IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY, :

Appellant, :

vs. : Case No. 70,554

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On January 15, 1986 a Hillsborough County grand jury returned an indictment charging Appellant, John Ruthell Henry, with the premeditated murder of Eugene Christian. (R 1424) The indictment alleged that Appellant stabbed the victim with a sharp object on December 22, 1985. (R 1424)

On January 30, 1987, Appellant, through counsel, filed a Notice of Intent to Rely Upon Insanity as a Defense. (R 1461) The notice listed Drs. Robert Berland and Walter E. Afield as the witnesses Appellant expected to call to establish his insanity. (R 1461)

Thereafter, upon motion by the prosecutor (R 1468-1469), the court below appointed Drs. Daniel Sprehe and James Fesler to examine Appellant, and continued Appellant's trial. (R 1468, 1473-1476) Drs. Sprehe and Fesler evaluated Appellant and found that he was sane at the time the crime allegedly was committed. (R 1470-1472, 1477-1480)

On March 26, 1987 the State file a motion requesting that its psychiatric experts be permitted access to Appellant for examination and observation. (R 1488-1489) The motion was heard by the Honorable Donald C. Evans on March 27, 1987 (R 1348-1370, 1417), and granted. (R 1365, 1417, 1488)

On April 2, 1987 the State filed a motion to strike Appellant's plea of insanity and to prohibit Appellant from introducing any evidence related to the defense of insanity at trial. (R 1512-1513) The State contended that Appellant had

waived his privilege of asserting insanity as a defense by failing to cooperate with a State-retained psychiatrist, Dr. Coffer. (R 1512-1513) Judge Evans heard the motion on April 3, 1987, and granted it. (R 1374-1384, 1417, 1512)

Appellant filed a motion on March 20, 1987 to suppress statements or admissions obtained from him after his arrest and all evidence that resulted from said statements. (R 1481-1482) The motion alleged that statements were obtained from Appellant as a result of a systematic pattern of coercion and promises, and came after Appellant had clearly indicated he wanted the questioning discontinued. (R 1481-1482) Judge Evans heard testimony and argument on this motion on April 6, 1987, and denied it. (R 1, 44-169, 1481)

Among the other pretrial motions Appellant filed were two motions in limine to prevent the State from adducing at Appellant's trial evidence of other crimes allegedly committed by Appellant, particularly evidence concerning the killing of Suzanne Henry (R 1495, 1499-1501), and a motion to prevent the State from mentioning or eliciting testimony regarding the relationship between Dr. Robert Berland and the public defender's office. (R 1496-1498) Judge Evans heard these motions on April 6, 1987 prior to the suppression hearing, and denied them. (R 5-36)

This cause proceeded to a jury trial which began on April 6, 1987 with Judge Evans presiding. (R 175-1346, 1418) On April 11, 1987 the jury found Appellant guilty of premeditated and felony murder in the first degree. (R 1177-1178, 1547)

A penalty phase was conducted on April 13, 1987. (R 1207-1346) After receiving additional evidence, the jury recommended by a vote of ten to two that the court impose the death penalty upon Appellant. (R 1333-1334, 1562)

A sentencing hearing was held on April 15, 1987. (R 1401-1415) At said hearing Judge Evans read his pre-prepared written order imposing a sentence of death upon Appellant. (R 1410-1414) The court found the following four aggravating circumstances (R 1411-1412, 1572-1573): (1) Appellant was previously convicted of a felony involving the use of violence to a person, based upon his conviction for second degree murder in 1976. (2) The capital felony was committed while Appellant was engaged in the kidnapping of Eugene Christian. (3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (4) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The court found the following two statutory mitigating circumstances (R 1412-1413, 1573): (1) The capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance. (2) The capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The court found no non-statutory mitigating factors to exist. (R 1413, 1573)

Appellant filed a motion for new trial on April 20, 1987 (R 1575-1577), which Judge Evans heard on May 6, 1987 (R 1395-

1399), and denied. (R 1398-1399, 1575)

Appellant filed his notice of appeal to this Court on May 12, 1987. (R 1581)

STATEMENT OF THE FACTS

I. PRETRIAL SUPPRESSION HEARING

Two witnesses testified for the State at the April 6, 1987 hearing on Appellant's motion to suppress statements he made to law enforcement authorities and any evidence flowing from said statements: Detectives Faye Wilber and William McNulty of the Pasco County Sheriff's Office. (R 45-142) Rosa Mae Thomas testified for the defense. (R 143-154)

Detective Wilber responded to the residence of Suzanne Henry, an alleged murder victim, in the unincorporated area of Zephyrhills on December 23, 1985. (R 49-50) He viewed her body and interviewed her neighbors and relatives. (R 50)

Detective McNulty also participated in the investigation into the death of Suzanne Henry, although Faye Wilber was the lead detective in the case. (R 120-121)

Suzanne Henry was Appellant's wife. (R 52) Suzanne's sisters advised Wilber that Appellant and Suzanne were not getting along, and Appellant was identified as a suspect in the homicide. (R 51) The sisters were very much interested in the whereabouts of Suzanne Henry's son, Eugene Christian. (R 52)

Wilber and his partner put out several BOLOs for Appellant, then went to an area of Zephyrhills where Appellant was known and began talking to people. (R 53, 55)

Wilber eventually learned that Appellant was possibly in Room 14 at the Twilight Motel with Rosa Mae Thomas. (R 58-61)

Wilber and Nulty proceeded to the motel, where they were met by uniformed officers of the Pasco County Sheriff's Office. (R 61-62, 123) It was approximately 12:20 a.m. when they arrived. (R 77)[1]

Detectives Wilber and McNulty went to the door of Room 14 and knocked. (R 62) They had their weapons in their hands at their sides. (R 62-63) Rosa Mae Thomas responded to the knock and came outside. (R 63-64) Wilber asked if John Henry was in the room, and Thomas replied that he was. (R 64) Appellant had been sleeping. (R 148) Wilber said, "John, are you in there?" (R 64) Appellant replied in the affirmative, and came outside when Wilber asked him to do so. (R 64)

According to Wilber, his gun was holstered prior to either Rosa Mae Thomas or Appellant coming out of Room 14. (R 64-65) However, Detective McNulty testified at the suppression hearing that he still had his gun drawn when Appellant came out of the motel room, and believed Detective Wilber did as well. (R 126)

When Appellant exited the motel room, Wilber identified himself and read Appellant his constitutional rights from a Miranda warning card. (R 66-67) Appellant was arrested and handcuffed. (R 127) Upon questioning by Wilber as to the whereabouts of Eugene Christian, Appellant said he did not know where Eugene was. (R 71)

Appellant was put into a patrol car, and Wilber and McNulty searched the motel room for Eugene Christian, but did not

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[1] Rosa Mae Thomas thought it was earlier when the detectives showed up, between 10:00 and 10:30 p.m. (R 147)

find him. (R 72-73)

Wilber's primary concern at that point was finding Eugene, whom Wilber believed to be alive. (R 73, 75) He was therefore very frustrated with Appellant. (R 74-75)

Detective McNulty testified that immediately after Wilber spoke with Appellant while Appellant was in the patrol car, Wilber approached McNulty and said in a loud voice that if they could not find Eugene Christian, or if Eugene were dead, then Wilber would kill Appellant. (R 130, 137) Wilber was very emotional, on the verge of tears, when he made this statement. (R 131, 138-139) Appellant was 15 to 20 feet away at the time. (R 131) McNulty thought the doors to the patrol car were closed, but he was not sure. (R 130) McNulty did not know whether Appellant heard Wilber's statement. (R 131-132)

Appellant's witness at the suppression hearing, Rosa Mae Thomas, testified that Wilber made a threat directly to Appellant. She said that while Appellant was sitting in the patrol car in front of the motel, Wilber opened the car door, told Appellant that if they did not find the boy, then he (Wilber) would kill Appellant personally, himself, and slammed the door. (R 145, 149-151) Thomas also said that Wilber pointed a gun at Appellant, and that McNulty pointed a gun at her. (R 148-149)

Wilber testified that he did not have a recollection of threatening to kill Appellant. (R 76, 102-104) He also generally denied threatening Appellant in any way. (R 87, 91-92)

The two detectives also denied pointing their guns at

either Appellant or Thomas. (R 65-67, 126-127)

Appellant was transported from the motel to the sheriff's office in Dade City by a uniformed deputy and taken to a conference room. (R 76-78) Detective McNulty was alone in the room with Appellant prior to Detective Wilber's arrival and attempted to gain a "friendly rapport" with him. (R 132) McNulty said to Appellant that he understood that he had done some time before, whereupon Appellant said, "'I am not saying nothing to you, besides you ain't read me nothing'" (R 132-133), or, "'I don't want to talk no more, besides you haven't read me anything.'" (R 132-133, 140) (McNulty testified to the former version at the suppression hearing, while the latter version is what he put in his written report.) McNulty told Appellant that he was mistaken, that Detective Wilber had read him his rights at the motel, to which Appellant made no response. (R 133) After Appellant said he did not want to talk any more, McNulty continued to ask him questions. (R 141) He asked him two or three times where Eugene Christian was, and asked him where he could find the car that Appellant had been driving. (R 141)

When Detective Wilber entered the room, McNulty left. (R 133) He did not advise Wilber of Appellant's statement about not wanting to say anything. (R 134)

McNulty was in and out of the interview room on several occasions. (R 135) During the second time he entered the room he asked Appellant where they could find Eugene Christian, and Appellant said something to the effect that the last time he saw Eugene was at the babysitter's house. (R 135)

Detective Wilber advised Appellant of his constitutional rights again at 2:10 a.m. (R 80) Upon further questioning by Wilber, Appellant again said he did not know anything about Eugene Christian, nor did he know anything about some wet clothes with dirt and some towels with what appeared to be blood on them that the detectives found at the motel. (R 83)

Detective Wilber was called away from the interrogation of Appellant at 2:50 a.m. (R 84-85) He returned at 4:00 or 4:15. (R 85)

In talking with Appellant, Wilber told him there was no problem, he just needed to find Eugene. (R 86)

At one point Wilber got up as if to leave the room and said, "Okay, if you don't want to talk about it we are going to find the boy somehow. I am going to find that kid," and, "John, you won't tell me anything, what am I going to do?" (R 106-107) Wilber put his hand on the door, but Appellant stopped him from leaving. (R 107) Appellant began fidgeting and was almost on the verge of tears, and then began crying. (R 87, 107) He told Wilber that Eugene was in Plant City and was not alive. (R 87)

Wilber and McNulty then drove to Hillsborough County, with Appellant directing them where to go. (R 88-89) A sergeant and a captain followed. (R 89)

After arriving at the area where Appellant said Eugene's body was located, Detective McNulty, Sergeant Troy, and Captain Brady began searching by flashlight. (R 90) After they had been at it for about an hour without success, Wilber suggested to

Appellant that they "go in and find the boy". (R 92-93) Appellant expressed reluctance to do so, saying he feared the others would beat him. (R 93) Wilber assured Appellant that he would not let anyone harm him, and the two went into the woods, where Wilber found the body. (R 93-94)

When Wilber told Appellant he had found Eugene, Appellant began crying, and embraced Wilber. (R 94) They walked back to the detective's car together, and Wilber remained there with Appellant. (R 94-95)

McNulty and Wilber transported Appellant back to the sheriff's office in Dade City. (R 95) Wilber stopped along the way to buy coffee for everyone and cigarettes for Appellant. (R 95)

When they arrived back at the sheriff's office, Wilber again advised Appellant of his constitutional rights. (R 96) Appellant said he would answer questions, but he was not willing to use a tape recorder or write. (R 96-97) Appellant then detailed how he killed Suzanne Henry and Eugene Christian. (R 98, 100-101)

