IN THE FLORIDA SUPREME COURT

JOHN RUTHELL HENRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,554

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

John Ruthell Henry will be referred to as the "Appellant in this brief and the State of Florida will be referred to as the "Appellee". The record on appeal consists of ten (10) volumes and will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee agrees with Appellant's Statement of the Case and Facts but would like to add the following additional facts.

At the suppression hearing, testimony showed that there was a time gap of approximately one hour between the time Deputy Wilbur left Appellant at approximately 2:50 A.M. and when he returned at approximately 4:00 A.M. (R. 84, 87). It appears from the record that Deputy McNulty only spoke with Appellant during the beginning of the period where Deputy Wilbur was out of the room. (R. 86).

Deputy Wilbur did not have his gun drawn at any time Appellant was "Mirandized". (R. 571). The Deputies testified that Appellant did not appear to be under the influence of durgs or alcohol at the time of his arrest. (R. 609). Deputy Wilbur even bought coffee and cigarettes for Appellant after Eugene was found. (R. 95, 609).

On cross-examination, Dr. Afield admitted that his opinion of Appellant's capacities was based solely on what Appellant had told him and that he had no way of corroborating such statements. (R. 718). Dr. Sprehe testified that Appellant had the "capability of cognitive thought" when he killed Eugene. (R. 755). Dr. Coffer indicated that all the other experts relied solely on the truth of what Appellant had told them. (R. 1002). He also testified that hallucinations are not typical of cocaine intoxication. (R. 1022). Dr. Coffer further told the jury that Appellant's course of conduct, including driving a car

almost into a pond, constituted an "intricate complex act" that required a "certain amount of skill and coordination and presence of mind". (R. 1026).

Terry Chancey, a deputy sheriff, testified that his police radio was broadcasting dispatches and that he had his flashlight and car headlights on when he investigated the spot where Appellant's car had come to rest. (R. 964, 965). Daniel McGill, a crime scene technician with the Hillsborough County Sheriff's Office testified that he could find no soda can that could concievably have been used for ingesting cocaine. (R. 972-975). Steven Moore, an Identification Detective with Hillsborough County testified that Appellant's car had to be towed out of a pond of water and that he found no soda can or vials that could have been used for ingesting cocaine. (R. 979, 981).

The prosecutor argued to the jury that Appellant's hallucinations regarding a knight in shinning armour and flashing lights was nothing more than Deputy Chancey. (R. 1093).

SUMMARY OF THE ARGUMENT

ISSUE I: In order for the State to rebut Appellant's proposed defense of insanity, Appellee would have had to prove that Appellant was sane beyond a reasonable doubt. Therefore, in order for the Appellant to have maintained his insanity defense, the state's expert had to have had access to Appellant. Any of Appellant's constitutional rights that may have been infringed necessarily give way when he sought to take advantage of the privilege of pleading insanity.

ISSUE II: The trial court is entitled to a presumption of correctness. Therefore, its determination that Appellant's confession was freely and voluntarily given should be upheld. Appellant's right to cut off interrogation was directed only at Deputy McNulty. Any incriminating statements made to Deputy Wilbur were given voluntarily and cannot reasonably be attributed to coercion or promises.

ISSUE III: The testimony concerning the death of Suzanne Henry was admissable under the Williams Rule. Therefore, the state need not have complied with the 10 day written notice rule. It would have been impossible for the state and the prosecution witnesses to have related their stories in a coherent fashion without referring to the murder of Suzanne Henry. The killing of Suzanne Henry was relevant and necessary in order for the state to have proved its case. Moreover, Appellant should not be heard to complain because he also took advantage of Suzanne Henry's murder in order to provide evidence for his defense.

ISSUE IV: Common civil and criminal trial practice in this state allows for the extensive cross examination of an expert's "billing practices" and relationship to the party offering the expert's testimony. Appellant's rights were not violated merely because Dr. Berland was subject to effective cross-examination. Even if Appellant had retained private counsel, the prosecutor would still have been allowed to cross examine Appellant's expert based upon his "billing practices" and relationship to the defense attorney.

ISSUE V: There was ample evidence to support an instruction on kidnapping. The scenario of events demonstrate that Eugene was "confined" against his will. Appellant could not have given his consent to young Eugene's kidnapping because, according to statute, Appellant was not his parent or legal guardian.

ISSUE VI: Allowing a jury to rehear testimony during their deliberation is within the sound discretion of the trial court. The trial court did not abuse its discretion because the lengthy and complicated psychological testimony would not have clarified any factual events readily susceptible to resolution.

ISSUE VII: This court and other reviewing courts have repeatedly upheld the jury instructions as given by the trial court. Moreover, the instruction in no way prevented Appellant from arguing any mitigating factors to the jury.

ISSUE VIII: Jurors are presumed to follow the law as given them by the court. Accordingly, there is no reason to doubt that they obeyed the court when they were twice instructed to disregard the murder of Suzanne Henry as an aggravating

circumstance and that such evidence was introduced for only a limited purpose. Merely because the jury recommended a death sentence by a margin of 10 to 2 does not mean that their verdict was "tainted" by evidence of the murder of Suzanne Henry.

ISSUE IX: Once again, there was ample evidence to support a finding that Appellant kidnapped young Eugene and, therefore, killed him while committing the felony of kidnapping. The court was entitled to disregard the testimony of Appellant's psychological experts. Surely, this Court in Banda, infra, did not intend "pretense of moral justification" to include as ludicrous a claim as advanced by Appellant. Moreover, the trial court's alleged failure to specifically announce his decision making process with respect to the mitigating evidence is not recognized as grounds for reversal, particularly when Appellant was not restricted in his ability to offer mitigating evidence.

ISSUE X: The murder of Eugene Christian was a product of a "domestic dispute" is without merit because Eugene's death was too attenuated in distance and time from Suzanne Henry's death to be considered the outcome of a domestic argument. Once again, the trial court was entitled to disregard Appellant's mental health testimony when he reached his decision to sentence John Ruthell Henry to death.

ARGUMENT

ISSUE I

THE REFUSAL OF THE COURT BELOW TO PERMIT APPELLANT, JOHN RUTHELL HENRY, TO PRESENT HIS INSANITY DEFENSE AT TRIAL DEPRIVED APPELLANT OF THE RIGHT TO PRESENT WITNESSES ON HIS OWN BEHALF, THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE, HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND DUE PROCESS OF LAW. (As stated by Appellant).

Appellant would like for this Court to hold that he has an unfettered fundamental constitutional right to assert an insanity defense and that any attempt by the prosecution or the trial court to impose conditions upon that defense is violative of his constitutional rights. However, as this Court so aptly noted in its decision in Parkin v. State, 238 So.2d 817 (Fla. 1970), ". . . the decision to plead insanity and tender proof is not a pathway without stones".

Courts, both state and federal, have long held that a defendant's constitutional rights give way in the face of a compelled psychiatric examination to determine sanity at the time of an offense. In United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), the court passed upon a defendant's privilege against self-incrimination. Therein, the court rejected the notion that a court ordered psychiatric examination is unconstitutional "per-se" as violative of a defendant's right not to incriminate himself. At footnote 10, the Cohen court further expanded the breadth of constitutional infringment that may be placed upon an individual who pleads insanity. The court cited Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated and remanded on

other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968) for the proposition that such a compelled psychiatric examination will be upheld based upon the Fifth Amendment or fundamental fairness (due process) grounds. Cohen, supra, at 47. Moreover, the Cohen decision extends the constitutional analysis to include compelled psychiatric examinations performed by a psychiatrist selected by the government. Cohen, at 48.

