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

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

Appellant, John Ruthell Henry, will rely upon his initial brief to reply to the arguments presented in the State's answer brief as to Issues IV and VII.

STATEMENT OF THE CASE AND FACTS

Appellee's statement that "[i]t appears from the record that Deputy McNulty only spoke with Appellant during the beginning of the period where Deputy Wilbur was out of the room. (R.86)." (Brief of Appellee, p. 2) is not necessarily supported by the record; the record is unclear. Wilbur testified that he thought McNulty stayed in the room with Appellant when Wilbur was absent, but he did not know "what went on." (R86) McNulty testified to leaving the interview room when Wilbur first entered, but then coming back into the room on several occasions. (R134-135) McNulty's testimony did not establish if he was in the room with Appellant during the period of over one hour when Wilbur was gone, or what may have been said during that time.

One point that needs to be made regarding Appellant's confinement in the interview room is that he was handcuffed to a chair while he was in there; only one hand was free so that Appellant "could smoke or drink or whatever." (R78)

Appellee says at page two of its brief that Dr. Walter Afield "admitted" on cross-examination "that his opinion of Appellant's capacities was based solely on what Appellant had told

him and that he had no way of corroborating such statements. (R.718)." However, Dr. Afield also testified that his expert opinion that Appellant was psychotic would not change even if Appellant had not been entirely truthful with the doctor:

> Q [by the prosecutor] My point being that if he is not being truthful, if he is lying to you, if he is exaggerating things that would cause your opinion to be inaccurate, wouldn't it?
>
> A [by Dr. Afield] Well, my opinion is he is psychotic and that doesn't change. Maybe he didn't smoke cocaine at the time and he had no drugs and no drinking whatsoever, I still believe he was psychotic. Killing a child is not the -- is not the actions of a rational man or a rational human being. You have got to be very sick.

(R718-719)

Appellee's statement at page two of its brief that Dr. Sprehe testified that Appellant had the "'capability of cognitive thought"' when he killed Eugene is inaccurate. Dr. Sprehe actually testified that Appellant "had the capability of <u>some</u> cognitive thought." (R755 -- emphasis supplied). Dr. Sprehe went on to explain that he thought Appellant

> knew what he was doing was killing his son but he had trouble with the volitional aspect of it. In other words, the ability to stop himself from doing it and that is typical of cocaine intoxication.

(R755)

At page two of its brief Appellee mentions that Dr.

Coffer testified that hallucinations are not typical of cocaine intoxication. However, Coffer also testified that hallucinations are typical of cocaine toxicity, which is a condition that may result from long-term use of the drug. (R1022-1023)

Appellee says at pages two through three of its brief:

> Dr. Coffer further told the jury that Appellant's course of conduct, including driving a car almost into a pond, constituted an "intricate complex act" that required a "certain amount of skill and coordination and presence of mind". (R.1026)

This is not exactly what Dr. Coffer said. On cross-examination by defense counsel the witness was asked the following questions and gave the following answers (R1026):

> Q I gather from your direct examination that you place some emphasis on the intricate and complex things that you perceive Mr. Henry to have done during the period of time between the time he left Zephyrhills and the time that Eugene Christian was killed; is that correct?
>
> A I placed some emphasis on that, yes.
>
> Q You consider driving a car almost into a retaining pond to be an intricate complex act?
>
> A Well, my understand [sic] of it is that he drove the car to Plant City. He was able to negotiate a purchase from Church's Fried Chicken. He was able to drive the car quite without accident for quite a long period of time after that, turning up dirt roads and retracing and going up other dirt roads. I think that requires a certain amount of skill and coordination and presence of mind

> and the people I have seen in real bad crash phases aren't able to do anything except plea for help.

The phrase "intricate complex act" appears in counsel's question, not in Coffer's answer, as Appellee would have this Court believe.

At page three of its brief Appellee mentions that when Deputy Terry Chancey was investigating the spot where the car Appellant was driving came to rest in the mud, Chancey's "police radio was broadcasting dispatches." Chancey did not say his walkie-talkie was actually broadcasting dispatches. He had the radio on when he exited his vehicle and began approaching the car that was stuck in the pond. (R965-966) But he did not know if the volume was high or low that night. (R970) And Chancey acknowledged that sometimes the walkie-talkie would not pick up signals at all when it was out of the car at his side. (R970)

Appellee says at page three of its brief that Steven Moore, an identification detective with the Hillsborough County Sheriff's Office, testified that

> Appellant's car had to be towed out of a pond of water and that he found no soda can or vials that could have been used for ingesting cocaine. (R.979, 981)

Some clarification is needed. Moore was referring to not finding any cans, etc. in the area around where Eugene Christian's body was found, not in the car, as Appellee seems to suggest. (R980-981)

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.