On direct examination at the suppression hearing, Wilber testified there was no tape recorder in the room while Appellant was being questioned. (R 97) However, in his deposition Wilber had said that he had a tape recorder in his hand, and that he removed the tape therefrom to assure Appellant that the interview was not being recorded. (R 105-106)

At the conclusion of the interview, when Wilber asked

Appellant if he would put the interview on tape, Appellant declined and indicated that he did not "want to talk about it any more." (R 109-110) Wilber initially stated at the suppression hearing that he did not ask any more questions after Appellant said that, however, after defense counsel refreshed his memory with his written report, Wilber acknowledged that he had indeed asked Appellant further questions after Appellant said he did not want to discuss the matter further. (R 110)

After testimony at the suppression hearing was concluded, defense counsel argued that Appellant's statements to the detectives should not be admitted for two reasons. Firstly, they resulted from threats and promises, the threats being Wilber's statements about killing Appellant, and the promises being suggestions of leniency implicit in Wilber's remarks to Appellant that there was no problem, they just wanted to find the boy. (R 154-159) The second prong of the argument was that the detectives continued to question Appellant after he clearly indicated he did not wish to discuss the matter, in violation of his right to remain silent. (R 159-162)

The court was "satisfied that the statement made by the defendant was free and voluntary," and denied Appellant's motion to suppress. (R 169, 1481)

II. TRIAL - GUILT PHASE

On December 22, 1985, after smoking a little crack cocaine, Appellant went to the house of his wife, Suzanne Henry, from whom he was separated. (R 582, 601-602, 751, 757, 810) The

purpose of his visit was to discuss the purchase of a Christmas gift for Eugene Christian, who was Suzanne Henry's son. (R 602, 751) Although Appellant was not Eugene's father, the two had a close relationship and often went on outings together. (R 513, 701-702, 756, 813-814, 835-836, 903-904)

Suzanne Henry was upset with Appellant because he was living with another woman, Rosa Thomas. (R 602, 751) After Appellant arrived at Suzanne's house, she began yelling at him, and told him to leave. (R 602, 751) Suzanne took a knife from the kniferack in her kitchen and approached Appellant and again told him to get out of the house. (R 602, 751) the two began "tussling," and Suzanne cut Appellant about three times on his left arm. (R 602) Appellant "freaked out" when he was cut, took the knife from Suzanne, and stabbed her in the throat several times, resulting in her death. (R 547-548, 552, 553, 602-603, 751) He covered her with a small rug, then went into a bedroom and picked up Eugene, who had been watching television. (R 603, 751) Turning Eugene's head down into Appellant's shoulder so he would not see his mother, Appellant took Eugene outside to a car Appellant had borrowed. (R 502, 603, 751, 808, 810) They drove away at about 1:10 or 1:15 p.m. (R 505-506)

Appellant proceeded to Plant City, where he bought fried chicken for Eugene. (R 603, 751, 974-975) Appellant drove around Plant City for awhile, and made several stops for more crack cocaine. (R 603, 751)

At one point Appellant noticed some flashing lights

behind him. (R 603-604, 610, 751, 764, 882-883, 943) Fearing someone, possibly the police, might be following him, he turned onto a side road. (R 603-604, 610, 751-752) He drove onto Layton's Chicken Farm, where he came to a dead end, and the car became stuck in some mud. (R 604, 752, 957, 962-968)

Appellant and Eugene left the car and crossed a couple of fences. (R 604) Appellant thought he heard voices that he could not understand. (R 604, 882-883, 943), and he saw a man in shining armor like in the olden days. (R 752, 764, 884) He felt things were closing in on him. (R 706, 884)

Appellant and Eugene sat down in an area where there were many trees. (R 604) Appellant smoked some more crack. (R 604, 782) Eugene was lying in his lap. (R 604) Appellant "freaked out" and killed Eugene by stabbing him several times in the neck with the same knife used to stab Suzanne Henry. (R 605, 624, 706, 752, 782-783) He then lifted Eugene up in his arms and hugged him for a short time. (R 605) Appellant put the knife to his own throat and was going to kill himself so that he and Suzanne and Eugene could all be together, but he could not do it. (R 605, 706, 783, 932)

Appellant laid Eugene down and walked into an open field, where he dropped the knife. (R 605-606) He walked in circles for awhile, eventually making his way to a highway. (R 614, 752) He walked back to Zephyrhills, reaching Rosa Thomas' house the next

night at about 8:00. (R 606, 614, 669, 752)[2] When he arrived there he was tired and sleepy and hungry. (R 688) It appeared to Thomas that he had been on drugs. (R 688)

Appellant was arrested at the Twilight Motel a few hours later. (R 594-569)

Rosa Thomas testified at trial that Suzanne Henry threatened to kill her in July or August, 1985. (R 700-701)

Another defense witness, Nathan Giles, testified that he saw Suzanne Henry pull a butcher knife during an argument in the early part of 1985. (R 824-825)[3]

Appellant presented evidence from three mental health professionals at the guilt phase of his trial. (R 702-733, 746-784, 849-956) Dr. Walter Afield, a psychiatrist, saw Appellant at the county jail for approximately an hour on December 17, 1986. (R 703, 705) Dr. Afield opined that Appellant could not have formed the premeditated intent to kill Eugene Christian. (R 703, 709-710) He diagnosed Appellant as one who was chronically paranoid, and who had probably been psychotic off and on over the years. (R 707) Appellant's emotional problems were exacerbated by the use of alcohol and cocaine. (R 707)

During Dr. Afield's testimony, the prosecutor inquired whether it was Afield's opinion that Appellant did not know right

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[2] The events at Layton's Chicken Farm occurred between 9:30 and 11:30 p.m. on December 22 [1985] (R 606)

[3] Giles also saw Appellant smoking crack cocaine behind Grant's Pool Hall on the day Suzanne Henry and Eugene Christian were killed. (R 808, 810)

from wrong when he killed Eugene, to which Afield responded that he did not think Appellant knew right from wrong at that time. (R 720-721) The prosecutor later asked whether Appellant knew right from wrong when he killed Suzanne Henry. (R 724) Defense counsel objected, and argued that the State had opened the door to the insanity defense, which defense had been stricken pretrial. (R 726) Although the court sustained objections to the question, he would not permit Appellant to pursue his insanity defense on redirect. (R 729)

Dr. Daniel Sprehe, also a psychiatrist, first saw Appellant in his office on February 12, 1987 for slightly over one hour. (R 746, 748) He noted that Appellant displayed much remorse over what had happened. (R 756) Sprehe agreed with Afield that Appellant lacked the necessary capacity to form the premeditated intent to kill Eugene Christian, although Sprehe did not agree with Afield's principal diagnosis of chronic paranoia. (R 754-755, 767)

Forensic Psychologist Dr. Robert Berland interviewed Appellant and performed psychological tests on him, including the Minnesota Multiphasic Personality Inventory, Wechsler Adult Intelligence Scale, Rorschach ink blots, and Bender-Gestalt with Carter's Background Interference Procedure. (R 855) Berland spent four hours and nine minutes with Appellant. (R 853)

The MMPI revealed that Appellant was suffering from a psychotic disturbance principally involving disturbed thinking, with which hallucinations are typically associated. (R 859) Appellant basically appeared to be suffering from a biological

disorder which made him principally paranoid in his thinking. (R 860) His IQ was 78, which is between the retarded and normal ranges. (R 874)

Berland concluded that Appellant was incapable of forming the specific premeditated intent to kill Eugene Christian. (R 893-894, 896)

On cross-examination the prosecutor referred to a portion of a letter the witness received from one of Appellant's attorneys which said, "Our defense, if any, would revolve around cocaine intoxication, perhaps rising to the level of insanity." (R 914) Defense counsel objected and moved for a mistrial, and asked to be allowed to pursue the insanity defense now that the State had opened the door. (R 914-916) The court told the prosecutor to stay away from insanity, and instructed the jury to disregard, but denied the motion for mistrial and refused to allow Appellant to present his insanity defense. (R 915-918)

The prosecutor was permitted to elicit from Berland, over objections and a motion to withdraw by defense counsel, information concerning the percentage of his criminal practice that came from the public defender's office, his billing practices, etc. (R 919-923)

One of the rebuttal witnesses the State called was Dr. Robert Coffer, a psychiatrist. (R 983-984) Among other things, Coffer expressed his conclusion that the MMPI administered by Dr. Berland was invalid. (R 993) A high score on one of the scales suggested to Coffer that Appellant was responding randomly or

deliberately attempting to fake bad responses. (R 994)

Over defense objections the jury was instructed on felony murder, with kidnapping as the underlying felony, and given a verdict form which permitted them to find Appellant guilty of premeditated murder in the first degree, felony murder in the first degree, or both. (R 1036-1042, 1105-1107, 1115-1116, 1530-1531, 1547)

During deliberations the jury asked whether Appellant was the legal guardian of Eugene Christian, to which the court responded that the jurors would have to rely upon their recollection. (R 1141-1142) The jury also asked to see again a videotape of the scene where Eugene's body was found that had been admitted into evidence, which the court permitted. (R 651-653, 1143, 1561) However, the court refused a jury request to review the testimony of the four mental health professionals who testified. (R 1144-1148, 1559-1560)

III. TRIAL - PENALTY PHASE

The State presented two witnesses at penalty phase who testified concerning Appellant's prosecution in 1976 for the homicide of Patricia Roddy, his common law wife, which resulted in his conviction for second degree murder. (R 1209-1225) Roddy died from stab wounds to the chest and neck areas that occurred after an argument. (R 1211-1212, 1217)

Faye Wilber had arrested Appellant on this charge. (R 1220-1222) After Appellant was placed in the patrol car, he advised Wilber to proceed out of the area immediately, as friends

or relatives of Appellant might hurt him. (R 1222) Wilber was "pretty grateful" for this suggestion, because he believed Appellant may have saved him from getting hurt. (R 1225)

Dr. Afield testified again at penalty phase as a defense witness. (R 1232-1241) His opinion was that Appellant was suffering from an extreme mental or emotional disturbance at the time he killed Eugene Christian. (R 1232) Appellant's capacity to conform his conduct to the requirements of law was substantially reduced. (R 1233) His capacity to understand the criminality of his conduct was substantially impaired. (R 1234)

Dr. Sprehe likewise was recalled for penalty phase. (R 1241) He believed that Appellant suffered from severe cocaine intoxication, an extreme form of mental disturbance, when Eugene Christian was killed. (R 1242) He also was of the opinion that Appellant's capacity to conform his conduct to the requirements of law was substantially impaired. (R 1242-1243) Dr. Sprehe said the killing of Eugene was not a calculated act, but was a sudden impulsive one. (R 1243)

Dr. James Fesler, a psychiatrist, spoke with Appellant at his office on February 19, 1987 for approximately one hour. (R 1257) Fesler testified at penalty phase that Appellant was very distressed, very upset at the time Eugene was killed. (R 1263) His capacity to appreciate the criminality of his conduct and to conform his behavior to legal requirements was impaired to some extent. (R 1266-1267)

Dr. Berland was recalled for penalty phase and stated his

views that Appellant was suffering from an extreme mental or emotional disturbance at the time he killed Eugene Christian, and Appellant's ability to conform his conduct to the requirements of law and to understand the criminality of his conduct was substantially impaired. (R 1286, 1290)

Ruby Lee Henry, Appellant's younger sister, testified that Appellant had two daughters by his first wife. (R 1281) He was a real father to them, and was good with all children. (R 1281-1282) He was wonderful with Eugene. (R 1282)

In the months before he was arrested for killing Eugene, Appellant seemed distressed and very upset, as if something was troubling him. (R 1282-1283)

Ruby Lee's niece informed her that Appellant was "strung out heavily on drugs." (R 1283) He would be passed out at his house for three or four days at a time. (R 1283) Many times Appellant would be found "stretched out on the floor with no clothes on." (R 1283) Ruby Lee did not herself see evidence of Appellant's drug use. (R 1283)

SUMMARY OF THE ARGUMENT

I. The trial violated important constitutional rights and safeguards Appellant should have enjoyed when the court struck Appellant's insanity defense due to his non-cooperation with the psychiatrist retained by the prosecution. The Florida Rules of Criminal Procedure do not require a defendant to cooperate with the State's doctor upon pain of losing his defense. The State would not have been prejudiced by Appellant's refusal to talk to their psychiatrist if Appellant had been permitted to plead insanity, and the striking of Appellant's defense was too extreme a sanction under the circumstances of this case. Furthermore, the State itself opened the door for Appellant to present his insanity defense when cross-examining defense witnesses at trial, but the court refused to allow Appellant to proceed.