In Florida, this Court has unequivocally carved out the law governing a defendant's constitutional claims against any infringment upon his or her right to plead insanity. In Parkin v. State, supra, this Court held:

> When the plea of not guilty by reason of insanity was entered, it was done so with the knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead his defense, and, if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. The defendant's right at trial to offer evidence on the issue of his sanity at the time of the alleged crime is conditioned upon his cooperation during a psychiatric examination on behalf of the prosecution or court. (Emphasis added)

Parkin, at 822. Yet, in the face of such authority, Appellant cites United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975) for his contention "that use of statements obtained from the defendant during a compelled psychiatric examination to establish his sanity would violate the privilege against self-incrimination enjoyed by the accused." Again, this Court in Parkin has already supplied the answer to the Appellant's self-incrimination claim:

> The privilege never has required that any Court be deaf to any word a defendant may choose to speak, simply because they may be incriminating. The Constitution does not shield against incrimination by voluntary statement, even if given in pursuit of a collateral issue such as insanity: it does, however, shield against unfair use of such statements. . . A defendant pleading insanity may in the end prove himself guilty while trying to prove himself insane; this is a risk he must take. (Emphasis added)

The "unfair use" of a defendant's statements concerning the facts surrounding a crime can, however, be avoided. Citing Parkin, the court in McMunn v. State, 264 So.2d 868 (1972) held:

> The Court should prohibit the psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination.

Thus, in the instant case, as well as any other case wherein the maintenance of an insanity defense rests upon a defendant's cooperation with the prosecution's psychiatrist, the trial court, as the recognized guardian of the defendant's rights, should require the psychiatrist and the prosecutor to refrain from mentioning any statements made by the accused that bear upon the facts and events of the crime charged. Obviously, such judicial control over Dr. Coffer's testimony, had he been allowed to examine the Appellant, could have easily been exerted, much as it was over Dr. Afield's and Dr. Berland's testimony when they began to stray into the area of Appellant's sanity at the time of the murder. (R. 725-729; 914-918). However, because the Appellant failed to submit to such an examination by the state's own

expert, the trial court was simply never given the chance to protect the Appellant from the "unfair use" of any incriminating statements that may have related to the factual events surrounding the murder of Eugene Christian.

The necessity for having a state psychiatrist examine a defendant for the purposes of determining his sanity at the time of the offense springs from the law that a plea of insanity is an affirmative defense requiring the defendant to go forward with his burden of proving that he was insane at the time he committed the crime. Fisher v. State, 506 So.2d 1052 (Fla. 2d DCA 1987); Parkin, at 821. Accordingly, after a defendant has provided testimony establishing his insanity (presumably expert testimony), the prosecution must prove the defendant's sanity beyond every reasonable doubt. On this point, Chief Justice Ervin, in his concurring opinion in Parkin stated:

> However, when the issue of insanity as defined under the M'Naghten rule is raised by a defendant and a reasonable doubt as to the defendant's sanity generated, the prosecution is put to the test, so to speak, in any endeavor to prove sanity and thus mens rea. The presumption of sanity vanishes and the normal inferences of mens rea derivative from the conduct of the defendant are obliterated. The prosecution is forced to meet the issue of sanity head on - meaning it must produce expert opinion evidence on this issue comparable to that available to the defendant. Any competent expert opinion as to the sanity or insanity of a defendant must of course utilize in some respects testimonial responses from the subject. (Emphasis added).

Parkin, at 823.

What sanction, then, should be imposed for a defendant's

failure to comply with a court's lawful order to submit to an examination by the state's psychiatrist? Appellant contends that striking the insanity defense deprives him of his right to produce witnesses to testify on his own behalf and the effective assistance of counsel. As support for such a theory, he cites Shepard v. State, 453 So.2d 216 (Fla. 5th DCA 1984), and Lee v. State, 13 F.L.W. 2675 (Fla. 1st DCA 1988). In Shepard, the trial court erred because the striking of the defendant's insanity defense based upon the mere lack of a piece of paper (notice of intent to plead insanity) was far too extreme a sanction in light of the fact that the state was already well aware of the defendant's proposed defense and was not prejudiced thereby. In Lee, the court was found to be in error for excluding a defense witness where, through absolutely no fault of his own, the witness failed to timely appear for a court ordered deposition. Rather, the witness appeared the very next day. Obviously, in both the Shepard and Lee, cases, exclusion of a defense and a witness was too extreme a sanction in the face of a defendant's relatively minor violations of the details of procedural rules.

In the case sub judice, Appellant's failure to abide by the trial court's order to submit to an examination by the state's psychiatric expert directly prejudiced the state's long recognized obligation to prove the Appellant's sanity beyond and to the exclusion of every reasonable doubt. No leap of legal logic can ever equate exclusion of a witness or a defense based upon a mere technical procedural error to that of excluding a defense where the defendant's failure to cooperate, as required,

infringes upon the states ability to prove the very elements of its case!

In Bannister v. State, 358 So.2d 1182 (Fla. 2d DCA 1978), cert. denied 364 So.2d 891 (Fla. 1978), the district court held that "in appropriate circumstances, such as total noncooperation with any psychiatrist save his own, the court may properly refuse to admit any evidence propounded by the defendant relative to the issue of his sanity." (Emphasis added) Thus, irrespective of any constitutional rights, the Appellee urges this Court to recognize that, in the case of the assertion of the insanity defense, exclusion of that entire defense is indeed warranted, without consideration as to any other lesser sanctions, when a defendant fails to submit to an examination by the state's psychiatrist. Implicit in such a recognition would be a re-recognition that a plea of insanity is not a right but a privilege afforded by statute and decisional law, that assertion of the insanity defense carries with it certain limitations upon a defendant's constitutional right against self-incrimination, right to call witnesses on ones own behalf, right to present a defense, and a right to effective assistance of counsel.

With respect to Appellant's specific claim that he was denied the right to call witnesses on his own behalf as a result of having his insanity defense stricken, nowhere in any of the cases cited by Appellant is there a connection made between the right to plead insanity and the right to call witnesses on ones own behalf. Rather, decisional law, both state and federal, have, as argued above, found that various constitutional rights

yield to a defendant's privilege to plead insanity. Along with a defendant's right against self-incrimination and "fundamental fairness", a Defendant's sixth amendment rights may also be found to yield to the decision to plead insanity. In Shepard, the district court held that "exclusion of defense evidence may impinge upon a defendant's sixth amendment right". However, where the state is prejudiced, as in a case where a defendant fails to cooperate with a state psychiatrist while pleading insanity, the defendant's right to present an insanity defense and attendant witnesses must fade. Again, because the state would not have been allowed to rebut the Appellant's insanity defense with an expert who has had the opportunity to examine the Appellant, it was greatly prejudiced by not being able to meet this burden of proving the Appellant sane beyond a reasonable doubt.

Appellant also contends that he was denied effective assistance of trial counsel because the attorney-client relationship was damaged. The Appellant may no longer have had confidence in him after his attorney's advise not to cooperate with Dr. Coffer backfired. However, if such were actually true, then why hasn't Appellant asserted a claim of ineffective assistance of trial counsel? Obviously it is because Appellant and his attorney never had any intention of cooperating with the state's expert and were willing to forego the insanity defense in fear of Dr. Coffer's finding that the Appellant was not insane at the time he murdered Eugene Christain. Moreover, if Appellant was indeed unhappy with his attorneys, why did he not say as much

to the trial court?

