filed its Answer on December 9, 2014. (V3, R483-543). On March 9, 2015, the circuit held a case management conference. (V11, R1-13). On March 23, 2015, the circuit court summarily denied Kopsho's amended postconviction

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[1] Citations to the Direct Appeal record are DAR, V_, R_; Citations to the postconviction record are V_, R_.

motion. (V4, R544-689). Kopsho's motion for rehearing was denied on April 27, 2015. (V4, R719-29). A timely notice of appeal was filed on May 26, 2015. (V4, R730-59).

PENALTY PHASE FACTS

Kopsho's trial counsel completed a competent mitigation investigation and mental health evaluation as evidenced by the penalty phase presentation. Kopsho presented testimony from seven lay witnesses and a clinical neurologist, Dr. McMahon, at the penalty phase trial. The testimony, in pertinent part, was presented as follows.

Antoinette Harton

Kopsho presented the videotaped perpetuated testimony of his older sister, Antoinette Harton. Harton is "a year or two" older than Kopsho. (DAR, V37, R1398, 1400, 1405). There were five children in the Kopsho household. (DAR, V37, R1401). The children did not see their father often as he worked various shift hours. (DAR, V37, R1403). Their parents did not have a loving relationship with each other. (DAR, V37, R1413). The children were sent to private Catholic school and always had food to eat. (DAR, V37, R1423). There were strict rules enforced in the home. (DAR, V37, R1424-25). They were allowed to go places with their cousins. (DAR, V37, R1431). Harton and Kopsho had a typical "brother/sister" relationship. Kopsho was never violent with her and she was not afraid of him. (DAR, V37, R1430).

When their mother, Ida Mae Kopsho, disciplined the children, she screamed and yelled, and they were grounded or "hit with a belt" at least a couple of times a week. (DAR, V37, R1405, 1406). All of the children were disciplined the same way. (DAR, V37, R1407). When the children played with the gas stove, Ida held their hands over the stove so they would "know what it's like to play with the stove, we wouldn't get burned but it would be hot." (DAR, V37, R1409, 1425). The children were not allowed in the home unless their mother was in the house. They were not allowed to have a key. (DAR, V37, R1409-10).

Harton recalled an instance when Kopsho was disciplined by being tied to a tree in the yard "like a dog." (DAR, V37, R1410). Ida Kopsho was not affectionate with the children at all. (DAR, V37, R1414). Harton was kicked out of the home before she graduated high school. (DAR, V37, R1416). At about the same time, Kopsho started running away from home. (DAR, V37, R1418, 1426-27). He argued with his mother, did not come home when he was supposed to, and stole money from her. (DAR, V37, R1429). At 15 or 16 years old, he was sent to the Indiana Boys School. (DAR, V37, R1418, 1426-27). Kopsho did not tell Harton about his stay at the Indiana Boy's School. (DAR, V37, R1430). Harton said their older sister, Theresa, died in childbirth. (DAR, V37, R1420). Harton knew about Kopsho's conviction involving Helen Little. (DAR, V37, R1432-33). After his release from prison, Kopsho lived with his mother for a short time. (DAR, V37,

R1433). Harton's cousin called her and told her about Lynne's Kopsho's murder. (DAR, V37, R1433-34). By this time, Ida Kopsho had Alzheimer's disease and could not recall what had occurred earlier in Kopsho's life. (DAR, V37, R1434).

David Kopsho

David Kopsho, Kopsho's younger brother, stated their mother was a disciplinarian that punished the Kopsho children with whippings once or twice a week. (DAR, V38, R1445, 1447). The Kopsho sisters were allowed to do things the brothers were not allowed to do. (DAR, V38, R1466). Kopsho's punishment was "even worse" than his siblings. He was punished more than the others and for things his sisters did. (DAR, V38, R1448, 1449, 1465). There were times when Kopsho was locked out of the house. (DAR, V38, R1450). He occasionally ran away from home after he was disciplined by their mother. (DAR, V38, R1452). Kopsho did not follow Ida Kopsho's rules. He stole money from her. (DAR, V38, R1458, 1459, 1466).

Kopsho was eventually sent to the Indiana Boys School. (DAR, V38, R1452). David was not aware that Kopsho was on probation before being sent to the home. (DAR, V438, R1458). Kopsho stayed there for seven months. The Kopshos, David, and his younger sister visited Kopsho at the Indiana Boys Home about once a month. (DAR, V38, R1452, 1459, 1460). David said everyone there "had a terrified look on their face." Kopsho always asked his parents to take him

home. (DAR, V38, R1453).

After Kopsho was released from the home, he was still under supervision. Kopsho told David it was a "bad place" and that, if boys did not listen to staff or ran away, they got beat. (DAR, V38, R1461). Kopsho told David he had been beaten at the school. (DAR, V38, R1462).[2]

Sean Kopsho

Sean Kopsho is Kopsho's thirty-two-year-old son. Kopsho was not around much while Sean was growing up. Sean went back and forth living between his mother and his father. (DAR, V38, R1471). As Sean spent more time with Kopsho, his father offered advice, took Sean places, and was affectionate. Sean is "best friends" with his father and loves him very much. (DAR, V38, R1472). Kopsho knows how to be kind and loving. He never beat or threatened Sean. (DAR, V38, R1473). Sean vaguely recalled his father's previous conviction for the incident involving Helen Little. (DAR, V38, R1473-74). Sean wrote a letter to Little and asked her to drop the charges against his father. (DAR, V38, R1474).

Donella Bullard

Donella Bullard worked with Kopsho at Custom Windows. Kopsho was a good worker, "a very respectable young man . . . an outstanding, hardworking

[2] In an October 28, 2008, deposition, David testified that Kopsho had told him a "bigger kid" at the school had beaten him. (DAR, V38, R1463-64).

man." He was close friends with Donella's husband. (DAR, V38, R1474-75).

Ida Mae Scott

Ida Mae Scott was Kopsho's supervisor at Custom Window Systems. (DAR, V38, R1476-77). Kopsho was a good worker and helped others in the workplace. (DAR, V38, R1477).

William Seibold

William Seibold was a teacher at the Indiana Boys School for thirty-nine years. (DAR, V38, R1478, 1485). Vocational programs offered at the school included woodworking, lumber work, farm work, dry cleaning and tailoring, auto mechanics and service, and horticulture. There was a band as well as intramural and inter-high school sports. (DAR, V38, R1491). Kopsho was a student there from April to December of 1970. (DAR, V38, R1479). The average length of stay for a boy in 1970 was eight to fourteen months. (DAR, V39, R1484). In 1970, the boy's school was the only juvenile detention facility in Indiana. (DAR, V38, R1480). The facility housed rapists, murderers, violent offenders, runaways, and those "uncontrollable by their parents." (DAR, V38, R1479).

Of approximately 600 boys at the facility, 60 were placed in each of the cottages located on the property. (DAR, V38, R1480). The boys in each cottage were supervised by one untrained male staff person per eight hour shift. (DAR, V38, R1481). Their respective offenses had nothing to do with their housing.

(DAR, V38, R1479-80). Seibold was aware that corporal punishment was used at the school. (DAR, V38, R1482). Although a new superintendent ordered the cessation of corporal punishment in 1969, the staff continued to use it for quite a while. (DAR, V38, R1482-83, 1489-90). A Federal lawsuit resulted in certain changes being implemented at the school. (DAR, V38, R1482). Seibold was aware a bully system was used where a boy would punish other children. "The big guys ruled the cottage." (DAR, V38, R1484). Seibold did not personally know Kopsho nor did he have personal knowledge any of Kopsho's experiences at the school. (DAR, V38, R1492).