II. Appellant's confession to Detectives Wilber and McNulty was obtained upon continued questioning after Appellant said he did not want to talk, in violation of his constitutional right to remain silent.

The State also failed to show that Appellant's inculpatory statements were freely and voluntarily made. They resulted from Wilber's threats to kill Appellant, and from the suggestion of leniency in Wilber's remarks to Appellant that there was no problem, the detectives only needed to find Eugene.

III. Appellant's jury should not have been permitted to hear evidence concerning the killing of Suzanne Henry. This

evidence did not establish a motive for the killing of Eugene Christian, because there is nothing in the record to show that Eugene could have served as a witness in the Suzanne Henry homicide, and nothing to show that Appellant killed Eugene to eliminate him as a potential witness.

In addition, the State failed to give Appellant the statutorily-required notice that it intended to introduce evidence at trial of another crime he allegedly committed (the Suzanne Henry homicide), and the trial court failed to instruct the jury on the limited purpose for which it could consider this evidence at the time it was introduced.

IV. The prosecutor below should not have been permitted to cross-examine Forensic Psychologist Dr. Robert Berland about his billing practices and ongoing relationship with the public defender's office. These were matters which were irrelevant, and which could not have been used against Appellant had he not been indigent.

V. The evidence did not support the giving to the jury of an instruction on first degree murder, with kidnapping as the underlying felony. Eugene Christian was not confined or abducted against his will. The statutory provision relating to confinement of a child under age 13 being against his will if it is without consent of his parent or legal guardian should not apply here, as Appellant was Eugene's stepfather.

VI. The trial court should not have refused the jury's request to rehear the testimony of the four mental health

professionals who testified at the guilt phase of Appellant's trial. Their testimony went to the very heart of Appellant's defense, and the jury apparently had not clearly understood it when it was first presented. Furthermore, the court had granted a jury request to review a piece of evidence introduced by the prosecution.

VII. The court below should have granted several of Appellant's proposed penalty phase jury instructions which were designed to remedy improper suggestions in the standard instructions that the defendant in a capital case bears a burden of proving that the mitigating circumstances outweigh the aggravating and that the defendant's evidence must rise to a certain level before it may be considered mitigating.

VIII. The death recommendation of Appellant's jury was tainted by their receipt of evidence concerning the non-statutory aggravating circumstance of Suzanne Henry's killing. The prosecutor improperly used this evidence in arguing for a death recommendation, and the court did not charge the jury in a manner that would preclude them from considering the Suzanne Henry homicide in aggravation.

IX. The trial court erroneously found several aggravating circumstances, and did not properly consider all the evidence Appellant offered in mitigation.

A. For the reasons stated in Issue V in this brief, the evidence was insufficient to support the court's finding that the murder of Eugene Christian was committed while Appellant was

engaged in his kidnapping. Nor did the evidence support the court's statement that Appellant's purpose in removing Eugene from his home was to inflict harm upon him.

B. The evidence did not show that the dominant or only motive for the killing of Eugene Christian was to eliminate him as a witness to the Suzanne Henry homicide, as discussed in Issue III in this brief, and so the court should not have found in aggravation that the homicide of Eugene was committed for the purpose of avoiding arrest or effecting an escape from custody. Furthermore, Appellant lacked sufficient capacity for rational thought to form such a motive for stabbing Eugene.

C. The trial court's finding that the homicide of Eugene Christian was cold, calculated and premeditated, without pretense of moral or legal justification, was not justified by the evidence. The killing was not planned or calculated, but was a sudden, impulsive act brought on by Appellant's mental problems and heavy ingestion of crack cocaine. Furthermore, Appellant expressed at least a pretense of justification for stabbing Eugene when he said he planned to commit suicide after killing Eugene so that he and his stepson could be together with Suzanne in heaven.

D. At penalty phase Appellant presented evidence to show that he was good to children, and fathered two children of his own with his first wife. He also presented evidence of a severe and long-standing alcohol and drug problem. And he presented evidence that he had saved Deputy Sheriff Faye Wilber from possible bodily harm after Wilber arrested Appellant for the killing of his first

wife.

E. The sentencing weighing process was skewed in an unconstitutional manner, requiring reversal of Appellant's death sentence.

X. Appellant's sentence of death should not be allowed to stand because the killing of Eugene Christian was not particularly torturous, and resulted from a heated domestic disturbance.

Appellant is not a proper candidate for the ultimate punishment, due to his severe and chronic mental problems and low intelligence quotient.

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.

On January 30, 1987, Appellant, John Ruthell Henry, filed a notice that he intended to rely upon insanity as a defense. (R 1461) The notice listed Drs. Robert Berland and Walter E. Afield as the witnesses Appellant expected to call at trial to establish his insanity at the time of the offense. (R 1461)

The State filed a motion requesting the appointment of additional experts to examine Appellant and to continue his trial, which the court below granted. (R 1468-1469, 1473-1476) Drs. Daniel Sprehe and James Fesler examined Appellant and concluded that he was sane at the time the crime allegedly was committed. (R 1470-1472, 1477-1480)

On March 26, 1987 the State filed a motion requesting that its own psychiatric experts be permitted access to Appellant for examination and observation. (R 1488-1489) The Honorable Donald C. Evans conducted a hearing on the motion on March 27, 1987. (R 1348-1370) The prosecutor indicated at the hearing that defense counsel had informed him that they objected to the State having access to their client for the purpose of conducting a

mental examination, and that counsel would advise Appellant, in effect, not to cooperate with the State's psychiatrist. (R 1350-1351) After hearing argument, the court granted the State's motion for access to Appellant, and said that if Appellant did not cooperate with the State's psychiatrist, he would "not be entitled to present the defense of insanity." (R 1365)

On April 2, 1987 the State filed a motion to strike Appellant's plea of insanity and to prohibit Appellant from introducing any evidence related to the defense of insanity. (R 1512-1513) Judge Evans heard the motion on April 4, 1987. (R 1374-1384) The prosecutor argued that the insanity defense should be "revoked" because Appellant would not cooperate with the State's chosen expert, Dr. Coffer. (R 1376-1377) Defense counsel argued that Appellant had no obligation to speak to the State-retained psychiatrist, any more than he would be obliged to speak to the lead detective in the case. (R 1380-1382) Counsel made it clear, however, that if the court chose to appoint a third expert, Appellant would cooperate with him, provided he was disinterested, that is, not one of the experts hired by the parties. (R 1381-1382) Counsel also argued that striking Appellant's defense was too severe a sanction to impose under the circumstances of this case. (R 1382) The court did not appoint a third expert, but granted the State's motion, and struck Appellant's insanity defense. (R 1384, 1512)

Florida Rule of Criminal Procedure 3.216 sets forth the procedure to be followed when the accused may have been insane at

the time of the alleged crime. The trial court may, on its own motion, and must, if requested to do so by the State or the defendant, appoint two or three disinterested, qualified experts to examine the defendant as to his sanity or insanity. Fla.R.Crim.P. 3.216(d). The rule also provides that the parties may call additional expert witnesses to testify at trial, notwithstanding the court's appointment of experts. Fla.R.Crim.P. 3.216(h). However, a provision granting the parties free access to the defendant for examination or observation by their experts that appeared in the former incarnation of this rule was eliminated in 1980. See Committee Note to Fla.R.Crim.P. 3.216.

The cases emanating from this Court as to the failure of a defendant to cooperate with experts on the issue of sanity all seem to have involved court-appointed mental health professionals rather than, as here, an expert retained by the State. For example, in Christopher v. State, 416 So.2d 450 (Fla. 1982), Jones v. State, 289 So.2d 725 (Fla. 1974) and Parkin v. State, 238 So.2d 817 (Fla. 1970), the Court indicated that an accused may be required to cooperate with court-appointed experts if he wants to pursue his insanity defense. However, these cases did not address the situation involved herein, where Appellant fully cooperated with the two psychiatrists the court appointed to examine him, and only chose not to speak to the State-retained psychiatrist. In Parkin this Court recognized the unique position of court-appointed experts, noting that they "are neither prosecution nor defense witnesses, but neutral experts working for the Court, and their

findings and opinions are subject to testing for truth and reliability by both prosecution and defense counsel." 238 So.2d at 821. A psychiatrist retained by the prosecution obviously would not possess these attributes.

By eliminating Appellant's insanity defense the trial court infringed upon several important constitutional rights and safeguards Appellant should have enjoyed. Perhaps the most obvious of these is the right to call witnesses in one's own defense. In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) the Supreme Court of the United States held that the Sixth Amendment right to compulsory process for obtaining witnesses in one's favor is applicable to the states via the Due Process Clause of the Fourteenth Amendment, and that a statute which prohibited a defendant from introducing the testimony of certain witnesses was unconstitutional. The Supreme Court observed as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

18 L.Ed.2d at 1023. In Taylor v. Illinois, 484 U.S. _____, 108 S.Ct. _____, 98 L.Ed.2d 798 (1988) the Supreme Court similarly

noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," and that [i]ndeed this right is an essential attribute of the adversary system itself." 98 L.Ed.2d at 810. See also Morgan v. State, 453 So.2d 394 (Fla. 1984); Shepherd v. State, 453 So.2d 215 (Fla. 5th DCA 1984); Art. I, §16., Fla. Const. Appellant was deprived of this fundamental right when the court below ruled that he could present no evidence to establish a defense of insanity.

Also affected by the ruling of the court below was Appellant's right to be assisted effectively by counsel, which right is established by the Sixth Amendment to the Constitution of the United States, and by Article I, Section 16. of the Florida Constitution. Counsel clearly could not provide Appellant with the best possible defense, to which he was entitled, when the court took away their defense of choice. Our adversary system cannot function the way it was meant to when one side is forced to proceed with no chance to present its case to the triers of fact in the best possible light.

The fact that Appellant relied upon his attorneys' advice in choosing not to speak with the State's psychiatrist, and thereafter was forced to give up his defense, is another aspect of the court's interference with Appellant's right to the effective assistance of counsel. It seems likely that such a sequence of events damaged the attorney-client relationship by undermining Appellant's confidence in his lawyer's advice.

In Taylor v. Illinois the Supreme Court noted that the

very nature of the right to compel the presence of witnesses and present their testimony requires that its effective use be preceded by deliberate planning and affirmative conduct. 98 L.Ed.2d at 811. This planning and conduct requires the assistance of counsel for proper execution, which counsel could not have provided in an effective manner after the court stripped Appellant of his right to present any witnesses whatsoever as to his insanity defense.

The court's ruling also violated Appellant's privilege not to incriminate himself, pursuant to the Fifth Amendment to the Constitution of the United States and Article I, Section 9, of the Florida Constitution. The court placed Appellant in the untenable position of being able to exercise his right to remain silent only upon pain of forfeiting his best defense.

In United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975) the court noted 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.

Similarly, in State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (Minn. 1966) the court held that the accused could not be compelled to carry on conversations with the State's psychiatrist against his will. To require him to cooperate with persons appointed to examine him under penalty of forfeiting his defense if he failed to do so would contravene both the state constitution and the Fifth Amendment to the Constitution of the United States.