Appellant would first note that the two cases upon which Appellee primarily relies, Parkin v. State, 238 So.2d 817 (Fla. 1970) and United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), were not cases in which a sentence of death was imposed. Cohen dealt with conspiring to distribute illegal drugs. Parkin did involve a first degree murder charge, but the Petitioner had not even been convicted at the time this Court decided her case, and it is not clear from the opinion whether the State intended to seek the death penalty in the event of a conviction.[1]

Furthermore, Parkin did not involve non-cooperation with a State-retained psychiatrist, but non-cooperation with court-appointed experts. Therefore, Parkin is not directly on point. Anything the Court may have said in Parkin regarding lack of cooperation during a psychiatric examination on behalf of the prosecution was dictum.

Cohen involved the appellant's refusal to submit to an

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[1] Mary Julia Parkin was indicted for shooting her husband. It seems unlikely she would have been sentenced to death for this offense.

examination by psychiatrists selected by the government to evaluate his sanity at the time of the commission of the crime. It must be remembered that here Appellant did subject himself to examination by two psychiatrists selected by the State. Drs. Sprehe and Fesler, the two doctors the court appointed to examine Appellant, were the two psychiatrists the State specifically asked the court to appoint. (R1468-1469, 1473-1476). See also paragraph three of Appellee's "Response to Motion to Relinquish Partial Jurisdiction to Trial Court for Purpose of Reconstructing Record," served January 18, 1989.)

At page nine of its brief, Appellee claims that during their testimony Drs. Afield and Berland "began to stray into the area of Appellant's sanity at the time of the murder. (R.725-729; 914-918)" These witnesses did not simply "stray" into this area; they were led there by the prosecutor's questions. (R720-721, 724, 914) The State thereby opened the door for Appellant to present his insanity defense, as Appellant argued in his initial brief, which argument Appellee makes no attempt to answer or rebut.

At page 12 of its brief Appellee incorrectly states that in Bannister v. State, 358 So.2d 1182, 1184 (Fla. 2d DCA 1978) the court "held" that

> in appropriate circumstances, such as total noncooperation with any psychiatrist save his own, the court may properly refuse to admit any evidence propounded by the defendant relevant to the issue of his sanity. [Citation omitted.]

This quotation from Bannister cannot fairly be characterized as its

"holding;" it is dictum at best. The issue in Bannister was whether the trial court could tax costs against the defendant for the fees of the State's psychiatrist after the defendant refused to talk to him. The Second District Court of Appeal held that costs could not be taxed. The appellate court also noted that the trial court "cannot compel the defendant to cooperate with the [State's] psychiatrist by answering questions posed as part of the mental examination. [Citations omitted.]" 358 So.2d at 1183-1184.

Furthermore, the portion of the Bannister opinion quoted at page 12 of Appellee's brief is irrelevant. Appellant's case does not involve "total noncooperation with any psychiatrist save his own" -- far from it. Appellant fully cooperated with the two State-selected court-appointed doctors, and offered to cooperate with a third court-appointed expert. (R1381-1382)

At page 13 of its brief the State claims that it would have been prejudiced if Appellant had been permitted to present his insanity defense to the jury because the state "would not have been allowed to rebut the Appellant's insanity defense with an expert who has had the opportunity to examine the Appellant [emphasis in original]." This statement is patently erroneous. The court-appointed experts who were hand-picked by the prosecution, Drs. Sprehe and Fesler, both examined Appellant and both concluded that Appellant was sane at the time of the offense. (R1470-1472, 1477-1480) There is nothing in the record to suggest that the State "would not have been allowed to rebut the Appellant's insanity defense" with the testimony of these two

experts.

Perhaps the best approach for a trial court to take when faced with a situation such as that presented here would be to use a balancing approach similar to that used where there is a discovery violation. See State v. Sobel, 363 So.2d 324 (Fla. 1978); McCarty v. State, 107 N.M. 651, 763 P.2d 360 (N.M. 1988). The court would be required to balance the defendant's rights to present his defense, etc. against any harm that might come to the State as a result of the defendant's lack of cooperation with the State's psychiatrist. This might lead, for example, to the defense being required in some cases to proceed with lay testimony only, see United States v. Garcia, 739 F.2d 440 (9th Cir. 1984), which obviously would make the task of establishing insanity much more difficult, but which would at least give the defendant some opportunity to put his case to the jury. (As discussed in Appellant's initial brief, any prejudice that might have been suffered by the State here had Appellant been allowed to put on his insanity defense would have been minimal, and so any sanctions imposed upon Appellant for not talking to the State's psychiatrist should have been commensurate with this relative lack of prejudice.)