Thomas Digrazia

Thomas Digrazia had been practicing law for 39 years at the time of Kopsho's trial. (DAR, V38, R1540). In 1972, Digrazia and an associate became aware of conditions at the Indiana Boys School which lead to the filing of a Federal lawsuit. (DAR, V38, R1541, 1544). Digrazia conducted an investigation. The institution was spread over one thousand acres in a rural community. It housed boys from ages twelve through eighteen in twelve cottages. There were several administration buildings and an isolation unit within one of these buildings. (DAR, V38, R1541-42). The isolation unit contained "bird cages" in which the boys who committed infractions were sent to these detention cages. The cages ranged in size from 4 feet by 8 feet to 6 feet by 9 feet. The cages were covered with mesh wire so

observers could see through the cages. (DAR, V38, R1542). Digrazia observed one or two boys handcuffed to the bed in a spread eagle fashion. There were at least thirty cages; most of them were filled with boys. (DAR, V38, R1543).

After observing these conditions, Digrazia filed a class action lawsuit in which he ultimately prevailed. (DAR, V38, R1543, 1544). Digrazia does not know Kopsho and did not see him at the Indiana Boys School. (DAR, V38, R1545-46). However, conditions in 1970 were the same as they were in 1972, when Digrazia conducted his investigation. (DAR, V38, R1547).

Trial counsel also presented the testimony of Dr. Elizabeth McMahon, a licensed clinical neuropsychologist. (DAR, V38, R 1548). At the time she testified, Dr. McMahon had over eighteen years of experience in clinical and forensic psychology. (DAR, V38, R1549). Dr. McMahon has completed post-doctoral fellowships in neuropsychology, brain behavior (the areas of the brain that control various behaviors) and forensic psychology. (DAR, V38, R1548-49). Dr. McMahon spent three years evaluating patients that were involuntarily committed for psychotic episodes. (DAR, V38, R1549). Dr. McMahon has authored chapters in two textbooks—one in neuropsychology and the other in forensic neuropsychology. (DAR, V38, R1549). For the previous ten to fifteen years before testifying in Kopsho's case, Dr. McMahon worked almost exclusively in evaluating offenders of violent crimes, particularly homicides. (DAR, V38,

R1550). At the time of Kopsho's trial in 2009, Dr. McMahon had testified as an expert in criminal trials in Florida more than a hundred times in the areas of neuropsychology and forensic psychology. (DAR, V38, R1551-52). Of particular relevance, Dr. McMahon is an expert in the psychological aspects of abuse, neglect and development. (DAR, V38, R1551).

Dr. McMahon spent 25-26 hours over six occasions "face-to-face" evaluating Kopsho for mental health mitigation. (DAR, V38, R1552). Dr. McMahon reviewed a plethora of documents during her evaluation and in preparation for her testimony at the penalty phase. Those documents were: 1) all of the Marion County incident reports; 2) narrative reports of the indictment; 3) his arrest affidavit; 4) the Marion County autopsy form on Lynn Kopsho; 5) applications for employment of both William Kopsho and Lynn Kopsho; 6) Marion County records from a prior case; 7) Munroe Regional Hospital Emergency Room records with regard to Lynn Kopsho; 8) the EMS run report; 9) hospital records from Hamilton Center from 12/82 to 2/83, during which Bill Kopsho had three admissions to that hospital; 10) the *Nelson v. Heyne* case regarding the Indiana Boys School; 11) Lake County (Indiana) Juvenile record prior to him going to the boys school; 12) his [Kopsho's] military records; 13) Marion County Sheriff's Department records; 14) photographs; 15) victim impact statement; 16) letters from both his son and from his mother to Helen Little; 17)

the corp module of adult sex offender treatment from the Intensive Modality Group in Gainesville, particularly from Dr. Shaw; 18) Various filings by the State; 19) other hospital records; 20) and depositions of the witnesses in this case. (DAR, V38, R1553-54).

In response to questions about her evaluation of Kopsho, Dr. McMahon stated:

> I first ask the attorney to send me everything you got. I want copies of everything in your file. And as more information comes in, which it does throughout time that the case is being worked on, I want copies of all that, too. I don't know whether it's relevant until I look at it. So sometimes they'll say, well, what is it that you want? Well, I don't know because I don't know what you have. And I don't know what's going to be relevant. So I want all of that before I see the person. So I try to know as much about the individual as I possibly can. I want past school records. If there are military records, if there -- whatever there is, send me.
>
> I then do a full battery of evaluative procedures, some are tests, some are psychological procedures that are not tests. Always do some sort of a measure of intellectual functioning, cognitive functioning, IQ. Do some assessment, at least a screening of cognitive functioning, to make sure that the individual doesn't have some kind of brain damage, some kind of cortical deficient that might be influencing their behavior . . . . Some area of the brain that is not working in concert with the rest to a significant degree that may have impacted the behavior.

(DAR, V38, R1554-55).

Dr. McMahon also stated that she uses the "Rorschach test" (commonly recognized as the ink blot test) and a hand test used to norm inmates who had committed violent crimes. (DAR, V38, R1555). Dr. McMahon administered the

Minnesota Multiphasic Personality Inventory (MMPI). (DAR, V38, R1556). The MMPI is a test comprised of 567 true/false questions which indicated how Kopsho "sees himself, his environment, and the interaction between himself and his environment." (DAR, V38, R1556, 1579). After conducting the testing, Dr. McMahon conducted family background interviews—family origin, speaking to parents, siblings, etc. (DAR, V38, R1556). She spoke with all of Kopsho's siblings as well as his mother. His mother has dementia and, although "speaking with her was interesting, (it was) not very helpful." (V38, R1563). Dr. McMahon also collected additional background information about school, marriages, children, previous run-ins with the law and other life experiences. (DAR, V38, R1556-57). After completing all of the testing and background interviews, Dr. McMahon conducted collateral interviews with extended family members, teachers, employers, co-workers, "anybody who knows anything about this individual's background." (DAR, V38, R1557). After confirming that she had completed all of those evaluative steps with Kopsho, Dr. McMahon offered her opinions and conclusions. (DAR, V38, R1557).

On the MMPI, one score was elevated; the psychopathic deviance score. (DAR, V38, R1579). Dr. McMahon determined Kopsho has an IQ of average intelligence: 105. (DAR, V38, R1577-78). Results of the Wisconsin Card Sort test were normal. (DAR, V38, R1578). He has a "maladaptive way of learning" but it

would not have impacted his behavior at the time of Lynne's murder. (DAR, V38, R1557-58, 1578). At least 50 to 60 percent of the time, Kopsho's perceptions of reality are "right on." Kopsho's perceptions get distorted "at a time of increasing anxiety and stress, emotional turmoil, emotional upheaval." Kopsho has paranoid ideations, and is suspicious and distrustful of others. Kopsho's "affectional anxiety" gives him "the most trouble." His needs for security and affection were never met as a child. (DAR, V38, R1559). As a result, his emotional development was stunted. (DAR, V38, R1560). Most times Kopsho handled provocation in an appropriate manner. "But there are times when he sort of loses it in terms of aggressiveness." (DAR, V38, R1562).

Kopsho experienced a lot of rejection in his childhood home. (DAR, V38, R1562). His mother ruled the home and his father was a mild-mannered, secondary parent. (DAR, V38, R1564). Kopsho's father occasionally beat him with a belt. (DAR, V38, R1570). Kopsho's mother beat the children at least twice a week. Kopsho always got beat more than the others. (DAR, V38, R1571). At 15 years old, Kopsho was working, made passing grades in school, and lived with a friend so he did not have to pay rent to his mother. His mother came to his friend's house and asked if he was ready to come home. Kopsho said "no." Ida Kopsho told Kopsho, "then I'll have you put someplace else." The next day, Kopsho found out "he was on probation." (DAR, V38, R1565). At his probation officer's urging,

Kopsho agreed to go home to work things out with his mother. However, Ida Kopsho said no, and Kopsho was sent to the Indiana Boys school. (DAR, V38, R1566).