The court in French v. District Court, 153 Colo. 10, 384

P.2d 268 (Colo. 1963) likewise concluded that one cannot be forced to talk to examining physicians or give up his claim to an insanity defense, although the court based its holding solely on the Colorado Constitution, which contains a self-incrimination clause similar to that contained in the Florida Constitution.[4]

Also relevant to this discussion are cases in which the courts have held that one's post-Miranda[5] silence cannot be used as evidence of his sanity. This Court so held in State v. Burwick, 442 So.2d 944 (Fla. 1983), recognizing as a fundamental principle of constitutional law that "a defendant cannot be penalized for exercising his fifth amendment privilege to refuse to communicate to the authorities..." 442 So.2d at 947. See also Garron v. State, 528 So.2d 353 (Fla. 1988). In the instant case Dr. Coffer was acting as an agent of the state attorney's office when he attempted to interview Appellant, and so this principle fully applies.

In Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) the United States Supreme Court held unconstitutional the use of an accused's silence as evidence of his sanity, noting that such use is "an affront to the fundamental fairness that the Due Process Clause requires. [Footnote

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[4] Florida's Constitution provides that "[n]o person shall .... be compelled in any criminal matter to be a witness against himself." Art. I, §9. Colorado's Constitution provides that "'[n]o person shall be compelled to testify against himself in a criminal case...'" 384 P.2d at 270.

[5] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

omitted.]" 88 L.Ed.2d at 630.

Although this Court indicated in Parkin that the privilege not to incriminate oneself is not applicable when one raises an insanity defense, Appellant respectfully asks the Court to reexamine this position in light of the cases discussed herein.[6]

The situation presented here, where the defendant refuses to be examined by a State-retained psychiatrist is somewhat analogous to a discovery violation, as, for example, where an important witness fails to appear for deposition. A key question for the trial court where a discovery violation occurs is whether the aggrieved party was thereby prejudiced. See, for example, State v. Hall, 509 So.2d 1093 (Fla. 1987); Richardson v. State, 246 So.2d 771 (Fla. 1971). The court below failed to explore the subject of prejudice to any substantial degree before granting the prosecution's motion to strike Appellant's defense. (R 1377-1384) However, it is apparent that the State suffered no significant prejudice under the circumstances of this case. The State had two expert witnesses available, Drs. Sprehe and Fesler, the court-appointed psychiatrists, who were the very doctors the State asked the court to appoint in the State's motion to appoint experts (R 1466-1467), to rebut an insanity defense by testifying that they believed Appellant was sane when the offense allegedly occurred. Furthermore, lay testimony may have been available to the State to rebut the insanity defense. See State v. Van Horn, 528 So.2d 529

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[6] See also Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)

(Fla. 2d DCA 1988); Garron. In addition, Appellant's counsel expressed a willingness to allow him to be examined by a third court-appointed expert, who might conceivably have provided the State with yet another rebuttal witness. (R 1381-1382) And, finally, the State could have employed the services of its own psychiatrist to testify in opposition to the findings of the defense experts, even where the State's doctor had not personally examined Appellant; the State did precisely that when it called Dr. Robert Coffer in rebuttal to Appellant's defense at trial that he lacked the capacity to form the premeditated intent to kill Eugene Christian. (R 983-1031)

Appellant, on the other hand, was greatly prejudiced, not just by the trial court's initial ruling striking his insanity plea, but by the actions of the assistant state attorney during his trial. Not only was Appellant deprived of his primary defense, but the State injected the issue of insanity into Appellant's trial at least three times during the cross-examination of defense witnesses.

The prosecutor asked Dr. Walter Afield if he believed Appellant knew right from wrong when he killed Eugene, to which Afield responded that he did not think Appellant knew right from wrong at that time. (R 720-721) The prosecutor later asked Dr. Afield whether it was his opinion that Appellant did not know right from wrong when he killed Suzanne Henry. (R 724) Although a defense objection to this question was sustained, the court refused to allow Appellant to pursue his insanity defense upon redirect

examination of Dr. Afield after the question of sanity had been raised before the jury. (R 729)

A short while later, during the testimony of Dr. Robert Berland, the prosecutor referred to a letter the witness received from one of Appellant's attorneys which read, in part, "Our defense, if any, would revolve around cocaine intoxication, perhaps rising to the level of insanity." (R 914) The court instructed the jury to disregard the prosecutor's question, but denied a defense motion for mistrial, and refused to permit Appellant to put on his insanity defense. (R 915-918)

These episodes necessarily suggested to the jury that insanity was at least a possible issue in this case. Yet it was never formally submitted for their consideration. With nothing more to go on, the jury may well have inferred that the insanity defense was not being pursued because it lacked merit; perhaps the trial court had ruled as a matter of law that Appellant could not establish an insanity claim, and removed this defense from the jury's consideration. Having insanity raised in this manner, but not pursued, could have colored the jurors' views of the defense Appellant did pursue, namely, that he was incapable of forming the premeditated intent to kill Eugene Christian, and so was guilty, at most, of second degree murder (R 1098-1099), a defense the jury may well have felt to be closely related to that of insanity. If the jury felt that Appellant had no legitimate insanity defense, this could have prejudiced them against his lack-of-premeditation defense, to say nothing of the impact this must have had when the

jurors considered the mental mitigating factors at penalty phase.

If the court was not inclined to grant Appellant's motion for mistrial, he should have granted Appellant's request to be allowed to pursue the defense of insanity, once the State had opened the door.

As Appellant's counsel pointed out below, to strike his entire insanity defense and totally preclude him from presenting it was too sweeping a sanction in this case, particularly where the State was not unduly prejudiced by Appellant's non-cooperation with Dr. Coffer. Exclusion of a witness is an extreme remedy, which should only be invoked under the most compelling circumstances. Lee v. State, 13 F.L.W. 2675 (Fla. 1st DCA Dec. 13, 1988). In a slightly different context, but still dealing with the defense of insanity, the Second District Court of Appeal noted that a pre-trial motion in a criminal case to exclude expert testimony "must be viewed with great caution and any doubts must be resolved in favor of the accused." State v. McNally, 336 So.2d 713, 716 (Fla. 2d DCA 1976). This principle applies with even greater vigor where, as here, the accused is facing the death penalty. And the trial court excluded not just one witness, or even several witnesses, but Appellant's whole defense. See Shepherd. A remedy of excluding only expert testimony would have fully protected the State from any disadvantage it might suffer as a result of not being able to have its own expert examine Appellant, while leaving the insanity defense at least theoretically available to Appellant through his own testimony and/or that of lay witnesses.

People are presumed to be sane, and insanity is therefore an affirmative defense, requiring the accused to go forward with evidence to establish his insanity if he wishes to prevail. Preston v. State, 444 So.2d 939 (Fla. 1984); Chatman v. State, 199 So.2d 475 (Fla. 1967); Fisher v. State, 506 So.2d 1052 (Fla. 2d DCA 1987). Appellant was not afforded the chance to go forward with any evidence whatsoever in an attempt to establish his insanity defense. Without such chance Appellant was deprived of a fair opportunity to defend against the State's accusations, and hence was not afforded the essence of due process of law. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). As a result, John Ruthell Henry must be granted a new trial.[7]

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[7] The transcript of a hearing that may be relevant to this issue, the hearing of February 6, 1987 at which the trial court granted the State's motion to appoint experts to examine Appellant as to his sanity (R 1417), has not been included in the record on appeal. On October 21, 1988 this Court granted Appellant's motion to supplement the record with the transcript of the hearing, but the clerk of the circuit court and the court reporter have indicated that the transcript notes cannot be located. (R 1747). At the same time he files his brief, Appellant is filing a motion to relinquish partial jurisdiction over this cause to the circuit court for the purpose of reconstructing the record as to what occurred at the hearing of February 6, 1987.

ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS HE MADE TO SHERIFF'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 MADE VOLUNTARILY.

After Appellant was arrested outside the Twilight Motel, he was transported to the Pasco County Sheriff's Office in Dade City, where he found himself alone in a conference room with Detective William McNulty. (R 127, 76-78, 132) McNulty began questioning Appellant, who had previously been read his Miranda rights at the motel by Detective Faye Wilber. (R 66-67, 132) In an attempt to "gain a friendly rapport" with Appellant, McNulty stated that he understood that Appellant "had done some time before." (R 132) Appellant's response was either, "I am not saying nothing to you, besides you ain't read me nothing," or, "I don't want to talk no more, besides you haven't read me anything." (R 132-133, 140) McNulty told Appellant that he was mistaken, that Detective Wilber had read him his rights at the motel, to which Appellant made no response. (R 133) McNulty then continued his interrogation, asking Appellant two or three times where Eugene Christian was, and where he could find the car that Appellant had been driving. (R 141)

McNulty left the room when Wilber entered. (R 133) He did not tell Wilber about Appellant's statement that he did not

want to say anything. (R 134)

McNulty was in and out of the interview room on several occasions. (R 135) The second time he came into the room, he asked Appellant where they could find Eugene, and Appellant said something to the effect that the last time he saw Eugene was at the babysitter's house. (R 135)

Upon further questioning by Detective Wilber, Appellant ultimately admitted that Eugene was not alive, and directed the deputies to his body. (R 87-94) Later, back at the sheriff's office, Appellant made a full confession. (R 100-101)

At the conclusion of the interview, Detective Wilber asked Appellant if he would put the interview on tape, but Appellant declined, and indicated he did not "want to talk about it any more." (R 109-110) Wilber asked Appellant more questions after Appellant said he did not want to discuss the matter further. (R 110)

The court below denied Appellant's motion to suppress his incriminatory statements to the detectives and all evidence derived therefrom,[8] and the statements were admitted at trial over defense objections. (R 169, 572-573)

When a suspect in custody indicates in any manner that he wishes to remain silent, interrogation must cease. Miranda v.

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[8] When the trial court denied Appellant's motion to suppress, he specifically said he was "satisfied that the statement made by the defendant was free and voluntary," but made no specific finding with regard to whether the statements Appellant made were obtained in violation of his right to remain silent. (R 169)

Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987); Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977). The admissibility of statements obtained after the person has decided to remain silent depends upon whether his right to cut off questioning was scrupulously honored. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Bowen v. State, 404 So.2d 145 (Fla. 2d DCA 1981). The State bears a heavy burden of showing that an accused who makes incriminating statements after initially refusing to talk knowingly waived his right to remain silent. United States v. Hernandez, 574 F.2d 1362 (5th Cir. 1978); Jones; Bowen.

An equivocal expression of a desire to remain silent is sufficient to invoke Miranda's requirement that interrogation must cease, except that law enforcement authorities may ask further questions for the limited purpose of clarifying any ambiguity in the suspect's request to cut off questioning. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified, 781 F.2d 185 (11th Cir. 1986); Christopher.

Here Appellant clearly expressed his wish not to talk to the deputies. Yet he was thereafter subjected to an extended interrogation session in which both Detective McNulty, to whom Appellant actually communicated his desire to remain silent, and Detective Wilber, participated. Appellant either said that he was "not saying nothing" to McNulty, or did not "want to talk no more." Either version represented an invocation of Appellant's right to remain silent, which the deputies failed to scrupulously honor.

If there was any room for ambiguity in Appellant's words, the deputies were permitted to question him further for the limited purpose of clarifying the ambiguity, but the State has not claimed that the further interrogation of Appellant was so limited.

A second breach of Appellant's right to remain silent occurred at the end of the interview when Detective Wilber asked him additional questions after Appellant declined to put the interview on tape and said he did not want to talk about it any more. However, it is not clear from the record if Appellant made any further incriminating statements in response to this continued questioning.