Appellant has equated Dr. Coffer with a state agent equal in standing to a lead detective in a criminal investigation. However, as argued above, should Dr. Coffer have elicited any incriminating statements from the Appellant that related to the facts of the murders, the trial court was free to warn the doctor and the prosecutor to make no mention of those statements. Decisional law specifically calls for such a procedure, yet Appellant chose a course of conduct that took no cognizance of his right to have the trial court protect whatever fifth amendment rights could have been violated by submitting to an examination by the state's psychiatrist.

Appellant has pointed to the Committee Note to Rule 3.216, Florida Rules of Criminal Procedure, for his assertion that the state is no longer permitted to have free access to a defendant. However, the Committee Note, in full, reads as follows:

> (h) A restatement of former Rule 3.120(e)(7). The provision that experts called by the court shall be deemed court witnesses is new. The former provision relating to free access to the defendant is eliminated as unnecessary. (Emphasis added).

Nowhere in the Committee Note is it stated that access to a defendant, by an expert for the state, will not be allowed. Though the drafters of the new rule may have felt that court appointed experts is the better "way to go", the Appellee respectfully argues that in capital cases where the insanity

defense has been raised, the extra burdens of proof placed upon the state must necessarily entail free access to a defendant by the state's own psychiatric expert.

In the final analysis, the Appellant has chosen a course of procedure that flies in the face of long standing decisional law and has thereby deprived himself of his insanity defense. Clearly, Appellant "can be barred from pleading insanity if he did not submit to an examination by the state's psychiatrist or psychologist". Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979). Therefore, Appellant should not be granted a new trial on this issue.

ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS HE MADE TO SHERRIFF'S DEPUTIES AND ALL EVIDENCE RESULTING THEREFROM WHERE THE STATE FAILED TO CARRY ITS BURDEN OF PROVING THE STATEMENTS WERE NOT OBTAINED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND WERE VOLUNTARILY MADE. (As stated by Appellant)

Appellee respectfully contends that a resolution of this issue depends upon this court's assessment of the accuracy of the trial court's finding that the Appellant's confession to Deputy Wilbur was freely and voluntarily given, without coercion, and that any attempt Appellant may have made to discontinue questioning was only directed towards stopping the interrogation by Deputy McNulty.

At the outset, this Court must presume that the trial court's decision was indeed correct. State v. Belcher, 520 So.2d 303 (Fla. 3rd DCA 1988), citing Wasko v. State, 505 So.2d 1314, (Fla. 1987) and DeConingh v. State,, 433 So.2d 501 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); Williams v. State, 441 So.2d 653 (Fla. 3rd DCA 1985). In the instant case, the trial judge merely stated: "This Court is satisfied that the statement made by the defendant was free and voluntary and the Motion to Suppress is denied". (R. 169) Thus, in light of such a finding, Appellee urges that this court should not substitute its own judgment for that of the fact-finder.

The scenario of events as elicited from the officers during the suppression hearing reveal that the Miranda warnings and

subsequent brief interrogations yielded no information of an incriminating nature. Both at the motel and at 2:10 A.M. at the sherriff's office, the Appellant denied any knowledge of the whereabouts of Eugene Christian. (R. 70, 81, 82). Moreover, at no time did Appellant indicate any desire to be free from interrogation after the first two times he was "Mirandized". Thus, the focal point of whether or not the deputies scrupulously honored Appellant's alleged attempt to cut off questioning occurs when Deputy McNulty attempted to strike up a conversation with the Appellant.

At 2:50 A.M., Deputy Wilbur was called away from the room where Appellant was seated. (R. 84). Deputy McNulty took his place. (R. 86). Without asking Appellant any questions that might implicate him in the murder of either Suzanne Henry or Eugene Christian, Deputy McNulty merely tried to engage Appellant in a conversation. Appellant made the following response:

> "I am not saying nothing <u>to you</u>, besides <u>you</u> ain't read me nothing". (Emphasis added)

Though Deputy McNulty later tried to continue his conversation by asking Appellant where Eugene could be found, Appellant's only response yielded nothing that would have led the deputies to conclude that Appellant had killed either Suzanne Henry or Eugene Christian. (R. 135). Thereafter, McNulty left the room and did not tell Deputy Wilbur about Appellant's refusal to speak to him. (R. 134).

Once Deputy Wilbur and the Appellant were alone in the room again at approximately 4:00 A.M., Wilbur struck up the

conversation with Appellant. Unaware of the death of Eugene, Wilbur testified that he said the following to Appellant:

> " I asked Mr. Henry, you know, I said I would like to find Eugene. I said, you know, there is no problem. I just need to find Eugene ". (R. 86).

Shortly thereafter, Appellant admitted that Eugene was not alive. (R. 87).

Decisional law is replete with holdings stating that a defendant's request to cut off questioning, however equivocal, must be scrupulously honored. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Chistopher v. Florida, 824 F.2d 836 (11th Cir. 1987); Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977); State v. Belcher, 520 So.2d 303 (Fla. 3rd DCA 1988). However, the facts and statements by Appellant in the case sub judice demonstrate an unequivocal intent upon his part to stop the interrogation solely by Deputy McNulty, and not by Deputy Wilbur.

In State v. Belcher, the trial court concluded, in effect, that even though the defendant stated specifically to one particular officer: " I don't want to talk to you any more", such a statement meant that any and all officers were to cease questioning him. However, as the district court noted: "A trial court's ruling on a motion to suppress has a presumption of correctness". Ergo, because the record supported such a conclusion, the district court did not disturb the trial court's decision. In the case sub judice, Appellee submits that Appellant's statement to McNulty together with the totality of

the circumstances surrounding the Appellant's confession support a conclusion opposite of that in Belcher and, therefore, this Honorable court should defer to the trial court as the fact-finder and thereby presume the lower court decision to be correct. Though such facts may be subject to different conclusions, such differences do not mean that the trial court's decision should be reversed as incorrect.

In the alternative, Appellant argues that Deputy Wilbur threatened Appellant into confessing and, at the very same time, cajoled him into admitting his guilt by a promise that there would be "no problem" if only Eugene could be found. At the outset, it is important to note that if indeed Wilbur's combined threat to kill and promise not to prosecute the Appellant were so instrumental in eliciting the confession, then why didn't the Appellant take the stand at the suppression hearing? After all, the Appellant could have taken the stand at the hearing, stated ad infinitum that he was coerced into confessing, and yet be free from having any of his testimony used agianst him at trial. See Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

In order to determine whether Deputy Wilbur's threat and promise amounted to coercion, courts employ the totality of the circumstances test. Bryant v. State, 386 So.2d 237 (Fla. 1980), Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977). At no time did Deputy Wilbur subject the Appellant to any type of threatening atmosphere. (R. 76, 78, 88, 91, 92, 94, 98, 126, 128, 135). He did not have his gun drawn when issuing Miranda

warnings. (R. 571). Appellant even felt safe enough in Wilbur's presence to embrace him. (R. 93). Appellant was reassured by Wilbur that no one would harm him if he would help locate Eugene's body. (R. 93). Wilbur bought Appellant some cigarettes. (R. 95). On the occasion of Appellant's prior murder, Appellant felt enough concern for Wilbur that he advised him to drive away from the neighborhood before getting hurt. (R. 48, 49). Appellant never told Wilbur, as he had McNulty, that he did not want to speak to him. Yet, in light of these facts, Appellant wants this Court to find that he overheard Wilbur's threat and was so terrified of him that he confessed to the murders. Does a weeping embrace lead to a conclusion that Appellant was affraid Wilbur was going to kill him? If so, then why couldn't Appellant have taken the stand to say, as Rosa Thomas (Appellants girlfiend) did, that he overheard Wilbur's threat and that he confessed to avoid being summarily executed by a 10 year veteran of the sherriff's office?