Kopsho spent eight to ten months in the Boys' school and eventually joined the Navy. He went AWOL several times and received an other than honorable discharge. (DAR, V38, R1566-67). He married several times but the marriages did not last long and all ended in divorce. The wives were all considerably younger than him. Kopsho believed the wives "were running around on him." (DAR, V38, R1567). In the early 1980s, Kopsho was hospitalized in a mental hospital three times. (DAR, V38, R1594-95). Dr. McMahon was aware that Kopsho had twice threatened Lynne that he would kill her before he actually did. (V38, R1589-90, 1593). He had agreed to get counseling. (DAR, V38, R1596). After Lynne told Kopsho about her affair, "he shot and killed her." (DAR, V38, R1568).

Dr. McMahon concluded Kopsho has a severe psychological condition that "most certainly is in the presence of an intimate other." (DAR, V38, R1576). His upbringing led to an abusive personality which then led to a dependent personality disorder with borderline features. (DAR, V38, R1576). When women leave Kopsho, "it is being left that triggers that rage and the violence." (DAR, V38, R1576). His childhood home life is "greatly responsible" for Kopsho's current psychological condition. (DAR, V38, R1598).

STANDARD OF REVIEW

To establish a claim for ineffective assistance of trial counsel, a defendant must meet both of the requirements set forth in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687 (1984). The prejudice prong is met only if "there is 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*; see also Porter v. McCollum*, 558 U.S. 30 (2009) (explaining that the Court does not require proof "'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome'") (quoting *Strickland*, 466 U.S. at 693-94).

In evaluating counsel's representation under *Strickland*, there is a strong presumption that counsel's performance was constitutionally effective. 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential.") The

defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (quoting *Michel v. Louisiana*, 350 U.S. 91 (1955)). Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*.

A court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *Mann v. State*, 112 So. 3d 1158, 1161 (Fla. 2013) (claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record). *See also Franqui v. State*, 59 So. 3d 82 (Fla. 2011); *Troy v. State*, 57 So. 3d 828 (Fla. 2011) (citing *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008)). A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Moore v. State*, 820 So. 2d 199, 203 (Fla. 2002); *See also Doorbal v. State*, 983 So. 2d 464 (Fla. 2008) (citing *Downs v. State*, 453 So. 2d 1102 (Fla. 1984)). Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui*, 59 So. 3d 82 (Fla. 2011) (citing *Freeman v. State/Singletary*,

761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are not legally sufficient. *Franqui*, 59 So. 3d at 96. The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Knight v. State*, 923 So. 2d 387 (Fla. 2005); *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001). The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland. Troy*, 57 So. 3d at 834, (citing *Duest v. State*, 12 So. 3d 734, 747 (Fla. 2009)). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief. *See Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008); *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make a meritless argument).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, the defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to

which the witness would testify). Stating that a witness could testify about a subject, without more, is insufficient to require an evidentiary hearing. *Franqui*, 59 So. 3d at 101.

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (citing *Van Poyck v. State*, 694 So.2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied. *Franqui*, 59 So. 3d at 99 (citing *Michel*, 350 U.S. at 101). As this Court explained, "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009). S*ee also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to summary denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui*, 59 So. 3d 82; *Troy*, 57 So. 3d 828; *Freeman*, 761 So. 2d at 1063; *Duest*, 12 So. 3d at 747. *See also Walls v. State*, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial

appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong).

If the claim raised by the defendant is directly refuted by the record, no evidentiary hearing is needed and the claim may be summarily denied. *Carroll v. State*, 114 So. 3d 883, 885-86 (Fla. 2013) (claims may be summarily denied when they . . . are positively refuted by the record). *See also Long v. State*, 118 So. 3d 798, 808 (Fla. 2013); *Ferguson v. State*, 101 So. 3d 362, 364 (Fla. 2012); *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009), *quoting Connor v. State*, 979 So. 2d 852, 868 (Fla. 2007)).

This Court has consistently held that a claim that could and should have been raised on direct appeal is procedurally barred. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 915 So. 2d 95, 129 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224 1986 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman*, 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot

be relitigated under the guise of ineffective assistance of counsel). *See also Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1262 (Fla. 2005).

SUMMARY OF ARGUMENT

KOPSHO'S CLAIMS OF ERROR ARE WITHOUT MERIT. NONE OF HIS FIVE CLAIMS ENTITLE HIM TO RELIEF.

ISSUE I: The post-conviction court properly summarily denied Kopsho's claim that trial counsel was ineffective at the penalty phase for failing to ensure a reasonably competent mental health evaluation because that claim was refuted by the record. The court can summarily deny claims that are procedurally barred, legally insufficient, refuted by the record, or without merit. Dr. Russell's testimony would have been cumulative to Dr. McMahon's. Everything that Kopsho now claims Dr. Russell would have testified to was already presented to the jury, and Kopsho was already accorded the mitigation he claims he would have been entitled to had Dr. Russell testified.

ISSUE II: The post-conviction court properly summarily denied Kopsho's claim that trial counsel was ineffective at the penalty phase for failing to present testimony from James Aiken, a prison confinement and classification witness, was insufficiently pled and refuted by the record. The court can summarily deny claims that are procedurally barred, legally insufficient, refuted by the record or without merit. Kopsho failed to allege how his trial counsel was deficient for failing to call Aiken, and how he was prejudiced. Moreover, the trial court already considered, as

mitigation, the fact that Kopsho could have been sentenced to life, and gave that mitigation little weight.

ISSUE III: The court properly summarily denied Kopsho's claim that trial counsel was ineffective for failing to present, as mitigating testimony that the State was considering offering Mr. Kopsho a life sentence in exchange for a plea to first-degree murder if the victim's family members were in agreement. Kopsho also raised a separate constitutional claim that to allow the victim's family to make the decision regarding whether to seek the death penalty allows for arbitrary, capricious, and/or discriminatory imposition of the death penalty. The court can summarily deny claims that are procedurally barred, legally insufficient, refuted by the record or without merit. These claims was insufficiently pled because Kopsho identified no witnesses, no evidence, and made only vague, unsupported conclusions. The claims were also meritless. The evidence Kopsho seeks to elicit, even if presented, is not mitigating. Kopsho cites to no analogous case that supports his argument.

ISSUE IV: The post-conviction court did not err in denying Kopsho's claim of cumulative error. None of the individual issues is meritorious. There is no error as to any of the claims individually, so there can be no error to "cumulate." Kopsho's claim was properly denied.

ISSUE V: The court properly summarily denied Kopsho's claim that

Florida's capital sentencing statute is unconstitutional. No evidentiary hearing was requested on this claim and the court properly summarily denies claims that are procedurally barred, legally insufficient, refuted by the record or without merit. The trial court was correct in following the law of this Court in deciding Kopsho's claim of unanimous jury sentencing was meritless when there has been no decision to the contrary. Kopsho is not entitled to relief.

ARGUMENT

ISSUE I: THE POST-CONVICTION COURT PROPERLY SUMMARILY DENIED CLAIM 1A BECAUSE DR. RUSSELL'S MENTAL HEALTH TESTIMONY WAS CUMULATIVE TO THE TESTIMONY PRESENTED BY DR. MCMAHON IN THE PENALTY PHASE (RESTATED)

Kopsho first argues that the post-conviction court erred in finding that Kopsho's claim that trial counsel was ineffective at the penalty phase for failing to ensure a reasonably competent mental health evaluation was refuted by the record. (*IB* at 14).