State v. Belcher, 520 So.2d 303 (Fla. 3d DCA 1988) is a case with facts somewhat similar to those involved herein, insofar as they relate to the self-incrimination issue. Belcher was taken into custody in the early morning hours and charged with two murders. A Detective Conley advised Belcher of his rights and informed him of the charges. Belcher said he understood his rights and was willing to speak without an attorney present, and he signed a rights waiver form. Upon questioning, Belcher denied committing the murders, but admitted taking a car belonging to one of the victims. After being questioned further, Belcher finally said, "I don't want to talk to you any more," whereupon Conley left the room. Conley called another detective, Blocker, and informed him that Belcher denied any involvement in the murders and no longer wanted to talk to him. Blocker went to the interview room and told Belcher he wanted to hear his side of the story. Belcher said he

wanted to think about and asked to be left alone. Blocker left the room for five minutes. When he returned and asked Belcher if he wanted to talk to him, Belcher replied, "Just get your pad and pencil," and gave a confession.

The district court of appeal affirmed the trial court's order suppressing Belcher's confession, agreeing that his right to cut off questioning was not scrupulously honored.

The constitutional violation that occurred in the instant case is even more readily apparent than that in Belcher. Here the deputies did not initially stop questioning Appellant when he said he did not intend to talk; Detective McNulty persisted in his attempt to gain information from Appellant despite his expressed desire to remain silent. Also, Belcher had made at least partially incriminating statements prior to invoking his right to cut off questioning. Appellant had not given any incriminating responses until the detectives finally wore down his resistance, and he admitted that Eugene was not alive.

Although in Belcher the fact that the accused did not wish to talk any more was communicated from one officer to another, while here Detective McNulty said he did not tell Detective Wilber of Appellant's decision to remain silent, this is of no significance. Law enforcement officers have a responsibility to ascertain whether a suspect has invoked his constitutional rights before they begin questioning him. See Arizona v. Roberson, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 704 (1988); Kyser v. State, 13 F.L.W. 633 (Fla. Oct. 27, 1988). Cf. Giglio v. United States,

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

Not only was Appellant's privilege not to incriminate himself pursuant to the Fifth Amendment to the Constitution of the United States and Article I, Section 9. of the Florida Constitution violated, but the State failed to prove that Appellant's admissions to the deputies were made freely and voluntarily, as was required if the admissions were to be used at Appellant's trial. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Brewer v. State, 386 So.2d 232 (Fla. 1980); Drake v. State, 441 So.2d 1079 (Fla. 1983); Williams v. State, 441 So.2d 653 (Fla. 3d DCA 1983); Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977). The determination as to the voluntariness of a confession must be arrived at by examining the totality of the circumstances that surrounded its making. Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); State v. Dixon, 348 So.2d 333 (Fla. 2d DCA 1977).

To put Appellant's confession in the proper context, one must first examine Appellant's mental and physical condition at the time he gave it. Appellant's first incriminating statements came at some time after 4:00 on the morning of December 24, 1985. (R 85-87) He had been kept in the interview room at the Pasco County Sheriff's Office for at least two hours (approximately). (R 80) Appellant had smoked crack cocaine throughout the day on December 22, then walked from Plant City to Zephyrhills after wandering

around in circles, arriving at Rosa Mae Thomas' house approximately 24 hours after Eugene Christian was killed. (R 603, 606, 614, 669, 751-752, 810) It appears that the only sleep he had from the time he awoke on December 22 to the time he confessed on December 24 was a nap at the Twilight Motel. (R 148) In Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) the court found the defendant's confession not to have been made voluntarily because law enforcement officers exerted improper influences upon her, and the court also noted that Hawthorne had not eaten for 24 hours, nor slept for 36 hours, and had been interviewed for two and one half hours before she agreed to make a statement. See also Hernandez, where the court noted that the fact that the suspect arrived at the station house around 5:00 a.m., whereupon questioning began, was one circumstance suggesting that Hernandez was "ripened for influence by the inherent pressures attendant to a station house interrogation." 574 F.2d at 1368.

Furthermore, Appellant had long-standing mental problems, and an IQ of 78, placing him in the borderline retarded range. (R 707, 754-755, 767, 859, 860, 874) See Blackburn as it pertains to a suspect's mental condition affecting the voluntariness of his confession.

Appellant's physical and mental condition rendered him particularly susceptible to threats and promises that were employed by the detectives. Two witnesses testified at the suppression hearing below that Detective Wilber threatened to kill Appellant if the detectives could not find Eugene Christian, or if Eugene was

dead. Rosa Mae Thomas said Detective Wilber made the threat directly to Appellant while he was sitting in the patrol car in front of the Twilight Motel, while Detective McNulty said Wilber stated the threat to him (McNulty). (R 130, 137, 145, 149-151). The testimony of Rosa Mae Thomas and Detective McNulty is not necessarily in conflict, however. Wilber may have first threatened Appellant directly, then communicated to McNulty what he intended to do to Appellant; indeed, McNulty testified that Wilber had been speaking with Appellant at the patrol car immediately before Wilber approached McNulty with the threat to kill Appellant. (R 137) Although Wilber professed at the suppression hearing to be unable to recall making threats, he did not make an unequivocal denial that he ever threatened to kill Appellant. (R 76, 87, 91-92, 102-104)

Courts have long recognized the principle that a confession that is extracted by any sort of threats or violence, or procured by any direct or implied promises, however slight, is inadmissible because it may not have been voluntarily made. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897); Frazier v. State, 107 So.2d 16 (Fla. 1958); Foreman v. State, 400 So.2d 1047 (Fla. 1st DCA 1981); Brokelbank v. State, 407 So.2d 368 (Fla. 2d DCA 1981); State v. Kettering, 483 So.2d 97 (Fla. 5th DCA 1986). Here Detective Wilber applied the most powerful type of threat - a threat to kill Appellant - in a successful effort to extract from Appellant the whereabouts of Eugene Christian. Finding Eugene was Wilber's primary concern, and he was frustrated

with Appellant. R (73-75) This led him to employ improper means to obtain the information he sought.

Detective Wilber acknowledged at the suppression hearing that he told Appellant during their interview at the sheriff's office that there was no problem, Wilber just needed to find Eugene. (R 86) This may be construed as an implied promise to Appellant that nothing too bad would happen to him if he cooperated with the detectives and helped them locate the missing boy. The promise implicit in this statement, while perhaps more subtle, was but the "flip side" of the threat to kill Appellant if Eugene could not be found. That is, everything would be all right if the detectives found Eugene, but if they could not find him, then Wilber was going to kill Appellant.

Fullard v. State, 352 So.2d 1271 (Fla. 1st DCA 1977), disapproved on other grounds in Brown v. State, 376 So.2d 382 (Fla. 1979), involved a remark quite similar to the one Detective Wilber made to Appellant. Fullard confessed to a burglary after the investigating detective said, "'If I get the lawn mower back there won't be any problem.'" 352 So.2d at 1271. The district court of appeal concluded that this implied that the suspect would not be charged if he confessed. The implied promise to Fullard rendered his subsequent confession inadmissible. Wilber's comment to Appellant similarly suggested that Appellant would suffer no dire consequences if he would but reveal where Eugene was, as Appellant did, apparently soon after Wilber made the remark.

The courts have quite readily found confessions

inadmissible in a wide variety of situations involving promises or inducements. In Haynes the police essentially promised to let the suspect call his wife if he confessed. In Foreman an officer told the suspect that the victim was not inclined to prosecute if her property was returned. Brokelbank involved a promise to release the accused from custody so that he could put his personal affairs in order. In Hawthorne the officer appealed to the defendant's concerns for her children, and assured her he would try to help her secure bond. In Fillinger the officer told the suspect he would advise the state attorney of her cooperation and take that cooperation into consideration in seeking to establish the amount of bond. Kettering involved a direct or implied promise in a theft situation by one other than a law enforcement officer that the matter would be kept inside the K-Mart where it occurred if the suspect confessed. And, finally, Lawton v. State, 152 Fla. 821, 13 So.2d 211 (Fla. 1943) concerned the defendant's hope and expectation that he would not be prosecuted if he confessed.

In Bram the Supreme Court of the United States reasoned that any degree of influence that is exerted upon the accused will render his subsequent confession inadmissible, because the law cannot measure the force of the influence used or decide upon its effect on the mind of the prisoner. The Fourteenth Amendment requires the choice to confess to be the "voluntary product of a free and unconstrained will." Haynes, 10 L.Ed.2d at 521. Put another way, any incriminating statement that is to go before the jury must have been a "free will offering." Williams v. State,

188 So.2d 320, 327 (Fla. 2d DCA 1966), modified, 198 So.2d 21 (Fla. 1967). The State failed to show from all the attendant circumstances that Appellant's confession was the product of his own unfettered will, uninfluenced by the threats or inducements of law enforcement.

Both because Appellant's right to remain silent was violated, and because the State did not meet its burden of proving the voluntariness of Appellant's statements, his confession should not have been heard by the jury. Because it was, Appellant is entitled to a new trial.

ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE JURY TO HEAR HIGHLY PREJUDICIAL, IRRELEVANT TESTIMONY REGARDING APPELLANT'S KILLING OF SUZANNE HENRY.

Appellant filed three motions in limine before his trial, seeking to exclude therefrom any evidence relating to the homicide of Suzanne Henry. (R 1495, 1499-1501) The motions were heard by Judge Evans on April 6, 1987, and denied. (R 5-31)

Over defense objections at trial, the prosecution presented details of Suzanne Henry's homicide to the jury. (R 542-543) The jury learned that Suzanne Henry had been found in Zephyrhills in her living room covered with a rug. (R 541-542, 547-548) There was a considerable amount of blood in the area. (R 548)

Dr. Joanne Wood, the medical examiner, counted nine wounds to the neck and one wound to the left shoulder area. (R 552)

Appellant confessed to stabbing Suzanne Henry after she engaged him in an argument and grabbed a knife, over which the two "tussled." (R 601-603)

The jury also saw photographs of Suzanne Henry's house and her body, and pictures of blood stains in the house. (R 549-557)

The State was not content to supply the jury with the details of the homicide itself, but attempted to explore Appellant's sanity at the time of the homicide when cross-examining

defense witness Dr. Walter Afield, but was prevented from doing so. (R 724-729)

As a preliminary matter, Appellant would note that the State failed to comply with Section 90.404(2)(b) of the evidence code, which requires the State to give at least 10 days written notice to a defendant prior to trial that it intends to offer evidence of criminal offenses allegedly committed by the defendant other than the crime(s) for which he is on trial. The State's procedural default in this regard was the subject of one of Appellant's pretrial motions in limine. (R 15, 1495)

Assuming the proper procedure is followed, similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but inadmissible when its only relevance is to prove bad character or propensity. §90.404(2)(a), Fla.Stat. (1987); Garron v. State, 528 So.2d 353 (Fla. 1988); Drake v. State, 400 So.2d 1217 (Fla. 1981).

The State's theory here was that the homicide of Suzanne Henry was admissible on the issue of motive for the killing of Eugene Christian, because Eugene could have served as a witness against Appellant. (R 26) Even assuming that the young boy could have understood what it meant to tell the truth and otherwise qualified as a competent witness, for which there is no support in the record, there remain at least two serious flaws in the State's theory. The first is that there is no evidence Eugene Christian

saw or heard anything of significance that could be used against Appellant. Eugene was in a bedroom, watching television. (R 602-603) Although Appellant and Suzanne Henry may have been arguing and quarreling rather loudly and viciously, as Appellant described it to Dr. Afield (R 773), there is nothing to indicate that Eugene came out of his room while the altercation was in progress, or otherwise saw any of it, or heard any of it over the sound of the TV. And after the incident was over and Appellant was taking Eugene out of the house, Appellant took great care to spare Eugene form seeing his mother's rug-covered body by turning Eugene's head down into his own shoulder. (R 603)

The second flaw in the State's theory is that there is an absence of evidence that Appellant in fact killed Eugene in order to eliminate him as a witness in the Suzanne Henry homicide. Eugene was not killed immediately at the scene, as one might expect if witness elimination was the motive, but was killed many hours after Suzanne Henry, in another county. Appellant's only expressions of motive were that he did not know why he killed Suzanne and Eugene (R 606), or that he killed Eugene intending to then kill himself so that they could be together with Suzanne in heaven. (R 605, 706) At no time did Appellant suggest that he killed Eugene because he was a potential witness in the Suzanne Henry homicide. Furthermore, Forensic Psychologist Dr. Robert Berland, who testified at Appellant's trial, specifically considered the hypothesis that Eugene Christian was killed to eliminate him as a witness to the homicide of Suzanne Henry, and

concluded that Appellant's mental state was a better-fitting explanation for the killing. (R 907-908)

In both Garron and Drake this Court rejected the State's arguments that admission of Williams rule-type evidence[9] was justified to prove motive. The result in Appellant's case should be the same.