Paradoxically, Appellant appears to argue the flip side of the coercion argument that Deputy Wilbur made such reassurring promises to him that he was cajoled into confessing. As authority therefore, Appellant cites Brewer v. State, 386 So.2d 232 (Fla. 1980), Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1970), Fullard v. State, 352 So.2d 1271 (Fla. 1st DCA 1977), Fillinger, supra among others, as examples of the types of coercion or promises that have led to reversals. In Brewer, at least two law enforcement officials repeatedly brow beat the suspect about the evidence they had against him, how if he

confessed they would help him avoid the electric chair, etc. In short, the law enforcement officer's conduct was nothing short of a classic example of egregious overbearing and coercion. In Fillinger, the law officer offered a bond reduction and elimination of the possibility that, should Fillinger not confess, she would be swept off the street by an arrest warrant. Moreover, Fillinger was confined to a wheelchair. In Hawthorne, an unsophisticated mother of five children was told that her children were suffering, basically, due to her recalcitrance in failing to confess. In Fullard, the unequivocal statement: "if I get the lawnmower back there won't be any problem", absent any other surrounding circumstances, caused the reversal of a plea of nolo contendre.[1]

Each of the above cases demonstrates an extreme example of the sort of coercion or promises that deserve outright reversal. Even where a court states that a promise, however slight, can serve to disprove voluntariness, such as in Fillinger, all the decisions still require that the totality of the promises and threats must far exceed the totality of the circumstances for a confession to be suppressed as invalid. Hawthorne, supra, at 784. Did John Henry really think that he would not get prosecuted for the murders of Suzanne Henry and Eugene Christian, especially after having been convicted of second degree murder for the slaying of his first wife? Is it

[1] The court further appeared to indicate that if Fullard was found guilty by a jury as in Miles v. State, 303 So.2d 86 (Fla. 1st DCA 1974), his conviction may have been upheld based upon other evidence in the case.

logical to assume that Appellant thought he'd be released from police custody after confessing to a double homicide? Even if Appellant had taken the stand to so testify, could this Court reasonably expect a rational trier of fact to accept such testimony as truth? Moreover, could Wilbur's statement of "no problem" actually be equated, in context, with a virtual promise not to posecute, such as in Fullard? The answer to all of these questions can only be a resounding NO.

Finally, Appellant argues that he was so mentally retarded, tired and drugged that it was easy for Deputy Wilbur to have overborne his will by threats and promises. Once again, Appellant deprived the trial court and this Court of the testimony that only he could provide. True, Appellant did admit to having taken a large amount of cocaine during the course of the day before being apprehended, but, he only made such an admission in response to questions put to him by experts long after he confessed to the murders. Apparently, the trial court chose to believe the officer's testimony that Appellant was not under the influence of any chemical substances at the time of his confession, rather than the "testimony" of Appellant's lawyer and Rosa Thomas. (R. 136, 152)

In order for a confession to be admitted into evidence, it must be established by a preponderance of the evidence that the confession was voluntary. Brewer, citing Wilson v. State, 304 So.2d 119 (1974), and McDole v. State, 283 So.2d 553 (1975). By a preponderance of the evidence adduced at the suppression hearing, absent the testimony of the Appellant, it cannot be said

that the trial court erred so as to warrant suppression of the confession and reversal of Appellant's convictions.

ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE JURY TO HEAR HIGHLY PREJUDICIAL, IRRELEVANT TESTIMONY REGARDING APPELLANT'S KILLING OF SUZANNE HENRY. (As stated by Appellant)

Basically, Appellant has argued that because the death of Suzanne Henry is "similar fact" evidence, it was subject to the 10 day written notice provision of Section 90.404(2)(b), Florida Rules of Criminal Procedure. Further, Appellant appears to be arguing that because there is a complete lack evidence to show that he murdered Eugene Christian in order to eliminate him as a witness, the murder of Suzanne Henry should not have been mentioned to the jury. Finally, Appellant finds fault with the trial court's cautionary instruction regarding the evidence of Suzanne Henry's death. Appellee responds that each argument is without merit and thereby does not constitute reversible error.

In Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86, (1959), this Court held that evidence of other crimes is admissible where relevant to prove a material fact in issue except where the sole relevancy is propensity or character of the defendant. Prior to Williams the rule was that evidence of another crime was inadmissible unless the state could fit the collateral crime into some catagory such as motive, modus operandi, lack of mistake, etc. In Williams, this Court emphasized the basic principle of the

> ". . . admissibility of all relevant evidence having probative value in establishing a material issue."
>
> Id. 658

and stated that henceforth evidence of other crimes was not to be viewed in terms of exclusion, but of admissiblility. That is ". . . relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime." Id. 659. After Williams, the state no longer has to find an applicable category within which this evidence fits, otherwise it will be excluded., All that the state need establish is that the evidence is relevant. If it is relevant to any material issue it is admissible. Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.901, Florida Evidence Code. (Emphasis added). Once it is determined that the collateral crime is relevant to a material issue it does not matter that it also tends to demonstrate the defendant's propensity for crime or that it places his character in evidence. It continues to be admissible.

The evidence pertaining to the murder of Suzanne Henry was relevant to the issue of premeditation as well as motive. Because of the intertwined sequence of events between the death of Suzanne Henry and the killing of Eugene Christian, the admission into evidence of the first killing was proper because it was, simply, relevant, under Williams, to a material issue in the case.

Appellant seems to equates the Williams Rule or collateral crimes rule, with Section 90.404(2)(a). Such, however, is not

quite the case. The Williams Rule is broader than Section 90.404(2)(a), that is, that section is but one aspect of Williams Rule evidence; viz: similar fact evidence of other crimes. The Williams Rule encompasses all types of crimes be they dissimilar or similar to the one charged. If one is charged with a rape, evidence that the perpetrator stole a gun on another day may be relevant to the rape charge, but the two crimes are not similar. On the other hand, evidence of another rape would be "similar fact" evidence. It is the type of situation which concerned the court in Drake v. State, 400 So.2d 1217 (Fla. 1981) and to which Section 90.404(2)(a) addresess itself. Where collateral crime involves a similar fact crime it must not only meet the relevancy standards of Williams, but the uniqueness requirements of Drake, when applicable. Moreover the procedures set out in Section 90.404(2)(b) regarding 10 day written notice must be followed. Drake was concerned with those cases where a similar fact crime is utilized to prove identity through establishment of a method of operation. Drake holds that the points of similarity between two crimes must have some special character or be so unusual as to point to the defendant. Id. at 1219.

To summarize: all similar fact crimes bring the Williams Rule into play and, additionally, Section 90.404(2). But, while all collateral crimes will involve the Williams Rule, those not involving "similar" fact crimes do not require compliance with 90.404(b) nor establishement of the uniqueness requirement of Drake. The test is simply one of relevancy.

This Court has explained relevancy thusly:

> . . . and although the relevancy of any fact, when standing alone, may not be apparent, yet, when taken in connection with any other fact, or all the other facts, properly admitted, its relevancy is made to appear, it should go to the jury for their consideration.