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (citing *Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the

claim may be summarily denied. *Franqui*, 59 So. 3d at 99 (citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). As this Court explained in *Winkles v. State*, "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." 21 So. 3d 19, 26 (Fla. 2009). *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, the defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby,* 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify). Stating that a witness could testify about a subject, without more, is insufficient to require an evidentiary hearing. *Franqui*, 59 So. 3d at 101.

A. STANDARD OF REVIEW

This Court has held that:

> "[a] defendant is normally entitled to an evidentiary hearing on a postconviction motion 'unless (1) the motion, files, and records in the

> case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient.' " *Valentine v. State*, 98 So. 3d 44, 54 (Fla. 2012) (quoting *Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011)). An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires factual determination. *See Amendments to Fla. Rules of Crim. Pro*. 3.851, 3.852, & 3.993, 772 So. 2d 488, 491 n. 2 (Fla. 2000). "[T]o the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required." *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012). However, merely conclusory allegations are not sufficient—the defendant bears the burden of "establishing a 'prima facie case based on a legally valid claim.' " *Valentine*, 98 So. 3d at 54 (quoting *Franqui*, 59 So. 3d at 96).
>
> "To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief." *Everett v. State*, 54 So. 3d 464, 485 (Fla. 2010). When reviewing the circuit court's summary denial of an initial rule 3.851 motion, we will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. *See Walker*, 88 So. 3d at 135. Finally, "[b]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Seibert v. State*, 64 So. 3d 67, 75 (Fla. 2010) (citing *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding that pure questions of law that are discernable from the record are subject to de novo review)).

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B. RULE GOVERNING FAILURE TO INVESTIGATE AND PRESENT MITIGATION CLAIMS

As stated in *Robinson v. State*, 95 So. 3d 171, 178 (Fla. 2012), in order to

prevail on an ineffective assistance of counsel claim on this ground, Kopsho must first show "that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding." (quoting *Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006)); *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000); *Coleman v. State*, 64 So. 3d 1210, 1218 (Fla. 2011). Second, he must demonstrate prejudice. He has shown neither.

C. TRIAL COURT'S ORDER DENYING POST-CONVICTION RELIEF

After reviewing the pleadings, the trial court made the following findings of fact and conclusions of law with regard to Kopsho's claim of failure to investigate and present mitigation:

> Kopsho alleges that his trial counsel ("Counsel") were deficient for failing to conduct a reasonably competent mitigation investigation, including the failure to present expert testimony establishing that the capital felony was committed while he was under the influence of extreme mental or emotional disturbance. Kopsho further claims that expert testimony could have explained how his history of physical, emotional and sex abuse was connected to his life history and, in particular, his relationship with the victim and his decisions and conduct during the crime. In support of his allegation, Kopsho identifies Dr. William Russell who "will present expert 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" explaining "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 that he "was under the influence of extreme mental or emotional disturbance at the time of the

commission of the capital felony."

The 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 an d expert witnesses during the defense's case-in-chief. The jury was presented with a broad illustration of Kopsho's background and mental health. The Defense presented testimony from seven (7) lay witnesses and a clinical neuropsychologist. This collective testimony refutes Kopsho's claim that Counsel was ineffective for failing to conduct a competent mitigation investigation and mental health evaluation.

…

The presentation of mitigation testimony from lay witnesses and an expert witness shows that Counsel did produce the evidence Kopsho now claims he failed to produce. Through the testimony of the lay witnesses, Counsel presented a comprehensive picture of Kopsho's life history. Kopsho's dysfunctional, physically and emotionally abusive family was thoroughly described by his siblings. Dr. McMahon conducted a thorough, comprehensive evaluationof Kopsho, replete with psychological batteries, family background interviews, collateral interviews, extensive review of voluminous records, and hours of interaction with the Defendant. Dr. McMahon painted a detailed picture of Kopsho's mental health and emotional development. Trial counsel presented this evidence to support establishing both statutory mental health mitigators. Trial counsel succeeded in establishing mental/emotional disturbance as non-statutory mitigation.

The Sentencing Order noted the mitigating circumstances that were established. *See Sentencing Order*; *see also Kopsho's Memorandum in Support of a Life Sentence* p. 20-26. Contrary to Kopsho's claim, the 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 a moderate weight. *See id*. at p. 8-10.4 Furthermore, Dr. McMahon did testify that Kopsho's abusive upbringing attributed to his Borderline Personality Disorder traits which caused him to feel rage at his intimate partner, who he then murdered. *See Penalty*

> *Phase Transcript* p. 1568-74, 1575-77. Kopsho's claim that Counsel failed to conduct a reasonable competent mitigation investigation and failure to ensure a reasonably competent mental evaluation is refuted by the record.[5]
>
> > [FN5] The evidence Kopsho claims Counsel should have presented is also cumulative to the evidence that was presented. "A defendant is not prejudiced by trial counsel's failure to present cumulative evidence." *Diaz v. State*, 132 So. 2d 93, 111-12 (Fla. 2013). "Nor would the cumulative evidence influence the sentencing judge." *Id*. at 112.

(V3, R551-52; 560-62).

D. THE TRIAL COURT WAS CORRECT

These findings cite to the correct legal standards as set forth by this Court and the finding that Dr. Russell's testimony would be cumulative to Dr. McMahon's is supported by the record. As in *Hojan* at *5, the post-conviction court here properly concluded that Kopsho's claim lacked merit – so as to properly summarily deny his claim – based on the facts reflected in the record. Kopsho's trial record record conclusively shows that trial counsel did present the mitigating evidence Kopsho now requests, at the penalty phase. Kopsho was accorded the benefit of the evidence he claims should have been presented. (DAR, V24, R3969-76). Kopsho is not entitled to relief because the trial court properly summarily denied his Claim 1A when he could not establish the deficiency prong under the *Strickland* analysis. *Id.* His claim is conclusively refuted by the record. Therefore, the trial court properly denied evidentiary development of this claim.

Kopsho failed to articulate with any specificity why trial counsel's reliance on Dr. McMahon's comprehensive mental health evaluation was unreasonable. At the time she testified, Dr. McMahon had over eighteen years of experience in clinical and forensic psychology. (DAR, V38, R1549). Dr. McMahon had completed post-doctoral fellowships in neuropsychology, brain behavior (the areas of the brain that control various behaviors) and forensic psychology. (DAR, V38, R1548-49). Dr. McMahon conducted a thorough, comprehensive evaluation of Kopsho, replete with psychological batteries, family background interviews, collateral interviews, extensive review of voluminous records, and hours of interaction with the Defendant. (DAR, V38, R1553-57; 1559). Dr. McMahon painted a detailed picture of Kopsho's mental health and emotional development. Trial counsel presented this evidence to support establishing both statutory mental health mitigators. The jury heard evidence about Kopsho's experiences in the Indiana Boys School. (DAR, V38, R1566-67). The jury heard how his upbringing led to an abusive personality which then led to a dependent personality disorder with borderline features. (DAR, V38, R1576). The jury heard evidence about Kopsho's abusive and dysfunctional family. The jury heard about Kopsho being abandoned by his mother, going to juvenile detention at age sixteen, being housed with violent criminals at age eighteen, and being abused while in juvenile detention. (DAR, V38, R1566, 1571). Trial counsel attempted to establish the

statutory mental health mitigators and succeeded in establishing mental/emotional disturbance as non-statutory mitigation. (DAR, V24, R3957-3959; V37, R1399-1439; V38, R1444-1598; V41, R4-7).