Appellant would also call the Court's attention to a problem in the way the evidence was presented to the jury. After direct examination of Detective Faye Wilber, during which Wilber described Appellant's confession to killing Suzanne Henry, the court agreed to a defense request to instruct the jury on the limited purpose for which evidence as to the killing of Suzanne Henry was admitted, but then failed to give the instruction. (R 612-613) The court did give the following instruction at the end of the trial, when he gave the other instructions (R 1110):

> The evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of the motive and intention the [sic] part of the defendant.

However, section 90.404(2)(b)2. provides that the court shall charge the jury on the limited purpose for which such evidence is received and is to be considered, when the evidence is admitted, if requested. The court failed to discharge his duty under this section. And the instruction that was finally given could not have

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[9] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

undone the damage caused by the jury having sat through the trial with no charge to guide them as to how the Suzanne Henry evidence properly should have been considered. It is unlikely the jury even realized that the above-quoted instruction, read in a vacuum, pertained to the evidence they had received so long ago about the killing of Suzanne Henry.

In Keen v. State, 504 So.2d 396 (Fla. 1987) this Court acknowledged the extremely prejudicial nature of evidence of other crimes the defendant may have committed. Particularly is that true in a murder case such as this one, where the similar fact evidence involves a homicide.

Not only did the improperly - admitted evidence prejudice the jury against Appellant at the guilt phase, it necessarily infected the penalty phase and tainted the jury's recommendation, as will be discussed later in this brief.

Because of the improper admission of evidence pertaining to the Suzanne Henry homicide, Appellant must be granted a new trial.

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.

Counsel for Appellant filed a pretrial motion in limine seeking to prevent the State from cross-examining Psychologist Dr. Robert Berland as to his ongoing relationship with the Public Defender for the Thirteenth Judicial Circuit. (R 1496-1498) The motion further requested that the public defender's office be allowed to withdraw from representing Appellant if the court was unwilling to limit cross-examination of Dr. Berland. (R 1498) Judge Evans heard the motion on April 6, 1987 and denied it. (R 32-36, 1496)

At Appellant's trial the prosecutor was permitted to explore on cross-examination of Dr. Berland matters which were the subject of the motion in limine, over renewed defense objections and motion to withdraw. (R 920-923) The prosecutor elicited the fact that since June of 1986 approximately 40 per cent of Dr. Berland's criminal practice came from the Hillsborough County Public Defender's Office. (R 921) (Criminal work made up about 98 per cent of Dr. Berland's total practice. (R 919)) This 40 per cent amounted to 21 cases, all of them first-degree murders. (R 921) The prosecutor elicited the fact that Dr. Berland "billed out" at one hundred dollars an hour (R 921), that the public defender's office had paid for Dr. Berland to fly from Tallahassee

to Tampa (R 922), that the public defender's office was paying for Dr. Berland's hotel room while he was in town (R 922), and that the public defender's office was directly or indirectly responsible for Dr. Berland's payment. (R 922) The assistant state attorney also elicited the fact that Dr. Berland had not been called by the State of Florida to testify in a criminal trial in Hillsborough County since June of 1986 when he went into the private practice of forensic psychology. (R 923)

The basic test of evidentiary admissibility is relevance. §90.402, Fla.Stat. (1987). It is difficult to see how the prosecutor's cross-examination of Dr. Berland was relevant to the subject matter of the witness' testimony, which was Appellant's inability to form a premeditated intent to kill Eugene Christian.

Even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. §90.403, Fla.Stat. (1987). Here the prosecutor improperly insinuated through his cross-examination that there was something sinister in Dr. Berland's ongoing relationship with the public defender's office, and that the witness was therefore not to be believed.

The larger problem with the prosecutor's cross-examination is that it never could have occurred had the defendant not been indigent. A non-indigent could employ his own counsel and expert witnesses of his choosing. It is unlikely that a private attorney would have an ongoing relationship with a psychiatrist or psychologist that could be used to impeach the credibility of the

expert witness, because the private attorney would not likely have such a volume of cases. In the event that the non-indigent's case was imperiled by a relationship between his lawyer and an expert witness, the defendant could hire other counsel or another expert, a luxury not available to Appellant. Because the prosecutor was permitted to cross-examine Dr. Berland in the manner he did, Appellant's counsel was thereby rendered less effective than a privately - retained attorney would have been, and Appellant was deprived of the effective assistance of counsel to which he was entitled under the Sixth Amendment to the Constitution of the United States and Article I, Section 16. of the Florida Constitution.

In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) the Supreme Court of the United States recognized the importance of psychiatric testimony and held that the State must assure a defendant access to a competent psychiatrist when the defendant's sanity at the time of the offense is to be a significant factor at trial. The Court cited a long line of cases in which it had held that an indigent defendant must be provided with the basic tools for an adequate defense.

Appellant's defense was that he was incapable of forming the premeditated intent to *kill* when he stabbed Eugene Christian. Dr. Berland's testimony was an integral part of that defense. He was the only psychologist who testified, and he had spent more time with Appellant than the psychiatrists who testified, and had given Appellant a battery of psychological tests that the other experts

had not. Appellant's defense therefore was significantly harmed by the State's unwarranted cross-examination of Dr. Berland.

By permitting Appellant to be disadvantaged in the presentation of his defense in a way that a non-indigent defendant would not be disadvantaged, the court below deprived Appellant not only of the effective assistance of counsel, as discussed above, but of due process and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Appellant must therefore receive a new trial.

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.

Over defense objections, the trial court instructed the jury on first degree felony murder, with kidnapping as the underlying felony. (R 1036-1037, 1105-1107) He instructed on kidnapping as follows (R 1106-1107):

> Kidnapping means forcibly, secretly or by threat, confining, abducting or imprisoning another person against his will and without lawful authority with intent to inflict bodily harm upon the victim.
>
> In order to be kidnapping, the confinement, abduction or imprisonment must not be slight, inconsequential or merely incidental to the inflicting of bodily harm upon another person and must have some significant [sic] independence [sic] of the infliction of bodily harm upon another person in that it makes the infliction of bodily harm upon another person substantially easier of commission or substantially lessens the risk of detention [sic].
>
> Confinement of a child under the age of thirteen is against his will if such confinement is without the consent of his parents or legal guardian.

These instructions should not have been given, as the evidence was insufficient to support them. Eugene Christian was not abducted or imprisoned against his will. He and Appellant had a close relationship, and nothing the record suggests that Eugene

was unwilling to go with Appellant. A State witness, Marion Crooker, who was a neighbor of Suzanne Henry, saw Eugene sitting in the car immediately before Appellant and Eugene drove away and saw no struggle, nor anything unusual, except for the fact that Eugene was in a car. (R 500-501, 506)

Although the kidnapping statute does provide that confinement of a child under age 13 is against his will if such confinement is without the consent of his parent or legal guardian, section 787.01(1)(b), Florida Statutes (1985), and the jury was so instructed, surely the Florida Legislature did not intend for this subsection to apply in a situation such as the one involved herein. The record does not indicate whether Appellant was Eugene's legal guardian, but he was Eugene's stepfather by virtue of his marriage to Eugene's mother, and as such was responsible for the boy's welfare.[10] Also, there is no evidence that Eugene was "confined" within the meaning of this subsection.

The improper giving of the foregoing instructions not only enabled the jury to convict Appellant of both premeditated and felony murder, but made it more likely the jury would return a death recommendation at penalty phase, as Appellant entered that phase with one aggravating circumstance already against him: that the capital felony was committed while he was engaged in a kidnapping. §921.141(5)(d), Fla.Stat. (1987).

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[10] One of the questions the jury asked the court was whether Appellant was the legal guardian of Eugene Christian. (R 1141) The court responded: "You must rely upon your recollection." (R 1142)

Because the jury was erroneously instructed, Appellant must be granted a new trial.

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.

During the guilt phase of Appellant's trial, after the jury had been deliberating for four hours and 18 minutes, they sent a note to the court requesting a transcript of the entire testimony of certain witnesses. (R 1144, 1560) With the concurrence of counsel, the court wrote a note asking the jurors to specify whose testimony they desired. (R 1145) The jurors responded with names of the four mental health professionals who had testified: Drs. Sprehe, Afield, and Berland (who were defense witnesses) and Dr. Coffer (who was a rebuttal witness for the State). (R 1145, 1559) Over defense objections, the court responded by writing a note to the jury which read: "Continue your deliberations based upon your best recollection of the testimony." (R 1147-1149)

The court apparently was concerned that it would take too long to read back the testimony in question. (R 1147) He suggested to counsel that if the jurors did not reach a verdict that evening, the testimony could be read to them the next morning. (R 1147) However, when defense counsel renewed their request for the testimony to be read back the next morning, after the jury had been sequestered overnight, the court failed to honor the request. (R 1168)

In Nelson v. State, 148 Fla. 338, 4 So.2d 375 (Fla. 1941) this Court found error in the trial court's refusal of a jury

request to have the testimony of one witness read back, but found the error to be harmless because the witness' testimony was consistent with that of other witnesses.

In Furr v. State, 152 Fla. 233, 9 So.2d 801 (Fla. 1942) the jury indicated to the court after several hours in the jury room that there was a dispute concerning some of the testimony; some jurors contended the testimony was one way, and some contended it was another way. This Court wrote an opinion stating that the trial court should have ascertained whose testimony was the subject of disagreement and, if the witness had given any material testimony, had that testimony read to the jury. Because the trial court failed to take these steps, this Court awarded certiorari and quashed the judgment of the circuit court affirming a judgment of conviction.

The court in Penton v. State, 106 So.2d 577 (Fla. 2d DCA 1958) reversed where the trial court did not honor the jury's request to read back testimony about which the jurors displayed considerable doubt, where the testimony was not consistent with all the other testimony.

The jury in LaMonte v. State, 145 So.2d 889 (Fla. 2d DCA 1962) interrupted its deliberations to ask two specific questions regarding the evidence. They requested that the court supply answers to the questions, or that the testimony pertaining thereto be repeated. The court responded that he could not comment upon the evidence or tell the jury what was in the record, and that they had heard the testimony. The appellate court found fundamental

error in the trial court's refusal to have the testimony read to the jury.

The current procedural rule dealing with jury requests to review evidence is Florida Rule of Criminal Procedure 3.410, which reads:

> 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.

In Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976) the court concluded that, under the terms of this rule, it is within the court's discretion to have the court reporter read back the testimony of witnesses upon request of the jury. The Simmons court found no abuse of discretion there, where the jury did not ask to have the testimony read and the reading of it was impractical.