Jenkins v. State, 18 So. 182, 191 (1895)

It is with this explanation in mind that this Court has ruled Williams Rule evidence admissible where "[i]t was one incident in a chain of chronological events. . . "which begin at one point and terminated at another, Malloy v. State, 382 So.2d 1190, 1192 (Fla. 1979); it established ". . . the entire content out of which the criminal episode arose." Smith v. State, 365 So.2d 704, 707 (Fla. 1978); it ". . . establish[ed] the 'entire content' of the crime charged." Heiney v. State, 447 So.2d 210, 214 (Fla. 1984) it ". . . show[ed] the general context in which the criminal action occurred" Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981); ". . . it is impossible to give a complete or intelligent account of the crime charged without referring to the other crime" Nickels v. State, 106 So. 479, 489 (Fla. 1925); or the other criminal activity occurs as part of the primary arrangements for a contract murder. Antone v. State, 382 So.2d 1205, 1213 (Fla. 1980).

The federal courts appear to be in accord, holding:

> . . . that when an extrinsic offense is "so linked together in point of time and circumstances with the crime charged that one crime cannot be fully shown without proving

> the existence of the other, evidence of the extrinsic offense is admissible." This exception is available when extrinsic evidence is necessary to fully explain the circumstances or setting of the charged crime.
>
> United States v. De La Torre, 639 F.2d 245 (5th Cir. 1981) at 250.

See also United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) at 912 note 15 and United States v. McCrary, 699 F.2d 1308 (11th Cir. 1983) at 1311.

In the instant case, the prosecutor argued that the murder of Eugene Christain was premeditated and was designed to prevent young Eugene from identifying him as his mother's murderer. In order to prove that Eugene's death was premeditated, it was necessary for the state to show exactly how his murder came about. It would have made utterly no sense at all for the state to pick up the story at the point where Appellant spirits Eugene from his mother's home and thereafter kills him in a far away field, leaving him covered by tall grass and weeds. Understandably, the defense would have wanted the state to have been forced into presenting this case in a vacuum with huge gaps in the testimony to leave the jury guessing and surmising that the state was trying to hide something from them. The defense would have had a field day during closing arguments. The state would have been precluded from formulating the premeditation motive and its witnesses subjected to impossible situtations requiring them to relate their story in a disjointed fashion unable to explain the where's and why's. Consequently, because the murder of Suzanne Henry was not a "similar fact" crime but

part and parcel of the events bearing directly on the premeditated murder of Eugene Christian, there simply was no need for the state to have been forced to comply with the notice requirements of 90.404(b)(2).

Appellant further argues that, assuming the requisites of Section 90.404(b)(2) were complied with, (or, as Appellee suggests, they were inapplicable), it was impossible to infer any motive or premeditation to kill Eugene Christian in order to eliminate him as a witness in the Suzanne Henry homicide. This argument, amazingly, rests on a lack of evidence that could have come from Eugene himself, i.e., that he heard or saw nothing of significance that could have been used against Appellant. Of course there was no direct evidence that Eugene heard or saw the brutal murder of his mother, Appellant killed him before trial! Consequently, the state was called upon to produce evidence of Suzanne Henry's death sufficient to communicate to the jury just how and why Appellant felt it necessary to eliminate Eugene as the only witness to Suzanne's death.

Moreover, Appellant has the courage to suggest to this Court that 5 year old Eugene would not have been competent to testify at the murder trial concerning the death of his mother. Assuming, arguendo that Appellant and Eugene had as close a relationship as has been repeatedly suggested, is it not the height of illogic for Appellant to suggest to this Court that Eugene would not have been able to identify the man who has spent so many loving hours nurturing and playing with him? Further, how do we even know Eugene did not see the brutal stabbing of his

mother? We only have the self-serving statements of the Appellant to go by. Obviously, this points up the absolute neccessity for the state to have introduced the details of the murder of Suzanne Henry. The circumstances of her death was the only way the state could have explained its theory of premeditation to the jury.

Appellant further invites this Court to find reversible error on the grounds that the trial court failed to give the cautionary instruction regarding the killing of Suzanne Henry at the time such evidence was admitted. However, Appellant has failed to preserve this issue for appeal because he simply failed to lodge a contemporaneous objection to any such error. Nowhere in the record does it appear that, at the conclusion of Deputy Wilbur's testimony, Appellant's attorney reminded the court of its earlier promise to read the cautionary instruction. Accordingly, Appellant has failed to preserve this issue for appellate review.

In as much as the state did not need to introduce the Suzanne Henry homicide as similar fact evidence under Section 90.404, Appellee contends that there was no need for the judge to have complied with the rule by reading the cautionary instruction at the time the evidence was introduced.

Appellee respectfully wishes this Court to take note that at no time has Appellant argued that the nature and circumstances surrounding the death of Suzanne Henry were so prejudicial as to outweigh their probative value, persuant to Sec. 90.403. If, indeed, Appellant's case was "reversibly" harmed by the admission

of such testimony, why hasn't the issue of just plain prejudice been raised in this, the most serious of all criminal cases? Answer: because the Appellant himself needed the evidence of the murder of the mother in order to prove that his cocaine intoxication cause him to want to kill Eugene and himself so that they could all be together in heaven, as opposed to cold blooded premeditated murder. (R. 605, 706) Appellee submits that Appellant cannot have it both ways. This Court should not allow Appellant to use such evidence to his benefit yet, at the same instant, bar the state from using it to prove the very elements of the crime charged.

ISSUE IV

THE COURT BELOW ERRED IN ALLOWING THE STATE TO CROSS-EXAMINE DR. ROBERT BERLAND AS TO HIS BILLING PRACTICES AND HIS ONGOING RELATIONSHIP WITH THE PUBLIC DEFENDER'S OFFICE. (As stated by Appellant).

Appellant would like for this Court to take the untennable position that the state should not be allowed to cross-examine an expert witness in order to show his bias or prejudice in a case. Appellee submits that such an argument is contrary to the standards of day to day trial practice in both criminal and civil cases.

For a total of 5 record pages out of the hours of Dr. Berland's testimony, the prosecutor asked questions that have been asked thousands of times of experts who have been called upon to testify for the plaintiff or defense in personal injury as well as criminal cases. Appellant is unable to cite a single case wherein any court has stated that cross-examination regarding the relationship between an expert witness and the party calling him constitutites unfair and prejudicial impeachment. Attorneys spend great amounts of time detailing the billing practices of experts in civil cases that far exceed the scope and length of the examination of Dr. Berland. Yet, Appellant feels that because he is an indigent defendant in a capital murder case, it is fundamentally unfair for the state to have so cross-examined a witness who has been known to the state to appear almost exclusively as a criminal defense witness. (R. 35).

In Sudderth v. Ebasco Services, Inc.., 510 So.2d 320 (Fla.

4th DCA 1987), a plaintiff's economic expert was cross-examined regarding his involvement with illegal drugs. Thereafter, the plaintiff sought to rehabilitate the witness by inquiring whether he had ever been convicted of a crime, even though the plaintiff knew the answer would be "no" due to a withhold of adjudication. Yet, despite such cross-examination and redirect, the court upheld the judgment based upon harmless error. In the instant case, Appellant has conveniently failed to mention that his attorney rehabilitated Dr. Berland, without violating any Rules of Evidence as in Sudderth, by further clarifying his billing practices. (R. 947). In Sudderth, a direct violation of the Florida evidence Code did not warrant reversal. So too, in the case sub judice, proper cross-examination regarding Dr. Berland's relationship with the public defender's office cannot lead to a reversal.