Kopsho's claim that there was *more* testimony about this background information misses the crux of *Strickland*—the question is not what the best lawyer would do, and it is certainly not what the next lawyer would do, but what a reasonable lawyer would do under the same circumstances as the Defendant's attorney at trial. *Kilgore v. State*, 55 So. 3d 487, 501 (Fla. 2010) ("An attorney can almost always be second-guessed for not doing more. However, this is not the standard by which counsel's performance is to be evaluated . . ."). Counsel is not required to search incessantly for mitigation, turning over stones that reveal the same information simply from a different source. The jury and sentencing judge heard the evidence that Kopsho claims would have yielded him a life sentence. Kopsho's ineffectiveness claim was directly refuted by the record and was properly summarily denied.

E. HARMLESS ERROR

Counsel was not ineffective. Kopsho could establish neither deficient performance nor prejudice. The record reflects that counsel conducted a reasonable investigation. Assuming, *arguendo,* that Dr. Russell had testified to everything Kopsho claims he would have, there is still no factual dispute so as to require an

evidentiary hearing. Dr. McMahon had already testified to Kopsho's mental health and family background in an attempt to establish statutory mental health mitigation, including his operating under the influence of extreme mental or emotional disturbance under §921.141(6)(b), Fla. Stat. (2000). Dr. McMahon is a qualified expert and counsel was entitled to rely on her opinions. *Rodgers v. State*, 113 So. 3d 761, 770 (Fla. 2013) ("This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire."). *See also Stewart v. State*, 37 So. 3d 243, 255 (Fla. 2010) (Defendant did not demonstrate that his mental health evaluation was "grossly insufficient" or that his expert "ignored clear indications of mental retardation or organic brain damage"). More testimony of the same evidence is merely cumulative, and failing to put on cumulative evidence does not establish deficiency. *Diaz v. State/Crews*, 132 So. 3d 93, 111-112 (Fla. 2013) ("A defendant is not prejudiced by trial counsel's failure to present cumulative evidence"); *see also Troy*, 57 So. 3d at 835 ("defendant's claim . . . will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented") (citing *Van Poyck*, 694 So. 2d at 692-93).

Moreover, Kopsho could not have established prejudice by presenting Dr. Russell's testimony as alleged. The trial court found that this mitigation had been

proven as non-statutory mitigation and accorded it "moderate" weight. (DAR, V24, R3969-71). Cumulative evidence could not have established any likelihood of a life sentence in this heavily-aggravated, guilt-certain, ten to two (10-2) decision.

ISSUE II: THE POST-CONVICTION COURT PROPERLY SUMMARILY DENIED CLAIM 1B AND *SPERA* DOES NOT APPLY (RESTATED)

Kopsho next argues that the post-conviction court erred in finding that Kopsho's claim that trial counsel was ineffective at the penalty phase for failing to present testimony from James Aiken, a prison confinement and classification witness, was refuted by the record. (*IB* at 18). Kopsho claims that Aiken would have testified that Kopsho had adjusted to prison life and would not be a danger if given a life sentence. (*IB* at 20).

A. STANDARD OF REVIEW

As cited *supra*, this Court has held that:

> To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief." *Everett v. State*, 54 So. 3d 464, 485 (Fla. 2010). When reviewing the circuit court's summary denial of an initial rule 3.851 motion, we will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. *See Walker*, 88 So. 3d at 135. Finally, "[b]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Seibert v. State*, 64 So. 3d 67, 75 (Fla. 2010) (citing

> *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding that pure questions of law that are discernable from the record are subject to de novo review)).

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B. RULE GOVERNING FAILURE TO CALL A SPECIFIC MITIGATION WITNESS

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, the defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby,* 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify).

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (citing *Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)).

C. TRIAL COURT'S ORDER DENYING POST-CONVICTION RELIEF

After reviewing the pleadings, the trial court made the following findings of

fact and conclusions of law with regard to Kopsho's claim of failure to call prison witness Aiken:

> In this claim, Kopsho claims that Counsel was ineffective for failing to present mitigating evidence that he had made a positive adjustment to prison and he would not pose a problem in prison if given a life sentence. Kopsho references "numerous scientific studies" and seeks to present James Aiken ("Aiken"), "an expert experienced in prison confinement and classifications." 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.
>
> As raised in this motion, this claim is purely speculative. *See Troy v. State,* 948 So. 2d 635, 651 (Fla. 2006) (Proffered witness had never met defendant, nor had he ever witnessed defendant during one of his periods of incarceration, making his potential assessment regarding defendant's possible prison experience entirely speculative.) This claim is also refuted by the record. The adjustment to prison life and safety to society mitigation was neither argued by the State nor was evidence of Kopsho's level of dangerousness in a prison environment presented by the State. *See State's Memorandum of Law Regarding Sentence* p. 13. Any testimony from Aiken would also be cumulative to the testimony of Dr. McMahon.
>
> > Society will be protected by a sentence of life in prison. According to the testimony of Dr. McMahon, William Kopsho's emotional problems surface in the context of a spousal or domestic relationship. At a minimum, the Court must sentence Mr. Kopsho to serve life in prison without possibility of parole. A sentence of that nature will protect society from further harm by Mr. Kopsho. Incarcerating Mr. Kopsho will eliminate his ability to abuse women. If he is sentenced to life in prison William Kopsho would never be able to threaten the safety of any woman. He would never be able to have a

> relationship with a woman like he has had in the past. He would never again be a threat to any woman's safety. Also, William Kopsho succeeded in prison when he was placed there before. He did not attempt to escape. He worked well with others and was a help in the prison environment. If he is sentenced to life in prison William Kopsho will never again be a danger to society, and he will be able to contribute something as a working member of the prison community.

William Michael Kopsho's Memorandum in Support of a Life Sentence p. 25. *See also Sentencing Order* p. 13.[6]

> [FN6]. Society can be protected by a life sentence in prison. The length of a Defendant's mandatory sentence can be considered a mitigating circumstance. *Jones v. State*, 569 So. 2d 1234 (Fla. 1990). Therefore the fact that this Court can sentence the Defendant to life in prison without parole may be mitigating. The Court, adhering to *Jones, supra*, finds this factor to be mitigating in nature. However, the Court affords it little weight. *Sentencing Order* p. 13.

This claim is speculative, refuted by the record, cumulative, and is therefore denied.

(V3, R562-63).

D. THE TRIAL COURT WAS CORRECT

Kopsho seeks to circumvent his burden as the moving party in this post-conviction proceeding to prevent a facially sufficient claim. He states, "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," and, "[n]owhere 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." (*IB* at 20). It is clear that the Appellant carries the burden of proof in a 3.851 motion, and if he does not allege a facially sufficient claim, it is properly summarily denied. *Hojan* ("When reviewing the circuit court's summary denial of an initial rule 3.851 motion, we will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record.")

Kopsho also presents a circular argument, reasoning, "[i]t 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." However, it is clear that it is not the State's burden to *disprove* Aiken's credibility, but Kopsho's alone to present a facially sufficient claim, which he failed to do. *Id*. The trial court properly denied this claim without an evidentiary hearing.

Kopsho now claims that the trial court erred by failing to grant him the opportunity to correct any technical omissions in his pleading based on *Spera v. State*, 971 So. 2d 754 (Fla. 2007). *Spera* is distinguishable from the case at bar for several reasons. First, the actual holding of *Spera* is:

> Accordingly, to establish uniformity in the criminal postconviction process, we hold that in dismissing a first postconviction motion

> based on a pleading deficiency, a court abuses its discretion in failing to allow the defendant at least one opportunity to correct the deficiency unless it cannot be corrected.
>
> …
>
> Accordingly, when a defendant's initial rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion. As we did in *Bryant*, we hold that the proper procedure is to strike the motion with leave to amend within a reasonable period. We do not envision that window of opportunity would exceed thirty days and may be less. The striking of further amendments is subject to an abuse of discretion standard that depends on the circumstances of each case. As we did in *Bryant*, we stress here, too, that "we do not intend to authorize 'shell motions'- those that contain sparse facts and argument and are filed merely to comply with the deadlines, with the intent of filing an amended, more substantive, motion at a later date." *Bryant*, 901 So.2d at 819.