If the rule provides for any discretion on the part of the trial court, that discretion was abused in this case. The jury made a specific request for the testimony that went to the very heart of Appellant's defense that he was incapable of forming the premeditated intent to kill Eugene Christian because of his mental problems, exacerbated by crack cocaine use. There is nothing in

the record to suggest that reading the testimony back was impractical, although it might have taken a while to accomplish. (Defense counsel estimated it would take two or two and one-half hours. (R 1148))

As counsel for Appellant pointed out to the court, it was particularly important that the testimony be read in light of some comments made by one of the jurors on the morning after the jury had been sequestered overnight. (R 1168) Juror Epps met with Judge Evans to discuss what she felt were improprieties committed by the other jurors. (R 1155-1162) During the course of her conversation with Judge Evans, Ms. Epps made various comments about Appellant's mental condition. She felt he was a very sick individual who was not in his right mind when he killed Eugene Christian. (R 1156-1157) She felt Appellant really loved the child, but was not able to recognize the right and wrong of what to do. (R 1157) She felt he just panicked and blacked out. (R 1157) She did not believe the killing was premeditated. (R 1157) Epps asked Judge Evans to narrow down for her the time frame included in premeditation, but he said he could not do that. (R 1161-1162)

Juror Epps' remarks showed that she was having considerable trouble grasping the factual/legal concepts involved in this case as they pertained to Appellant's mental condition. Other jurors likely were grappling with similar concerns, as their request to rehear the doctors' testimony suggests. The confusion could perhaps have been eliminated had the court acceded to the

jury's request.

Ultimately, Juror Epps joined the other jurors in finding Appellant guilty of both premeditated and felony murder. One must wonder if her verdict might have been different if she had been given another chance to hear the expert testimony, which must have been most difficult for a layman to digest upon a single hearing.

The trial court's refusal to honor the jury's request was particularly unfair in view of the fact that he had earlier honored the jury's request to see again a videotape of the scene where Eugene Christian's body was found, which had been introduced by the State. (R 652-653, 1143) After letting the jury review prosecution evidence, the court should have been willing to let the jury review evidence relating to Appellant's defense, particularly where the jury wanted to hear the testimony of both defense and prosecution experts.

And after striking Appellant's preferred defense of insanity (please see Issue I, herein), the court should have afforded Appellant a full opportunity to present his secondary defense by allowing the jury every opportunity to comprehend what the experts were saying.

The court committed reversible error by denying the jury request to review the testimony of Drs. Sprehe, Afield, Berland, and Coffer. Appellant must be afforded a new trial.

ISSUE VII

THE COURT BELOW ERRED IN DENYING SEVERAL OF APPELLANT'S PROPOSED PENALTY PHASE JURY INSTRUCTIONS.

The trial court denied six of the seven jury instructions Appellant requested to be read to the jury at penalty phase. (R 1198-1201, 1551-1557)

The "Defense Requested Special Penalty Phase Instruction Number Two," one of those the court refused to give, read as follows (R 1552):

> If you find there are such sufficient aggravating circumstances that would justify the imposition of the death penalty, then you must consider the evidence in mitigation. It will be your duty to determine whether there are sufficient aggravating circumstances to outweigh the mitigating circumstances beyond a reasonable doubt.

This language was to replace the standard instruction which tells the jury that if sufficient aggravating circumstances are present, they must determine whether there are mitigating circumstances sufficient to outweigh any aggravating circumstances found to exist. Fla. Std. Jury Instr. (Crim.), p. 77. (R 1552)

Appellant recognizes that this Court has previously rejected attacks on this portion of the standard jury instructions in Arango v. State, 411 So.2d 172 (Fla.), cert. den., 457 U.S. 1140 (1982) and Francois v. State, 423 So.2d 357 (Fla. 1982). However, these holdings should be revisited in light of evolving federal constitutional standards.

Furthermore, the instruction Appellant proposed to the trial court suggested that the standard instruction was defective. Therefore, on appeal Appellant does not need to show that the standard instruction more properly states the applicable law. See Smith v. State, 521 So.2d 106 (Fla. 1988).

Twice during his penalty phase instructions the trial court told the jury it was their responsibility to determine whether there were mitigating circumstances that outweighed any aggravating circumstances. (R 1325, 1327)

In Arango, this Court held that these instructions did not shift the burden of proof to the defendant in violation of the Due Process Clause, Amendment XIV, U.S. Constitution. This Court wrote:

> A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

411 So.2d at 174.

Reliance upon "a careful reading of the transcript", however, is not the correct test to apply to a questionable jury instruction. The appropriate standard adopted by the United States Supreme Court is where there is a reasonable possibility that the jurors understood the instruction in an unconstitutional manner, reversal

is required. See Francis v. Franklin, 471 U.S. 307 at 322 n.8 (1985).

At bar, a reasonable juror could understand the instruction given to mean that the State first has the burden to prove sufficient aggravating circumstances to justify a recommendation of death. If the State sustains this burden, the burden then shifts to the defense to establish mitigating circumstances which outweigh the aggravating circumstances by a preponderance of the evidence in order to win a life recommendation.

Indeed, the format of the instruction at bar closely resembles instructions on affirmative defenses where the defendant can exculpate himself or reduce his culpability of he can prove by a preponderance of the evidence certain facts (e.g. insanity, extreme emotional disturbance) once the State has proved the charged crime beyond a reasonable doubt. Placing the burden on the defendant to prove an affirmative defense in the context of a guilt or innocence trial does not violate the Due Process Clause. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, 480 U.S. _____, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). The unresolved question presented here is whether the Eighth Amendment's requirement of heightened reliability in capital sentencing proceedings permits an instruction which a reasonable juror might interpret as placing the burden on the defendant to establish by a preponderance of the evidence that his factors in mitigation outweigh the aggravating circumstances in order to avoid the death

penalty.

Recently in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), the Eleventh Circuit found constitutional error where the jury was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

837 F.2d at 1473.

While this instruction is more blatantly prejudicial than the one given at bar in that it established a rebuttable presumption of death, the rationale of the Jackson decision is equally applicable here. Both instructions tilt the scales "by which the jury is to balance aggravating and mitigating circumstances in favor of the state." 837 F.2d at 1474.

One need only imagine the situation where a juror concluded that the aggravating factors were weighty enough to make death a possible sentence yet the mitigating evidence was of equal weight. The court gave the general weighing instruction found at page 81 of the Florida Standard Jury Instructions in criminal cases:

> You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(R 1328)

With only this general instruction for guidance, a juror might conclude just as likely as not that a life recommendation should be returned. With the additional proviso however, that the mitigating circumstances must outweigh the aggravating, the same juror would feel a duty to return a death recommendation.

Accordingly, the portions of the standard jury instructions in question do not satisfy the Eighth Amendment because they are skewed in favor of a death recommendation. Since counsel requested an instruction which would have clarified the State's burden to prove that the aggravating factors outweigh the mitigating factors before a sentence of death could be recommended, this case should now be remanded for a new penalty trial before a new sentencing jury.

Another of Appellant's proposed penalty phase instructions, number six, asked the court to strike the following language from the standard instructions (R 1556):

> If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.

Appellant's proposed instruction number three asked the court to strike the word "extreme" in the second mitigating circumstance, relating to whether Appellant was under the influence of extreme mental or emotional disturbance (R 1553), and his proposed instruction number four asked the court to strike the word "substantially" in the sixth mitigating circumstance, relating to whether Appellant's capacity to appreciate the criminality of his

conduct or to conform his conduct to the requirements of law was substantially impaired. (R 1554)

All these proposed changes in the standard instructions, which the court below refused to make, were designed to eliminate the inference that Appellant bore any particular burden of proof with regard to the mitigating circumstances he was seeking to establish.

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court considered an Ohio death penalty statute which required the sentencing judge to impose a sentence of death unless he found by a preponderance of the evidence that at least one of three statutory mitigating circumstances was proved by the defendant. 438 U.S. at 593. The Court found this statute invalid because it prevented the sentencer from considering any relevant aspect of the defendant's character or circumstance of his offense as an "independently mitigating factor." 438 U.S. at 607. Although the Lockett decision did not specifically address whether the Eighth and Fourteenth Amendments to the United States Constitution precluded the states from establishing a burden of proof for a capital defendant before his mitigating evidence could be considered by the sentencer, it appears to forbid any limitation on the sentencer's consideration of relevant mitigating evidence.

More recently in Hitchcock v. Dugger, 481 U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court held that merely allowing the defendant to present non-statutory mitigating evidence was insufficient. The jury must be instructed that they may

consider all relevant evidence in mitigation and the sentencing judge must also consider it.

The thrust of Lockett, Hitchcock and related decisions such as Eddings v. Oklahoma, 455 U.S. 104 (1982) and Skipper v. South Carolina, 476 U.S. 1 (1986) is that the federal constitution requires a capital sentencer to consider any and all relevant evidence that a defendant wishes to offer as a basis for a sentence less than death. Accordingly, the Eighth and Fourteenth Amendments to the United States Constitution should prohibit a limitation on mitigating evidence which requires it to meet any particular burden of proof before the sentencer may consider it. The capital sentencer must be free to give any evidence in mitigation the weight which the sentencer believes it deserves.

Because the portions of the standard jury instructions which Appellant requested the court to delete had the effect of establishing a burden of proof to be achieved before a mitigating circumstance could be considered by the jury, the capital sentencing proceeding at bar did not meet the constitutional requirements of the Eighth and Fourteenth Amendments.

ISSUE VIII

THE RECOMMENDATION 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.

Aggravating circumstances the jury and court may consider are limited to those enumerated in section 921.141(5) of the Florida Statutes. State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledge v. State, 346 So.2d 998 (Fla. 1977). Yet during the guilt phase of Appellant's trial the jury received over objection, a great deal of evidence concerning the homicide of Suzanne Henry, as discussed in Issue III. of this brief. Appellant had not been convicted of the homicide, and it did not relate to any of the aggravating circumstances set forth in the statute. Therefore, the Suzanne Henry homicide was not a proper matter for the jury to consider at penalty phase.

Despite the impropriety of doing so, during his final argument at penalty phase the prosecutor below urged the jury to consider the Suzanne Henry homicide in making their sentencing recommendation. Early on in his final argument the prosecutor said that Appellant had forfeited his right to live because he took opportunities to live away from a young woman and from a little boy. (R 1305) Although it is not clear to which "young woman" he was referring, the most reasonable inference is that he meant Suzanne Henry, rather than Appellant's first wife, Patricia Roddy.

Later the prosecutor made a more definite reference to the Suzanne Henry killing (R 1312):

> When you look at Mr. Henry's criminal conduct from 1975 to 1985 he has been convicted of killing two people and been involved in a third homicide. The time has come. [Emphasis supplied.]

The only instruction the court gave to the jury at penalty phase as to the Suzanne Henry homicide was this (R 1326):

> You may not consider the killing of Suzanne Henry as an independent aggravating circumstance. [Emphasis supplied.]

Because this instruction only told the jury not to consider the Suzanne Henry killing as an independent aggravating circumstance, it suggested that the jury could somehow consider this homicide in conjunction with one or more other aggravating circumstances.

Thus the jury heard the prosecutor tell them to consider Suzanne Henry's killing, and the court did not forbid them from doing so. The jury was therefore left free to consider an unauthorized aggravating circumstance, and their consideration of Appellant's sentence was not properly channeled and directed as required for the sentence to pass constitutional muster. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Obviously, the impact upon the jury of knowing that the defendant in a capital case may have committed another homicide would be devastating. Particularly is that true in the instant case, as the jury knew that Appellant had also been convicted of second degree murder in the death of his first wife, Patricia

Roddy. Furthermore, the trial court gave the above-quoted instruction to the jury regarding Suzanne Henry's homicide immediately after he instructed on the aggravating circumstance of a previous conviction of another capital offense or of a felony involving the use of violence to some person and instructed that the crime of murder in the second degree was a felony involving the use of violence to another person. (R 1326) The jury thus could not help but consider the Patricia Roddy and Suzanne Henry killings in tandem, doubling the prejudicial impact of the illegal aggravating circumstance.

Appellant recognized the problems that could arise as a result of the jury having heard at guilt phase evidence that they might improperly use in aggravation, and moved the court to impanel a separate sentencing phase jury, but the court denied the motion. (R 1190, 1202, 1525-1526)

For the foregoing reasons, the ten to two recommendation of the jury that Appellant be sentenced to death was tainted. He should receive a new penalty trial before a new jury.

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 UNITED STATES.