Appellant further argues the meritless point that had he not been indigent, and thereby been appointed a public defender, he would not have had his expert defense witness subject to such prejudicial cross-examination. Moreover, such cross-examination rendered the public defender's office a less effective advocate due to the mention of the relationship between Dr. Berland and the public defender's office. Somehow, if Appellant had retained a private attorney, a psychiatrist hired by that attorney would not have been subject to such a prejudicial cross-examination. Appellee submits that had Appellant retained some high-powered private criminal defense attorney together with that attorney's entourage of experts, the state would have been far more inclined

to dig even deeper into that expert's relationship with the defense attorney and members of the private criminal defense bar than was the case sub judice.

In short, this issue simply does not constitute grounds for reversal or serious consideration by this Court.

ISSUE V

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER AND KIDNAPPING WHEN THE EVIDENCE DID NOT SUPPORT THE GIVING OF THESE INSTRUCTIONS. (As stated by Appellant)

Again, Appellant appears to be arguing a position that allows him to benefit from his crime. He argues that nothing in the record suggests that Eugene Christian was abducted or imprisoned against his will because he and the Appellant had such a close relationship. However, the only person who could have testified accurately concerning Eugene's will is Eugene himself. Of course, the lack of Eugene as a witness is what this entire case is about. Apparently, Appellant also equates unwillingness with a need to show that the individual being abducted, Eugene in the instant case, must be found to have clawed and scratched at the walls and windows of the car in which he was transported to the site of his death.

In Ferguson v. State, 519 So.2d 747 (Fla. 4th DCA 1988), the court pointed out that "[C]ertainly a prudent victim can be expected to pay as much heed to a direct threat to his life as to other methods of securing his confinement". Thus, the court recognized that a confinement against someone's will can occur by the force of a perpetrator's voice as well as his gun or the enclosure of a prison. In as much as Marion Crooker may have not seen young Eugene struggling to break out of the car, she may not have heard the Appellant order him to remain seated under the threat of losing life or limb.

However, whether Eugene was abducted contrary to his will is really irrelevant in light of Section 787.01(1)(b), Florida Statutes, (1985) which conclusively states that confinement of a child under the age of 13 is against his will if such confinement is without the consent of his parent or legal guardian. Though Appellant wishfully suggests that the legislature did not intend this subsection to apply to his specific case, the opposite is true. Even absent any legal authority, it is beyond reason and sound public policy to assume that the legislature intended to hold harmless an individual who establishes a friendship, however close, with a child and who thereafter takes advantage of that friendship as a defense to a prosecution for the unconsented kidnapping of a child under 13 years of age. With the addition of legal authority, such a position becomes even more tenuous.

Appellant killed Eugene's only legal parent before kidnapping him. Appellant cannot be considered Eugene's parent or legal guardian in any sense, and, therefore, could not possibly have been the source of the consent envisioned by Section 787.01. In State v. Badalich, 479 So.2d 197 (Fla. 5th DCA 1981), the court held that the conceded natural father or legal guardian of a child cannot commit false imprisonment upon his own child. Implicit in such a holding is the law that an individual who is not a child's legal guardian or parent cannot consent to an asportation and confinement of that child. Appellant was not Eugene's natural or adoptive parent and most certainly was not granted a guardianship under the laws of this State. Consequently, he could not possibly have consented, for

purposes of the kidnapping statute, to the abduction of Eugene Christian.

1952 Op.Att'y. Gen. Fla. 052-78 (March 12, 1952) adds further support to the state's theory. In that opinion, the Attorney General advised that a divorced mother who was not awarded legal custody of her child could be prosecuted for kidnapping her natural child against the will of the father to whom sole custody was awarded as the result of a divorce decree. The reason behind the law requiring consent of a child under a certain age is because ". . . [A] child of tender years, is regarded as incapable of consenting to a kidnapping". Further, the opinion cites State v. Hoyle, 114 Wash.290, 194 P. 976 (Wash. 1921):

> To constitute the offense, the asportation, or carrying away, must have been against the will and without the consent of the person detained, and without any lawful authority therefore. A child of tender years was regarded as incapable of consenting to its own seizure and abduction, and, when taken away from its rightful guardian, it must be deemed to have been taken away without its consent as a matter of law. (Emphasis added).

In the case sub judice, clearly Appellant was of no relation, either naturally or by operation of law, to Eugene. Therefore, because Appellant caused Eugene's mother to predecease him, Appellant was totally without any authority to consent to the abduction of Eugene Christian.

Finally, Appellant boldy asserts, absent any decisional law defining it, that the element of "confinement" was not proved. Apparently, the jury found that Appellant's act of placing Eugene

inside a car and taking him to his execution constituted confinement under the jury instruction for kidnapping. (R. 1106-1107). Pray tell, just how much more confinement could a rational trier-of-act require than placing a little boy into a car and driving away? Appellee urges this court not to overturn the jury's verdict regarding the kidnapping of Eugene Christian.

ISSUE VI

THE COURT BELOW ERRED IN REFUSING THE JURY'S REQUEST TO REHEAR THE TESTIMONY OF THE FOUR MENTAL HEALTH PROFESSIONALS WHO TESTIFIED AT THE GUILT PHASE OF APPELLANT'S TRIAL. (As stated by Appellant).

Florida Rule of Criminal Procedure Section 3.410 reads as follows:

> Rule 3.410 Jury Request to Review Evidence or for Additional Instructions
>
> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant. (Emphasis added).

Implicit in this rule is that the reading of trial testimony to the jury during the course of their deliberations is a matter that is well within the discretion of the trial court. Green v. State, 414 So.2d 1171 (Fla. 5th DCA 1982); Simmons v. State, 334 So.2d 265 (Fla. 3rd DCA 1976). In all cases cited by Appellant wherein the decision of the trial court not to read the requested testimony back to the jurors warranted reversal, such testimony revolved around purely factual evidence that could have readily laid to rest any disagreements between the jurors about the factual events of the case.

In LaMonte v. State, 145 So.2d 889 (Fla. 2d DCA 1962), the jurors requested the reading of testimony concerning the relatively simple fact as to where a mask was found in the defendant's home. The court held that the trial court should have had the testimony read to the jury because the jury's question pertained to a material issue which would have readily been resolved by the reading of the testimony to them. Id. at 893. In Penton v. State, 106 So.2d 577 (Fla. 2d DCA 1958), the jurors requested the reading of testimony so that they could nail down the timing of when the defendant had passed checks. Though the district court recognized that the "question is a close one" they reversed the judgment. Yet, in Penton, the testimony that was requested related to a purely factual issue in the case. In Furr v. State, 9 So.2d 801 (1942), it was unclear exactly what particular testimony the jurors wanted to rehear. Therefore, the court granted a writ of certiorari because the trial court failed to ascertain the nature of the disagreement between the jurors and whether the requested testimony was so material to the case as to warrant that it be read to the jury. Nowhere did the court reach the conclusion that the trial court abused its discretion for simply not having the testimony read to the jury.

More recent authority in State v. Colbert, 522 So.2d 436 (Fla. 2d DCA 1988) adds yet another factor to consider when a jury requests the reading of certain testimony. In Colbert of prime importance to the district court was the fact that the jury never indicated it was deadlocked or unable to reach a verdict on any of the counts. The district court declined to find any

error.