Spera v. State, 971 So. 2d 754, 755, 761 (Fla. 2007).

Secondly, *Spera* is not a capital case, the defendant in that case was charged with fleeing and eluding and burglary; as such, *Spera* specifically pertains to motions for post-conviction relief filed under Florida Rule of Criminal Procedure 3.850, not 3.851. As stated in *Spera*, the case that actually controls for capital defendants is *Bryant v. State*, 901 So. 2d 810 (Fla. 2005). *Spera* merely broadened the holding of *Bryant* to all criminal defendants. In any event, this line of cases merely stands for the proposition that a trial court must allow a defendant an opportunity to amend an insufficient pleading, which Kopsho has certainly done. *See* V3, R441-479. Moreover, this line of cases specifically excludes from

consideration cases in which claims are denied because they are refuted by the record.

> We also stress that our decision is limited to motions deemed facially insufficient to support relief-that is, claims that fail to contain required allegations. **When trial courts deny relief because the record conclusively refutes the allegations, they need not permit the amendment of pleadings.**

Spera v. State, 971 So. 2d at 762 (emphasis added). Kopsho's post-conviction motion was certainly facially insufficient because he failed to allege what testimony Aiken would give, and how he was prejudiced by his trial counsel not calling Aiken in the penalty phase. *See Nelson v. State*, 875 So. 2d at 583; *Bryant v. State/Crosby*, 901 So. 2d at 821-22. Kopsho's argument in the circuit court was conclusory and therefore, insufficiently pled. However, in addition to facial insufficiency, the trial court also found that Kopsho's allegations were conclusively refuted by the record and cumulative. (V3, R563).

Kopsho argues, "[a]lthough 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 …" (*IB* at 22). While it is true that Dr. McMahon did not testify directly to future dangerousness or his ability to adapt in prison during the penalty phase, trial counsel made reasonable inferences from her expert testimony that formed the basis of his sentencing memorandum in favor of a life sentence. *See* ROA, V25, 4014-4048. The argument that Kopsho would adjust to a sentence of life in prison

and become a contributing member of the prison population was based on a reasonable inference from Dr. McMahon's testimony; specifically where she stated that Kopsho's particular personality profile and diagnosis of Dependant Personality Disorder with Borderline features was not triggered unless he was in an intimate relationship. She testified:

> Can't express that **anger**. Better not express that **rage** because you are going to drive those people that you are trying to get to help you farther away from you. So you don't dare express that. **That's not going to be expressed again until he's in an intimate relationship**.
>
> . . .
>
> But that's not going - - **that rage is not going to surface again until he's in that kind of relationship and that person makes a move to abandon the relationship.**
>
> His anxiety goes sky high. His need to keep that person from leaving him, in other words, his need to control that person is the only thing that will help his anxiety reduce is to keep them close to him. And, of course, obviously what's that going to do? If anybody tries to control us, most of us might put some distance between them and us. We don't like being controlled. So drive them away.
>
> And that rage comes out. And that is a description of the abusive personality.

(ROA, V38, R1573-1574) (emphasis added).

Because Dr. McMahon already established that Kopsho is only dangerous in the context of his intimate relationships with women, it is a reasonable inference on the evidence presented that the public would be protected by a life sentence because Kopsho would not be able to engage in relationships with women (or

intimate relationships at all, for that matter) in prison. Therefore, any further evidence as to society being protected by a life sentence is redundant and cumulative. *See* ROA, V38, R1576.

The law is well-settled in Florida; when a defendant claims counsel was ineffective for failing to present information, most of which is cumulative to the information that the jury and sentencing court heard at the penalty phase, the claim is properly summarily denied. *Diaz v. State/Crews*, 132 So. 3d 93, 111-112 (Fla. 2013) (A defendant is not prejudiced by trial counsel's failure to present cumulative evidence). *See also Troy*, 57 So. 3d at 835 (defendant's claim . . . will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented) (citing *Van Poyck*, 694 So. 2d at 692-93). Kopsho is not entitled to an evidentiary hearing to present cumulative evidence when his claim is refuted by the record. *See Hojan; Barnes*, 124 So. 3d at 911.

G. Harmless Error.

The mitigation Kopsho argues should have been presented in his penalty phase was, in fact, presented. Had Aiken testified, the jury would have heard the same mitigation they had already heard from Dr. McMahon. This is not a circumstance, as in *Ault v. State*, 53 So. 3d 175, 190 (Fla. 2010), cited by the Appellant, that the trial court refused prison adjustment mitigation. In fact, the trial

court already considered this exact mitigation when it found that society would be protected by a life sentence and gave that mitigator little weight. (DAR, V24, R3974).

Further, there is no indication more evidence of the same would have garnered more weight in mitigation. Moreover, had Aiken testified in the penalty phase, it stands to reason that the State could have rebutted his testimony with the fact that Kopsho was not amenable to rehabilitation in prison; or specifically, that Lynn Kopsho had not been protected by the fact that Kopsho was under a sentence of imprisonment (probation) at the time he procured a gun and murdered her.

Because the balance of aggravation and mitigation could not have been changed by Aiken's testimony, there is no prejudice for not having called him in the penalty phase. The trial court was correct in summarily denying the sub-claim.

ISSUE III: THE POST-CONVICTION COURT PROPERLY SUMMARILY DENIED CLAIM 1C AND *SPERA* DID NOT APPLY (RESTATED)

Kopsho next argues that the trial court erred in summarily denying Claim 1C, of the amended motion without allowing him an opportunity to amend under *Spera*. Claim 1C alleged that trial counsel was ineffective for failing to present as mitigation the fact that the State Attorney's Office considered making an offer of life in prison, in which he also argued that "to allow the victim's family's to affectively make the decision whether the State should seek the death penalty"

allows for arbitrary and capricious imposition of the death penalty. (*IB* at 23). Kopsho makes a slightly different argument to this Court, alleging, "[t]he trial court erred in denying this claim as facially insufficient without providing Mr. Kopsho the chance to amend this claim pursuant to *Spera*. (*IB* at 24).

As discussed *supra, Spera* (or, more accurately, *Bryant*) does not require the post-conviction court to allow Kopsho to amend his 3.851 claim when the claim is summarily denied on the merits as it was in this case. Kopsho argues that he should have been allowed to amend his claim. He ignores the fact that he did amend his post-conviction motion once, already. (V3, R441-479).

A. The Standard of Appellate Review

As discussed, *supra*:

> To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief." *Everett v. State*, 54 So. 3d 464, 485 (Fla. 2010). When reviewing the circuit court's summary denial of an initial rule 3.851 motion, we will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. *See Walker*, 88 So. 3d at 135. Finally, "[b]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Seibert v. State*, 64 So. 3d 67, 75 (Fla. 2010) (citing *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding that pure questions of law that are discernable from the record are subject to de novo review)).

Hojan v. State/Jones, 40 Fla. L. Weekly at S463.

