IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1256

WILLIAM M. KOPSHO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY TO ANSWER BRIEF OF APPELLEE

REUBEN A. NEFF
FLORIDA BAR NO. 0089171
ASSISTANT CCRC
neff@ccmr.state.fl.us

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

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

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

The Appellant relies on the arguments presented in his Initial Brief and Motion for Rehearing. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ISSUE IA: THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING, PER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851(f)(5)(A)(i), ON CLAIM IA

Under Florida Rule of Criminal Procedure 3.851, an evidentiary hearing must be held on an initial motion for post-conviction relief whenever the movant makes a facially sufficient claim that requires a factual determination. Hurst v. State, 18 So.3d 975 (Fla. 2009), citing Gonzalez v. State, 990 So.2d 1017 (Fla. 2008). On such a motion, to the extent the movant has made a facially sufficient claim requiring a factual determination, the court must presume that an evidentiary hearing is required. Id., citing Booker v. State, 969 So.2d 186 (Fla. 2007). The reason for granting an evidentiary hearing is detailed in Allen v. Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a

> significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system.

Id. At 66,67.

The Court's reasoning in Allen is reflected in the Court's commentary on Rule 3.851, under the 2001 Amendment, where the Court notes that "the failure to hold evidentiary hearings on initial motions" is "a major cause of delay in the capital convictions process" and that requiring evidentiary hearings on factually based claims will avoid this cause of delay. Fl. R. Crim. P. 3.851.

Dr. McMahon may have made a brief reference to Mr. Kopsho suffering from a "dependent personality disorder with some borderline features," but it was never explained to the jury what a borderline personality disorder is or how and why it affected Mr. Kopsho. The trial court overlooked that Dr. McMahon did not testify to the statutory mental mitigator that Mr. Kopsho was under the influence of extreme mental or emotional disturbance. Dr. McMahon's brief mention of "some borderline features" in no way comes close to, as Appellee claims, presenting the same testimony that Dr. Russell would present at an evidentiary hearing. A severe mental disturbance is a mitigating factor of the most weighty order. See Simmons

v. State, 105 So.3d 475, 506 (Fla. 2012). A short reference to a mental disorder is not on par with a properly developed presentation of evidence of said disturbance and its direct effect on Mr. Kopsho at the time of the homicide, which is the critical component of a statutory mental health mitigator.

When a defendant alleges ineffective assistance 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 have testified prejudiced the case." Nelson v. State, 875 So.2d 579 (Fla. 2004). The substance of Dr. Russell's testimony was described in detail in Appellant's Amended Motion to Vacate Judgment of Conviction and Sentence. ROA, V3, 450-53.

The deficiencies of trial counsel's investigation and evidentiary presentation of Mr. Kopsho's borderline personality disorder, specifically how it affected Mr. Kopsho at the time of the crime, are stated in detail in the amended motion. The substance of Dr. Russell's testimony and the deficiencies of trial counsel are again outlined briefly in Appellant's Motion for Rehearing of the Order Denying Amended Motion to Vacate Judgment of Conviction and Sentence. ROA, V4, 690-92. Finally, as noted in both motions, trial counsel's failure to present the previously described testimony prejudiced Mr. Kopsho by resulting in an inaccurate presentation of Mr. Kopsho's background and mental health at the time

of the homicide, depriving Mr. Kopsho of an individualized and accurate sentencing.

Stating a witness could testify about a subject, without more, is insufficient to require an evidentiary hearing. Franqui v. State, 59 So.3d 82, 101 (Fla. 2011). However, here, the substance and effect of Dr. Russell's testimony is clearly outlined. This is not a mere statement that Dr. Russell will testify and that such testimony will have an effect. The motions clearly detail the substance of what Dr. Russell will testify to at an evidentiary hearing.

In Franqui, no details about the proposed testimony were referenced, making it unclear what Franqui's wife, Vivian Gonzalez, would have even testified to. Id. Franqui merely claimed his wife could testify about his condition on the day he was interviewed by law enforcement, prior to providing incriminating statements, but gave no indication what this condition was or how his wife could elaborate on it. Id. This insufficiency in Franqui's pleadings is why the Court ruled that the pleadings did not merit an evidentiary hearing.

Franqui is not a basis to deny Mr. Kopsho an evidentiary hearing. Mr. Kopsho's motions outlining the substance and effect of Dr. Russell's testimony go significantly beyond the pleadings in Franqui. Mr. Kopsho alleged a facially sufficient claim and demonstrated the prejudice arising from the failure to present

evidence of severe emotional disturbance at the time of the homicide. Mr. Kopsho is entitled to an evidentiary hearing on Claim IA.

Only through an evidentiary hearing can the lower court, and the Court, make a determination of whether the failure to present evidence of extreme emotional disturbance undermines confidence in the outcome to establish the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). A ruling on the pleadings on that factual issue is not in accordance with the Florida Rule of Criminal Procedure 3.851 and the Court's repeated proclamations of the need for evidentiary hearings on past conviction claims in capital cases. It cannot be said that the failure to present mitigating evidence of the defendant's state of mind at the time of the homicide is without merit as a matter of law.