In the case sub judice, the jury requested the reading of lengthy expert opinion testimony as offered by four different mental health professionals. Appellant contends that juror Epps as well as the other jurors were having trouble grasping the factual/legal concepts involved in the case. However, Appellee suggests that juror Epps's concern regarding the "time frame included in premeditation" revolved around not what any expert thought about Appellant's ability to premeditate, but what the law considers to be an ample amount of time for reflective thought before effecting a murder. Juror Epps said:

> I know that the law state that when it came down to premeditated murder it doesn't have a time, time set he can be premeditated. It can be premeditated -- I assume now, I have to say this, five minutes, three minutes or two or three hours.
>
> (R. 1161)

In light of her comments, it appears far more likely that Ms. Epps was grappling with a concept that lawyers and judges have been pondering for many years, i.e., what constitutes premeditation? Furthermore, juror Epps stated that she felt Appellant panicked and that he just "blacked out". Nowhere did she give any indication that she felt Appellant "blacked out" due to cocaine intoxication. (R. 1157). In light of juror Epps' statements, it is only reasonable to conclude that she, and possibly other jurors, were simply wrestling with the application of the legal principles of premeditated murder to the factual events of the case, rather than disagreeing over the time and

place of those events as related to them by the witnesses. Furthermore, at no time did the jury ever indicate that, absent a reading of the expert testimony, would they be unable to reach a verdict.

Appellee suggests that at the time the jury requested the reading of the expert testimony, they were attempting to evaluate, based upon their own recollections, the conclusions reached by the experts. Ultimately, the evaluation of the merits of the conclusions given by the expert witness is within the province of the jury. The reading of the expert's testimony would not have provided the jurors any clarification regarding a "factual event" of the case. Therefore, the trial court properly left the jury alone to pass upon the accuracy of the expert's assessment of Appellant's defense of cocaine intoxication.

Though Appellant contends that the court's failure to have the testimony read was unfair in light of the replaying of the video tape of the crime scene to the jury, such a replay was well within keeping with the dictates of the above-cited cases. The tape constituted the height of purely factual evidence of the type that could readily put an end to any dispute the jury may have had about the facts depicted therein. Lengthy expert opinion testimony does not lend itself to a concrete and readily ascertainable conclusions even upon intensive study by other experts, let alone lay people. Accordingly, any reading of the testimony would have constituted an unnecessary delay that could only lead to further argument and confusion, rather than accurate fact-finding and resolution. Therefore, the court did not abuse

its discretion by refusing to have the expert testimony read to the jury.

It should be noted that the trial court did not totally rule out the reading of the testimony. Rather, the court indicated that it would have the tesitmony read if the jurors were unable to reach a verdict that evening. (R. 1147). Yet, the very next morning, after consideration of some preliminary matters by the court, the jurors promptly returned their verdict. (R. 1177). In light of State v. Colbert, it appears evident that there was no need to have read the testimony. Accordingly, no error occurred.

ISSUE VII

THE COURT BELOW ERRED IN DENYING SEVERAL OF THE APPELLANT'S PROPOSED PENALTY PHASE JURY INSTRUCTIONS. (As stated by Appellant).

In the case sub judice, the trial court gave the standard jury instructions as promulgated by this Honorable Court. (R. 1325-1328). Pursuant to Section 921.141(2), Florida Statutes, the jury was told that the penalty for first degree murder is life imprisonment or death. The jury was further instructed that the state must prove one or more of the statutory aggravating circumstances, beyond a reasonable doubt, before they can consider imposition of the death penalty. In other words, the state bears the burden of proving, much the same as the state has the burden of proving the substantive crime, that death is the appropriate sentence in the case.

Once the state has carried the burden of proving the aggravating circumstances, the jury was instructed to look at the mitigating circumstances to determine if these circumstances warrant a sentence less than death. Such an instruction is analogous to requiring a defendant to come forward at trial with an affirmative defense, i.e., self defense, alibi. Therefore it is only fitting that a defendant, such as Appellant, produce such a mitigating evidence since it is the type of information that is peculiarly within the defendant's knowledge. See, Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), and Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

Appellant now argues that the court should have instructed

the jury that the aggravating circumstances must outweigh the mitigating circumstances, beyond a reasonable doubt. (R. 1552). Such an argument was rejected in Kennedy v. State, 455 So.2d 351 (Fla. 1984), Jackson v. State, 502 So.2d 409 Fla. 1986). See also Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1986); Parks v. Brown, 840 F.2d 1496, 1507, fn. 7 (10 Cir. 1987); Sonnier v. Maggio, 720 F.2d 401 (5th Cir. 1983); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983).

Appellant's reliance on Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d (1985) is misplaced. Francis dealt exclusively with the states' burden of proof for intent during the guilt phase of a trial. It has no applicability to jury instructions for the penalty phase of a capital trial.

The standard instructions as given by the trial court did not in any way prohibit Appellant from introducing mitigating evidence nor did the instructions require him to meet any particular burden of proof. Appellant conveniently forgets that the court gave the following instruction:

> Among the mitigating circumstances you may consider, if established by the evidence, are, and there are three: . . . .
>
> 3. Any other aspect of the defendant's character or record, and any other circumstances of the offense. (Emphasis added)

Accordingly, Appellant's claim that the court should have read proposed penalty phase instructions excluding "substantially" and "extreme" from the statutory mitigating circumstances is without merit. Appellant was not prejudiced because he was given the

full opportunity to offer any evidence he felt the jury should consider by way of mitigation.

ISSUE VIII

THE JURY RECOMENDATION OF APPELLANT'S JURY THAT HE BE SENTENCED TO DEATH WAS TAINTED BY THE JURY'S RECEIPT OF EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE. (As stated by Appellant)

Somehow, even in the face of the trial court's instruction calling upon the jury to completely avoid considering the death of Suzanne Henry as an aggravating circumstance, Appellant sees fit to tell this Court that the jury totally disregarded that instruction and thereafter recommended the death penalty. At best, he merely speculates that the jury rode the evidence oF the death of Suzanne Henry to a recommendation of death. Moreover, he has failed to recognize that the trial court also instructed the jury that the only aggravating circumstances they could consider were those that were enumerated by the trial court which, of course, did not mention the death of Suzanne Henry. (R. 1326). Altogether, there is no doubt that the trial court gave the proper jury instructions which specifically prohibited the jurors from considering, as an aggravating circumstance, the death of Suzanne Henry.

Appellee submits that any jury is presumed to have followed the law as given them by the court. Just because the jury recomended the death penalty by a margin of 10 to 2 does not automatically mean that the trial court or prosecutor committed fundamental error or that the jury failed to reach the opposite recomendation because the prosecutor referred to the death of Suzanne Henry during closing argument.

During the guilt phase of the case, the jury was told that the arguments of counsel are not evidence and the they should rely on their own memory of what the evidence was. (R. 484). Moreover, there is no support for Appellant's proposition that a jury is bound to follow the instructions of a prosecutor over that of the trial judge! That the jury was "left free to consider an unauthorized aggravating circumstance" is totally unsupported by the record and is in direct conflict with the presumption that the jury followed the instructions of the court. Appellant is simply engaging in wild speculation on this issue. Though a jury may do just about anything to arrive at their verdict, absent misconduct or a verdict contrary to normal human rationality and experience, an assertion that they arrived at what Appellant feels is the wrong decision does not mean that they, the court or the prosecutor committed reversible error.

Finally, Appellee would point out that the Appellant failed to lodge a contemporaneous objection to the prosecutor's alleged error of referring to the death of Suzanne Henry during his closing arguments during the penalty phase of the trial. Therefore he has waived his right to have this issue considered on appeal. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING JOHN RUTHELL HENRY TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNTIED STATES. (As stated by Appellant)

Appellant, in the same breath, demands that this Court suppress his confession yet, argues that his words, and his words alone, constitute the "truth" in this case. Though Appellee realizes that Appellant has a right not to take the stand in his own defense, he nevertheless failed to take the stand at the suppression hearing in order to establish that his confession was involuntary or to confirm the story that he now advances to this court in support of this issue. It is against this backdrop that Appellee submits the following arguments.