B. The Post-Conviction Court's Order

With regard to Kopsho's Claim 1C, the post-conviction court held:

> Kopsho claims that Counsel was ineffective for failing to present as mitigating testimony that the State was considering offering Mr. Kopsho a life sentence in exchange for a plea to first-degree murder if the victim's family members were in agreement. Kopsho also raises a separate constitutional claim that to allow the victim's family to make the decision regarding whether to seek the death penalty allows for the arbitrary, capricious, and/or discriminatory winnowing of defendants convicted of crimes punishable by death and fails to ensure that the death penalty is imposed for only the most aggravated and least mitigated of first-degree murders in violation of the U.S. Constitution. Kopsho states that these claims were not previously raised because they are based on 2004 emails recently obtained from the Office of the State Attorney. This claim is insufficiently pled. 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 vague and conclusory statements as to the content do not rise to the level of a sufficiently pled claim.
>
> Additionally, Counsel cannot be deficient for failing to raise a meritless claim. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999). The Florida Constitution contains a victims' rights provision that entitles the victims of crimes, including the surviving family members of homicide victims, "to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." *Franklin v. State*, 965 So. 2d 79, 97 (Fla. 2007) (quoting Fla. Const. art. I, § 16). The United States Supreme Court has held that the Eighth Amendment to the United States Constitution did not prevent the State from presenting evidence about the victim,

> evidence of the impact of the murder on the victim's family, and prosecutorial argument on these subjects, if permitted to do so by state law. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Subsequently, the Florida Legislature enacted section 921.141(7), which permits the prosecution to introduce and argue victim impact evidence. See Fla. Stat. § 921.141(7). An argument that the State Attorney's Office could not discuss a possible plea offer with the victim's next of kin is not supported by Florida law. This claim is without merit. Counsel cannot be ineffective for failing to file a meritless claim.

(V3, R563-64).

C. The Trial Court Was Correct.

The trial court was correct in summarily denying this claim on the merits because trial counsel cannot be ineffective for failing for file a meritless claim. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999). Kopsho's argument that the State Attorney's office could not discuss a possible plea offer with the victim's next of kin had no support in Florida law. Kopsho now claims the trial court misinterpreted his argument stating, "Mr. Kopsho is not contending that the victim's family should not be consulted ..." but rather, "the victim's family should not be allowed to make the ultimate decision as to whether Mr. Kopsho would be offered life imprisonment." (*IB* at 25). Plain reading of Kopsho's post-conviction claim and argument aside, he still fails to identify any support for this argument, whatsoever.

Moreover, it is unambiguous, that the Office of the State Attorney, through the trial prosecutor, has sole discretion on whether or not to offer a plea deal and

whether or not to seek the death penalty in any given case, just as the sentencing Judge has sole discretion on whether or not to accept any plea deal and whether or not to sentence any convicted murderer to death. To argue as Kopsho does, that the "victim's family make[s] the ultimate decision" is disingenuous. However, even if the victim's family, or the victim herself, had been in opposition to the death penalty, that is still not a proper consideration for a mitigating circumstance. *Campbell v. State*, 679 So. 2d 720 (Fla. 1996); *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990). In *Campbell*, a murder victim's family member was prepared to testify that the murder victim opposed the death penalty, and this Court held "[t]he victim's opposition to the death penalty is unrelated to the defendant's culpability—it has nothing to do with the defendant's character or record or the circumstances of the crime—and thus is irrelevant to sentencing." *Campbell*, 679 So. 2d at 725 (citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). In *Griffin v. State*, 114 So. 3d 890, 903 (Fla. 2013), the victim's family was consulted in whether or not to offer a plea to life imprisonment over seeking the death penalty, and this Court found no ineffectiveness for trial counsel's decision not to relay the plea when it was contingent upon both the defendant and co-defendant's pleas. Kopsho advanced a much more ephemeral argument than that in either *Campbell* or *Floyd*. Kopsho argues that his trial counsel was ineffective for failing to rely on, as mitigation, a *conditional* consideration of a *possible* plea offer that

was never made. Because the victim's family's position on sentencing is not mitigating, trial counsel cannot have been ineffective in failing to present it, and neither prong of *Strickland* could have been established.

Furthermore, whether or not the State made a plea offer (which in this case they did not) is not a proper mitigating consideration. Sections 921.141(6)(h) and 921.142(7)(h) of the Florida Statues permit the introduction of evidence of "any other factors in the defendant's background that would mitigate against the imposition of the death penalty" in a capital case. Whether or not the State makes an offer is not a factor of the defendant's background or reflective of his character, and does nothing to mitigate the circumstances of the case. *See also Johnson.*

D. Appellant's Case Law is Not Applicable.

Kopsho cites to the Ninth Circuit case *Scott v. Schriro*, 567 F.3d 573, 584 (9th Cir. 2009), for the premise that, "[t]he plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case." The *Scott* case and the case of *Summerlin v. Schriro*, 427 F.3d 623, 640-41 (9th Cir. 2005), which *Scott* cites to, are both markedly dissimilar from Kopsho. *Scott* involves a defendant who was offered a plea deal plea to a lesser charge of second-degree murder if he would testify truthfully for the State of Arizona in a case with tenuous evidence. *Summerlin* specifically discusses the extremely favorable terms of the plea deal to discuss the prosecutor's hesitance to prove the case at trial, stating:

> Second, this was not by any means a clear-cut death penalty case. The initial, very experienced, prosecutor did not believe he could succeed in obtaining a death sentence given the facts and applicable law. Indeed, the prosecutor assented to an extremely favorable plea agreement. Under the proposed plea agreement, Summerlin was to enter an *Alford* plea, *see North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), which enabled him, without admitting guilt, to plead guilty to second-degree murder and aggravated assault and to be sentenced accordingly. The agreement stipulated that Summerlin would be sentenced to twenty-one years in prison for the murder of Ms. Bailey, of which he would be required to serve fourteen. The agreement was subject to court approval. If the court rejected the stipulated sentence, Summerlin could either (1) allow his plea to stand *641 and be sentenced to a term of up to thirty-eight-and-one-half years, according to the court's sole discretion, or (2) withdraw his plea of guilty and have the matters proceed to trial and disposition.
>
> This plea agreement was withdrawn after Summerlin's initial attorney and the prosecuting attorney were replaced. However, it is indicative of the fact that this was not a clear-cut capital case.

Summerlin v. Schriro, 427 F.3d at 640-41. This is certainly not the case here, where Kopsho was never offered a deal to plea to a lesser charge, and never officially offered a plea deal at all, never approached to become a State's witness, and this case certainly *was* a clear-cut, highly-aggravated case.

This Court discussed some of the same factors the State would have considered in determining the strength of their case in its discussion on sufficiency:

> Kopsho confessed to killing Lynne both during his 911 call and during his police interview. During the interview with Detective Owens, Kopsho repeatedly admitted that the crime was premeditated. Even if Kopsho had not confessed to the premeditation, his efforts to secure the gun that killed Lynne would be sufficient to demonstrate premeditation, as would the three shots it took to kill her. Witnesses

> saw Kopsho stop Lynne from fleeing and shoot her multiple times. Kopsho kept bystanders away while they watched Lynne die.

Kopsho v. State, 84 So. 3d 204, 221 (Fla. 2012). However, the prosecutor must also consider elements in addition to merely proof of guilt in whether or not to offer a plea deal in any particular case. To accept Kopsho's argument that every case in which the State contemplates a plea offer is a case the State will have difficulty proving, and is thus mitigated, is simply incorrect.

E. Harmless Error.

The mitigation Kopsho argues should have been presented in his penalty phase – the possibility of an offer of life in prison – was not a mitigating circumstance. Because it was not mitigating, the balance of aggravation and mitigation could not have been changed had the jury heard it; and there is no constitutional violation for discussing penalties with the murdered victim's next of kin, so the trial court was correct in summarily denying the sub-claim.

ISSUE IV: THE POST-CONVICTION COURT PROPERLY SUMMARILY DENIED CLAIM II BECAUSE THERE WAS NO ERROR/INEFFECTIVENESS TO CUMULATE (RESTATED)

Kopsho claims that the post-conviction court's denial of Claim II was reversible error. Claim II alleged that "the combined instances of prosecutorial [sic] 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." (*IB* at 26).