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

The trial court erroneously relied on Troy v. State, 948 So.2d 635 (Fla. 2006), when it denied Mr. Kopsho an evidentiary hearing where Mr. Kopsho intended to present testimony of James Aiken, 36 Tsiya Court, Brevard, N.C. 28712. Troy involved a situation where the proffered witness had not met with the

appellant; it was factually established that the witness never met Troy and did not know anything about him or the case. That is not the factual case here. Florida jurisprudence, specific to post-conviction proceedings, does not require that a movant allege that a particular expert met with the defendant in order to reach an evidentiary hearing. James Aiken met with Mr. Kopsho and can testify about mitigation not presented at Mr. Kopsho's penalty phase.

Where interests of justice require an evidentiary hearing on claims of ineffective assistance of counsel, judicial fairness and efficiency require that the trial court hear the balance of a defendant's claims regarding ineffective assistance of counsel, other than those that are procedurally barred, facially or legally insufficient, clearly without merit as a matter of law, or moot. See Thompson v. State, 796 So.2d 511, 516 (Fla. 2001). "On an initial rule 3.851 motion, to the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the court must presume that an evidentiary hearing is required." Seibert v. State, 64 So.3d 67, 75 (Fla. 2003).

In Parker v. State, 904 So.2d 370 (Fla. 2005), Parker, in his motion for post-conviction relief, asserted that his defense counsel should have presented additional substantial mitigating evidence at the penalty phase. Parker asserted, amongst several claims, that he could present details concerning mental illness, borderline retardation, and weaknesses in logical and abstract thinking, which went

beyond the mitigating evidence of Parker's childhood and intellectual capacity that defense counsel presented. Id. at 377-78. The trial court summarily denied Parker's claims. Id. at 374. The Supreme Court of Florida reversed and remanded, noting that Parker was entitled to an evidentiary hearing to present his evidence. Id. at 378. Though Parker's defense counsel presented evidence during the penalty phase that could lead to inferences related to the mitigation evidence Parker sought to present in post-conviction, Parker was still entitled to an evidentiary hearing.

Mr. Kopsho seeks to present significant expert testimony concerning his stay in prison, his adjustment to prison life, and the lack of danger he presents to others if given a life sentence. ROA, V4, 692-94. This evidence was not presented at Mr. Kopsho's original penalty phase, though evidence presented at the original penalty phase brushed briefly and inadequately on these topics. The record does not conclusively demonstrate that the mitigation evidence trial counsel failed to present regarding Mr. Kopsho's positive adjustment to prison and lack of future dangerousness under a life sentence was cumulative. An evidentiary hearing is proper when the allegations are sufficiently pled and the record does not conclusively refute the allegations. Freeman v. State, 781 So.2d 1055 (Fla. 2000). Mr. Kopsho is entitled to an evidentiary hearing where he may present his evidence.

Even assuming the trial court required more information concerning Claim IB, Mr. Kopsho requested leave in his Motion for Rehearing to amend this claim, pursuant to Spera v. State, 971 So.2d 754 (Fla. 2007), for the purpose of clarifying, in an abundance of caution, that Mr. Aiken did visit and evaluate Mr. Kopsho in prison on December 5, 2013, in addition to reviewing Mr. Kopsho's prison and jail records. ROA, V4, 694. This is not a case factually similar to Troy; the expert in this case personally met with and assessed Mr. Kopsho. An evidentiary hearing is required. Mr. Kopsho incorporates any other arguments raised in his amended rule 3.851 motion and Motion for Rehearing and does not waive anything alleged therein. Mr. Kopsho's claim requires a hearing.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Reply Brief, the Initial Brief of Appellant, and the Motion for Rehearing, the circuit court improperly denied Mr. Kopsho relief on his 3.851 motion. Relief is warranted in the form of a new trial, a new sentencing proceeding, an evidentiary hearing on Claims I and II of his post-conviction motion, or any other relief this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Reply Brief of Appellant** has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Stacey Kircher, Assistant Attorney General stacey.kircher@myfloridalegal.com, capapp@myfloridalegal.com; William Gladson, Assistant State Attorney, bgladson@sao5.org eservicemarion@sao5.org, the Honorable Judge David Eddy, mksicki@circuit5.org and by U.S. Mail to William Kopsho, DOC# 122787, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this 4th day of November, 2015.

/s/Reuben A. Neff____
Reuben A. Neff
Florida Bar No. 089171
Assistant CCRC
Capital Collateral Regional Counsel - Middle
Neff@ccmr.state.fl.us
Support@ccmr.state.fl.us

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

CERTIFICATE OF COMPLIANCE

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

/s/Reuben A. Neff
Reuben A. Neff
Florida Bar No. 089171
Assistant CCRC
Capital Collateral Regional Counsel - Middle
Neff@ccmr.state.fl.us
Support@ccmr.state.fl.us

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