Ample evidence was produced for a jury and judge to find that Appellant kidnapped young Eugene for the purpose of eliminating him as a witness.[2] At the scence of the crime, other than the Appellant's own words, we have no way of knowing what Eugene actually saw of his mother's death. Though Appellant would like for this Court to believe that he saw nothing at all, it is hard to imagine that he was totally oblivious to the struggle and blood-spattering murder that occurred while he was

[2] Appellee incorporates herein by reference its arguments as found in Issue V.

in the house, let alone the next room. The car Appellant was driving was found stuck in the grass and earth near where Eugene was found. (R. 604). Eugene was partially buried by tall grass and undergrowth when the officers found him. (R. 593, 594, 598). Appellant drove Eugene far away from the initial murder scene. (R. 587-588). He took him far off the roadway before killing him. (R. 589, 590). Though Appellant claims that he was so drugged up that he couldn't form specific intent, he still had enough presence of mind to drive his car all the way to the middle of nowhere in Zephyrhills and secret Eugene's body from the authorities, rather than deposit him at his aunt's house. Finally, nowhere is there any evidence, other than Appellant's own self-serving statements, that he actually bought chicken for Eugene, rather than for himself on another occasion.

Surely the facts amply support a judge or jury's finding that Appellant did not take the steps he did just so he could kill Eugene and himself so that they could be in heaven together. The facts are far more consistent with a kidnapping scenario than that of a kindly step-father protecting his favorite son from harm. Appellant had simply learned a lesson from his first murder in 1975; make sure to kill and dispose of the kids so that they can't testify against me in court! Cf. Correll v. State, 523 So.2d 562 (1988).

Appellant further hopes that this Court will override the jury's verdict and the findings of the trial court concerning the testimony of Appellant's mental health experts. Apparently, the judge and jury felt that Dr. Coffer's testimony regarding

Appellant's mental capacities at the time of the murder were more accurate than Dr. Berland's. Is it not the prerogative of a fact-finder to disbelieve the testimony of a witness? (R 1114). Appellant suggests that this Court should change Florida's standard jury instructions so that the jury and the trial court are bound to take as "truth" whatever testimony Appellant has to offer, particularly when he offers testimony more voluminous than that of the state. Cf. State v. Smith, 249 So.2d 16 (Fla. 1971) However, should this Court decline to do so, then ample testimony did exist from which a jury and the judge could conclude that Appellant had "at least some" capacity for rational thought. (R. 1026).

Appellant feels that he presented evidence of a sufficient "pretense of justification" to raise a reasonable doubt with respect to a finding of cold, calculated and premeditated murder. However, nowhere in Banda v. State, 536 So.2d 221 (Fla. 1988), or any other case, does this Court intimate that excepted hearsay testimony regarding a desire to have a young child join his dead mother in heaven is sufficient to raise a reasonable doubt as to a finding of cold, calculated premeditation. In Banda, at least this Court found that the defendant was, to some extent, acting in self defense. Surely this court did not intend to indicate that "any claim of justification or excuse" meant any claim, however ludicrous it may be.

Appellant suggests that he was just driving around for hours "trying to decide what to do". Appellee suggests that during those hours, he not only decided what to do, but exactly how to

do it. The end result of his decision yielded the grisly scene of a young barefoot boy, multiply stabbed to death, covered in thick grass in a remote part of the county in a spot unlikely to be traversed by anyone who may be looking for the whereabouts of a witness to Suzanne Henry's murder. Such a scene constitutes the very definition of a heightened degree of premeditation, rather than a conclusion to the contrary.

Finally, Appellant contends that the trial did not follow Rodgers v. State, 511 So.2d 526 (Fla. 1987) by failing to find any further non-statutory mitigating circumstances. However, Appellant fails to take note of Woods v. State, 490 So.2d 24 (Fla. 1986):

> That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial court's use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. Davis v. State, 461 So.2d 67 (Fla. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). The trial court did not restrict the presentation of mitigating evidence, and we find no indication in the findings of fact that the court ignored the evidence. We find no error in the trial court's failure to find more mitigation in this case. See, Stano v. State, 473 So.2d 1282 (Fla. 1982) (Emphasis supplied)

The court allowed Appellant to argue whatever evidence he wished to offer by way of mitigation. Accordingly, there was no error.

ISSUE X

A SENTENCE OF DEATH IS NOT A PROPER PUNISHMENT FOR JOHN RUTHELL HENRY UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE. (As stated by Appellant).

The death of Eugene Christian was not the direct result of any kind of violent domestic dispute. The scenario of events in the case sub judice do not lead to the same conclusions as the cases cited by Appellant.

In Ross v. State, 474 So.2d 1170 (Fla. 1985), the victim was murdered contemporaneously with the "angry domestic dispute". Moreover, in Ross, the Appellant contested the trial court's failure to list the domestic argument as a mitigating circumstance. In the instant case, Appellant has not raised this issue until the present appeal. Appellant killed Eugene many hours and miles away from the supposedly angry exchange between himself and Suzanne Henry. Thus, Ross is not applicable to the present case.

In Herzog v. State, 439 So.2d 1372, (Fla. 1983), the victim was murdered contemporaneous with a series of arguments. Again, in the case sub judice, Appellant killed young Eugene many hours and miles away from the scene of Appellant's first crime. Moreover, in Herzog, the Appellant sought to contest the trial court's failure to give "domestic dispute" as a nonstatutory mitigating circumstances. Appellant herein makes no such claim. Nonetheless, he was free to offer his argument to the jury. Accordingly, Herzog is inapplicable to the present case.

In Wilson v. State, 493 So.2d 1019 (Fla. 1986), the victim was murdered as he intervened in a "domestic dispute" (brutal criminal attack according to Justice Ehrilich). In the instant case Appellant murdered Eugene many hours and miles away from the "domestic argument" between he and Suzanne Henry. Consequently, Wilson is not applicable to Appellant's case.

Simply put, the murder of Eugene Christian was far too attenuated from the alleged domestic dispute for it to be considered an act that occurred during the course of a domestic argument. By the time Eugene was murdered, any domestic dispute had long since passed. Surely, according to the Appellant, no argument existed between himself and Eugene at the time of the murder. Consequently, Appellant's claim that his death sentence is inappropriate based upon "domestic dispute" is without merit.

Next, Appellant once again argues that the court was bound by Appellant's psychological testimony. However, in Roberts v. State, 510 So.2d 885 (Fla. 1987) this Court citing Bates v. State, 506 So.2d 1033 (Fla. 1987), held that: "[E]xpert testimony is not conclusive even where uncontradicted". Accordinly, the trial court was free to reject his expert's testimony. Undoubtedly, the trial court considered Appellant's mental difficulties because he instructed the jury on two mitigating circumstances as a result of the psychiatric evidence. However, absent a "palpable abuse of discretion", such as the utter failure to consider any such testimony, Appellant's death sentence cannot be reversed as not being a proper punishment. See Provenzano v. State, 497 So.2d 1177 (Fla. 1986).

CONSLUSION

Based on the foregoing reasons, arguments and authorites, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted

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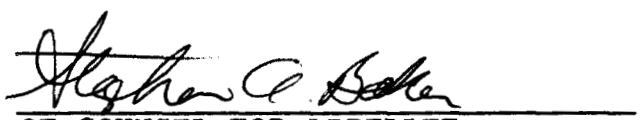
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to ROBERT F. MOELLER, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 this 1st day of March, 1989.



OF COUNSEL FOR APPELLEE