A. The Trial Court's Order

> In this ground, Kopsho claims that but for the cumulative effect of all aspects of the deficient performance of Counsel, he would not have been sentenced to death. "[A] claim of cumulative error will not be successful if a petitioner fails to prove any of the individual errors he alleges." Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005). As Kopsho has failed to prove any of the raised errors this claim is without merit.

(V3, R564-65).

B. The Trial Court was Correct

The trial court properly denied this claim as meritless. When none of Kopsho's claims warrant relief, there is no basis for relief because there is no "error" or "sum of errors" to "cumulate." The success of this claim is contingent upon Appellant succeeding on *several* of his individual claims. As such, the State relies on the substantive responses provided to the specific claims. Because all of the individual claims of error are without merit, a claim of cumulative error must also fail. *Kormondy v. State* , 983 So. 2d 418, 441 (Fla. 2007); *Griffin v.State*, 866 So. 2d 1, 22 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 219 (Fla. 2002); *Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999). As this Court has held*:*

> … [N]one of [Appellant's] individual claims of ineffectiveness of counsel warrant relief. "Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit.' " *Bradley v. State,* 33 So. 3d 664, 684

(Fla. 2010) (alteration in original) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)).

Butler v. State, 100 So. 3d 638, 668 (Fla. 2012), *cert. denied*, 133 S. Ct. 1726 (2013).

ISSUE V: THE POST-CONVICTION COURT PROPERLY SUMMARILY DENIED CLAIM III BECAUSE FLORIDA'S DEATH SENTENCING STATUTE IS CONSTITUTIONAL (RESTATED)

A. Preservation.

In his final claim, Kopsho argues that the post-conviction court's summary denial of Claim III – alleging that Florida's capital sentencing statute is unconstitutional because it allows for a non-unanimous death recommendation – was error. (*IB* at 27). This same argument was raised on direct appeal, and this Court found as follows:

> We have held that it is not unconstitutional for a jury to recommend death on a simple majority vote. *Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005). We have also rejected claims that a death sentence is unconstitutional under *Ring* where the prior violent felony aggravator is present. *See, e.g., Patton v. State*, 878 So. 2d 368, 377 (Fla. 2004); *Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003) ("We have previously rejected claims under *Apprendi* and *Ring* in cases involving the aggravating factor of a previous conviction of a felony involving violence."), *cert. denied*, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004). We therefore find Kopsho's argument without merit.

Kopsho v. State, 84 So. 3d at 220.

B. Standard of Review

> A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before

> the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to *de novo* review. *See, e.g., Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000).

Ventura v. State, 2 So. 3d 194, 197-98 (Fla. 2009).

Trial court's summary denial of this issue was correct. Kopsho did not ask for evidentiary development on this claim below, and cites to no case decided by this Court or any other court to support his position. He supports this argument, instead, by citing to the grant of *certiorari* in *Hurst v. Florida*, U.S.--, 135 S.Ct. 1531, 191 L. Ed.2d 558 (2015), currently pending before the Supreme Court of the United States.

It is well-settled, however, that a grant of *certiorari* by the United States Supreme Court has no precedential value. *Ritter v. Smith*, 811 F.2d 1398, 1400-05 (11th Cir. 1987). Just as a denial of *certiorari* expresses no opinion on the merits of the case, *Schiro v. Indiana*, 493 U.S. 910, 110 S. Ct. 268, 107 L. Ed. 2d 218 (1989) (opinion of Stevens, J., respecting the denial of certiorari), the Supreme Court's decision to grant a petition for *certiorari* expresses no judgment concerning the merits of the case to be decided. *Clinton v. Jones*, 520 U.S. 681, 689, 117 S. Ct. 1636, 1642, 137 L. Ed. 2d 945 (1997).

C. The Trial Court's Order.

The trial court followed the law in Florida when it held:

> Kopsho raises this claim as a standalone claim that the Florida statute violates procedural due process under the Federal Constitution by allowing a less than unanimous jury verdict on the issue of life or death. Kopsho states that societal standards show that Florida is an outlier with respect to its capital sentencing statute. He alleges that the controlling precedents and the Court's understanding and interpretations of the Eighth Amendment demonstrate that Florida's non-unanimous jury requirement does not comport with the Eighth Amendment's standards of decency.
>
> The Florida Supreme Court has ruled on this identical issue in two recent cases, *Mann v. State* and *Kimbrough v. State*. In *Mann*, 112 So. 3d 1158, 1162 (Fla. 2013), the Florida Supreme Court "reject[ed] this argument by concluding that it is subject to our general jurisprudence that non- unanimous jury recommendations to impose the sentence of death are not unconstitutional." *Id*. In *Kimbrough*, 125 So. 3d 752, 754 (Fla. 2013) endorsed its holding in *Mann* in denying Kimbrough's identical argument. This issue has been raised and rejected by the Florida Supreme Court on multiple occasions. This claim is without merit.

(V3, R565).

D. Case Law Supporting the Trial Court's Finding.

The trial court was correct in following the law of this Court in deciding Kopsho's claim of unanimous jury sentencing was meritless when there has been no decision to the contrary.

E. Harmless Error

It is clear that even if *Hurst* were to put to rest the question of *Ring's* applicability on Florida's sentencing statute, Kopsho would not be affected by the

outcome. Kopsho was on probation for prior violent felonies –armed kidnapping and sexual battery – at the time he murdered his wife, and he was convicted of armed kidnapping contemporaneously. *Kopsho v. State*, 84 So. 2d 204 (Fla. 2012). Thus, he falls outside *Ring*'s scope for several reasons. *Ring* specifically excludes from consideration cases where the defendant was convicted of another violent felony conviction.[3] Because the jury unanimously found Kopsho guilty of armed kidnapping, any complaint about the jury's unanimity as to the prior violent felony conviction as an aggravator supporting the recommendation of death is without merit, as Kopsho entered the penalty phase having already had an aggravator found by a unanimous jury beyond a reasonable doubt based on the contemporaneous felony convictions. As stated in *Evans v. Sec'y, Florida Dep't of Corr.*, 699 F.3d 1249, 1258 (11th Cir. 2012) *citing Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*), "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of

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[3] This is a critical distinction since the United States Supreme Court has repeatedly held that the existence of a prior felony conviction is an exception to the need for jury fact-finding. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring,* 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almandarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming *Almendarez-Torres* provides valid exception for prior convictions).

death be made by the jury." *Id*. at 640–41, 109 S.Ct. at 2057. Further, even if Kopsho had not entered the penalty phase already having an aggravator established, a jury's recommendation of death means the jury found an aggravator – that is all that is required to satisfy *Ring*. *See Grim v. Sec'y, Florida Dep't of Corr.*, 705 F.3d 1284, 1288 (11th Cir.) *cert. denied sub nom. Grim v. Crews*, 134 S. Ct. 67, 187 L. Ed. 2d 53 (2013).

Moreover, even if a future decision in *Hurst* were to change the sentencing procedures in Florida, Kopsho's trial counsel could not have been ineffective for failing to anticipate a change in the law, and Kopsho would still not be entitled to relief. *Hojan v. State/Jones*, 40 Fla. L. Weekly S463, (concluding that trial counsel cannot be deemed ineffective for not anticipating a then-future change in death penalty protocol).

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this Honorable Court affirm the trial court's summary denial of Kopsho's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the following by E-Portal on October 15th, 2015: Nicholas Whittle, Esquire, whittle@ccmr.state.fl.us; Eric Pinkard, Esquire, pinkard@ccmr.state.fl.us; Reuben A. Neff, Esquire, neff@ccmr.state.fl.us; and support@ccmr.state.fl.us, Capital

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

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