The trial court improperly applied section 921.141 of the Florida Statutes in sentencing John Ruthell Henry to death. This misapplication of Florida's death penalty sentencing procedures renders Henry's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed separately in the remainder of this argument.

A. The court erred in instructing the jury upon, and finding as an aggravating factor, that the capital felony was committed while appellant was engaged in the commission of kidnapping.

One of the aggravating circumstances submitted to the jury and found by the court below was that the capital felony was committed while Appellant was engaged in the felony of kidnapping. (R 1326, 1411, 1572)

As discussed in Issue V, in this brief, the evidence was insufficient to support a finding that Appellant kidnapped his

stepson, Eugene Christian.

Furthermore, the court's written sentencing order states that Appellant "removed Eugene Christian from his home for the purpose of inflicting harm upon him." (R 1572) However, the evidence does not show that Appellant had such a purpose when he left with Eugene. Appellant told Detective Wilber his intention was not to kill Eugene, but to get him out of the residence so he would not see his mother. (R 616) Appellant mentioned to Dr. Daniel Sprehe that he was intending to take Eugene to his aunt's house. (R 778) After all, Eugene was killed many hours after his mother was killed. Appellant bought him chicken in Plant City. The evidence all suggests that Appellant did not have the intention of harming Eugene when he carried him out of the house.

B. The court erred in instructing the jury upon and finding as an aggravating factor, that the capital felony was committed for the purpose of avoiding arrest or effecting an escape from custody.

The court below submitted to the jury and found as an aggravating circumstance that the homicide of Eugene Christian was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (R 1326, 1411-1412, 1572) In order to establish this aggravating circumstance where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So.2d 496 (Fla. 1985); Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978);

Menendez v. State, 368 So.2d 1278 (Fla. 1979). In fact, there must be clear proof that the dominant or only motive for the killing was the elimination of a witness. Rogers v. State, 511 So.2d 526 (Fla. 1987); Bates.

While this Court has recognized that a motive to eliminate potential witnesses to an antecedent crime may suppport this aggravating circumstance, Swafford v. State, 13 F.L.W. 595 (Fla. Sept. 29, 1988), the evidence did not show that this was Appellant's motive here, as he discussed in Issue III of this brief.

One factor not mentioned in Issue III, is that a motive to eliminate a witness requires at least some capacity for rational thought. The testimony of the mental health experts who testified at Appellant's trial established that he had little, if any, capacity for rational thought when he stabbed Eugene Christian, due to his mental problems and ingestion of cocaine.

> C. The court erred in instructing the jury upon, and finding as an aggravating factor, that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court instructed the jury upon and found as an aggravating circumstance that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 1326, 1412, 1572-1573)

Florida's legislature did not intend this aggravating circumstance to apply to all premeditated killings. Harris v. State, 438 So.2d 787 (Fla. 1983). It must be limited to those having some quality to set them apart from the ordinary premeditated murder. Brown v. State, 473 So.2d 1260 (Fla. 1985). It is reserved primarily for executions or contract murders or witness-elimination murders. Bates; Herzog v. State, 439 So.2d 1372 (Fla. 1983). The defendant must have exhibited a heightened degree of premeditation in order for this aggravating element to apply. Mills v. State, 462 So.2d 1075 (Fla. 1985). This heightened degree of premeditation must bear the indicia of calculation, which consists of a careful plan or prearranged design to kill. Rogers.

The evidence produced below failed to show that Eugene Christian's murder possessed any of the extraordinary attributes needed to qualify it for this aggravating circumstance. As discussed in Part A. above, nothing suggested that Appellant intended to kill Eugene from the time he removed him from Suzanne Henry's house.

Dr. Walter Afield testified at penalty phase that Eugene's killing was not a calculated act. (R 1234) Dr. Daniel Sprehe agreed that the killing was not a calculated act, but a sudden, impulsive one. (R 1243)

Appellant was in no condition to calculate anything, due to his mental problems and heavy use of crack cocaine on the day Eugene died.

Furthermore, the fact that Appellant and Eugene drove around for hours, during which time Appellant bought food for Eugene and crack for himself, suggests that, far from having a predetermined plan, Appellant was driving around rather aimlessly and trying to decide what to do.

Finally, Appellant expressed at least a pretense of justification for stabbing Eugene when he said he was planning to then commit suicide so that he and the boy could be together with Suzanne in heaven. (R 605, 706) In Banda v. State, 13 F.L.W. 709 (Fla. Dec. 8, 1988) this Court defined "pretense of justification" to mean any claim of justification or excuse that, though insufficient to reduce the degree of the homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide. See also Cannady v. State, 427 So.2d 723 (Fla. 1983). Appellant's explanation for his actions, sad and bizarre thought it may be, did serve to negate the cold, calculated and premeditated aggravating circumstance.

D. The court failed to give adequate consideration to all evidence Appellant presented in mitigation at the penalty phase.

The sentencing authority in a capital case must consider all relevant evidence offered in support of a sentence less than death. Hitchcock v. Dugger, 481 U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In Rogers this Court described the duties of the Florida trial judge when considering evidence in mitigation, as follows:

> ....[W]e find the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

In the instant case, while the trial court did find two statutory mitigating circumstances, that Appellant was under the influence of extreme mental or emotional disturbance, and that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (R 1412-1413, 1573), the court rejected all non-statutory mitigation in a single sentence: "The Court finds that no non-statutory mitigating factors were found to exist." (R 1413, 1573) This simple conclusory statement fails to establish that the court engaged in the three-step analysis mandated by Rogers.

Appellant presented considerable testimony at his penalty phase that was at least worthy of the court's consideration. For example, Appellant was good to children, and he was the father of two daughters with his first wife. (R 1281-1282) See Jacobs v. State, 396 So.2d 713 (Fla. 1981). Appellant had a severe and long-standing alcohol and drug problem, the full extent of which was not explored during the guilt phase. (R 1258-1260, 1283) And Appellant had saved Deputy Faye Wilber of the Pasco County Sheriff's Office from possible physical harm at the hands of Appellant's relatives or friends after Wilber arrested him, for which Wilber was "pretty grateful." (R 1222, 1225) These are all matters which the court should have specifically addressed in order to bring his conduct of the sentencing process within the parameters set forth in Rogers.

E. Conclusion

The sentencing weighing process was skewed in an unconstitutional manner by the above-mentioned defects. Appellant's sentence of death must not be allowed to stand.

ISSUE X

A SENTENCE OF DEATH IS NOT A PROPER PUNISHMENT FOR JOHN RUTHELL HENRY UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

In addition to the matters previously discussed in this brief, there remain at least two reasons why the punishment of death should not be inflicted upon Appellant, John Ruthell Henry.

One reason is that Eugene Christian's death result from a domestic dispute between Appellant and his wife, Suzanne Henry. This Court has recognized the heat of passion that can arise from domestic situations as a mitigating element in a number of cases. For example, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), the victim, defendant's live-in paramour, was strangled with a telephone cord following an unsuccessful attempt to smother her with a pillow. The trial court found no mitigating circumstances, but one of the potential non-statutory mitigating circumstances identified by this Court in overturning Herzog's death sentence was "the domestic relationship that existed prior to the murder". 439 So.2d at 1381.

Ross v. State, 474 So.2d 1170 (Fla. 1985) involved a much more heinous murder than the one in the instant case. The death of the victim in Ross, who was the defendant's wife, resulted from multiple blows to the head with a blunt instrument. Her face was extensively bruised, scratched and lacerated. The bruises occurred while she was still alive, and were probably inflicted with a fist or foot. There was evidence she had tried to fight off

her attacker, as she had injuries on her hands and arms. The jury recommended death for Ross, and the trial court agreed, finding the murder to be heinous, atrocious and cruel, and finding nothing in mitigation. In vacating the death sentence, this Court noted that the lower court should have considered in mitigation, among other things, "that the killing was the result of an angry domestic dispute." 474 So.2d at 1174.

The killing of Eugene Christian was accomplished with much less trauma to the victim that in Ross. Eugene would have become unconscious within a minute or two after he was fatally stabbed. (R 629) There were no defensive wounds on Eugene (R 627-628), thus indicating that no struggle preceded his death. Nothing in the record suggests that Appellant displayed anything but kindness toward Eugene up to the moment he was stabbed, or that Eugene had any fear whatsoever that his life was about to end.

In Wilson v. State, 493 So.2d 1019 (Fla. 1986) the defendant killed his father and a five year old cousin while also attempting to murder his stepmother. The jury recommended death and the trial court agreed, finding two aggravating circumstances, prior conviction of a violent felony and heinous, atrocious or cruel, and nothing in mitigation. This Court overturned Wilson's death sentence and remarked as follows with regard to his sentence for killing his father:[11]

> We find it significant that the record ... reflects that the killing

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[11] Wilson's conviction and death sentence for killing his cousin were overturned due to a lack of evidence of premeditation.

> of Sam Wilson, Sr. was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration. See Ross v. State, 474 So.2d at 1174.

493 So.2d at 1023. These comments apply equally to Appellant's case. Although Eugene Christian was not directly involved in the heated exchange between Appellant and Suzanne Henry, his death would not have occurred if that confrontation had not taken place. And any period of reflection before Eugene was killed was clearly of short duration; the act was impulsive, not calculated. (R 706, 709-710, 754-755, 893-894, 1234, 1243)

Appellant's serious mental problems and low IQ form the second reason why the ultimate punishment is not warranted in his case.

Appellant has an IQ of only 78. (R 755, 874) This places him between the normal and retarded ranges, "at the borderline level of intellectual functioning." (R 874)

The question of whether a person of low IQ may constitutionally be punished by death is currently pending before the Supreme Court of the United States in Penry v. Lynaugh, Case Number 87-6177, which is scheduled to be argued on January 11, 1989.

In Jones v. State, 332 So.2d 615 (Fla. 1976), a life override case, this court reversed the appellant's death sentence for the following reason:

> ...[t]he principle [sic] determinative fact directing the judgment of this Court is that the

> Appellant had a paranoid psychosis which was undenied and unrefuted, the degree of which no one can fully know. The record shows that for a long time appellant had believed that persons were attempting to kill him and were following him and that he had other hallucinations. The testimony makes it clear that Appellant suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not fully known, but it is reasonable to assume that this mental illness contributed to his strange behavior. Extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment. [Footnote omitted.]

332 So.2d at 619. This Court could have been describing Appellant's condition instead of Jones's. Although the doctors could not agree on an exact diagnosis, Appellant clearly had serious mental and emotional problems that extended back many years. Dr. Afield diagnosed his illness as rather sever chronic paranoia (R 707), the same condition with which Jones was afflicted, and Dr. Berland cited his history of paranoid thinking. (R 882-883) Like Jones, Appellant had a history of experiencing hallucinations. (R 882-883) In fact, Appellant was hallucinating and delusional prior to killing Eugene Christian. (R 909) He thought he saw flashing lights and a man in shining armor like in the olden days who was pursuing him. (R 603-604, 610, 751-752, 764, 882-884, 943) He saw shadows moving, and heard mumbling voices of people he thought were pursuing him. (R 604, 882-883, 943) There can be no doubt that Appellant's mental illness

contributed to his strange behavior, which was so out of character for a man who cared deeply for children in general and Eugene Christian in particular. Appellant's extreme emotional condition is clearly a legitimate basis for mitigating his punishment.

The death penalty is reserved for "only the most aggravated and unmitigated of first degree murder cases". State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Appellant's case does not fall into this category, and his death sentence cannot be allowed to stand.

CONCLUSION

Appellant, John Ruthell Henry, respectfully prays this Honorable Court to grant him a new trial. In the alternative he asks the Court to reverse his death sentence and remand with instructions that he be sentenced to life in prison. If neither of these forms of relief is forthcoming, he asks for reversal of his death sentence and remand for a new penalty trial before a new jury impanelled for that purpose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 10th day of January, 1989.

Robert F. Moeller

ROBERT F. MOELLER

RFM/an