On page 13 of its brief, when discussing Appellant's argument that the trial court's ruling precluding Appellant from presenting his insanity defense interfered with the relationship between Appellant and his attorneys, Appellee queries why Appellant has not "asserted a claim of ineffective assistance of trial

counsel?" Perhaps Appellee is unaware that claims of ineffective assistance of trial counsel generally cannot be raised for the first time on direct appeal. Kelley v. State, 486 So.2d 578 (Fla. 1986); State v. Barber, 301 So.2d 7 (Fla. 1974); Ayers v.State, 14 F.L.W. 469 (Fla. 1st DCA Feb. 17, 1989). At any rate, Appellant has raised the point that his counsel were rendered less than fully effective by the trial court's ruling, at pages 29-30 of Appellant's initial brief.

Finally, the State's argument that Appellant, in effect, waived the insanity defense by failing to cooperate with Dr.Coffer raises the issue of whether such a waiver must be shown to have been the free and voluntary choice of the defendant himself. In People v. Gettings, 530 N.E.2d 647 (Ill. 4th DCA 1988) the court held that a trial judge must conduct a colloquy with the defendant to establish that any waiver of a potentially viable insanity defense is made voluntarily and intelligently by the defendant himself. There is nothing in the record of Appellant's case to demonstrate that the court below engaged in any type of discussion with Appellant himself to make certain that Appellant understood the consequences of his refusal to be examined by Dr. Coffer, or to ascertain that Appellant freely and voluntarily engaged in the course of conduct which resulted in a court ruling that he had, in effect, "waived" the defense of insanity. Such a discussion was especially needed here in light of Appellant's borderline intelligence. (R755, 874)

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.

Appellee concedes at page 18 of its brief that Appellant unequivocally expressed a desire to cut off questioning, but argues unconvincingly that this invocation of Appellant's right to remain silent pertained only to Deputy McNulty, and not to Deputy Wilbur. However, State v. Belcher, 520 So.2d 303 (Fla. 3d DCA 1988), which was discussed in Appellant's initial brief at pages 40-41, indicates that when the defendant invokes his right to remain silent as to one officer, he is invoking the right as to other officers as well. The Belcher court was not merely giving deference to the presumption of correctness that is due to the trial court's ruling on a motion to suppress, as Appellee suggests. If that was all that was involved in Belcher, a per curiam affirmance would have sufficed, or perhaps a one-paragraph opinion.

In Kyser v. State, 533 So.2d 285 (Fla. 1988), which was mentioned on page 41 of Appellant's initial brief but not discussed, a Detective Miller began questioning the in-custody defendant about a shooting in Panama City. Kyser said, "'Can we talk about something else, I think I want to talk to a lawyer before I talk about that and I hope you understand that.'" 533

So.2d at 286. Questioning was discontinued at that point. However, Kyser was later interrogated by other detectives who had no knowledge of his desire to remain silent and to have a lawyer, and Kyser made incriminating statements which were used against him at trial. The appellate court reversed, holding that Kyser's statements should have been suppressed.

Similarly, in Arizona v. Roberson, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 704 (1988), which was also mentioned at page 41 of Appellant's initial brief but not discussed, the defendant told the arresting officer he wanted a lawyer before answering any questions about a particular burglary. A few days later the defendant was being questioned by a different officer, who did not know of his request for counsel, about a different burglary, when the defendant made an incriminating statement as to the first burglary. In holding that this statement was properly suppressed, the United States Supreme Court "attach[ed] no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel." 100 L.Ed.2d at 717. The Court stressed the need for police procedures which will assure adequate communication concerning invocation of rights by the accused.

To the extent that Appellee may be arguing that Appellant meant that he did not want to talk to McNulty instead of that he did not want to talk to law enforcement authorities when he said, "I am not saying nothing to you" or "I don't want to talk no more," McNulty's own testimony suggests otherwise. After Appellant said

to McNulty, "besides you ain't read me nothing" or "besides you haven't read me anything," McNulty told Appellant that he was mistaken, that Detective Wilbur had read Appellant his rights at the motel. (R133) This shows that McNulty interpreted the "you" spoken by Appellant as plural, encompassing both Wilbur and McNulty.

If there was any question about whether Appellant did not want to talk to McNulty, or did not want to talk to any deputy, then further interrogation should have been limited to clarifying this ambiguity. See cases cited at page 39 of Appellant's initial brief.

Even if Appellee is completely correct that Appellant only wanted to stop the interrogation by McNulty, and not by Wilbur, McNulty did not stop, but continued to ask Appellant questions both immediately after Appellant invoked his right to remain silent, and later during Wilbur's interrogation session. (R135, 141) Thus Appellant's right to cut off questioning was not scrupulously honored, as the Constitution requires. See cases cited at page 39 of Appellant's initial brief.

At page 19 of its brief Appellee urges this Court to "defer to the trial court as the factfinder" on the issue of whether Appellant's right to remain silent was violated. However, the trial court made no findings whatsoever regarding whether this right had been violated, and so there is nothing to defer to. The court below denied Appellant's motion to suppress and expressed satisfaction that the statement Appellant made was free and

voluntary, but said nothing about the violation of his right to halt the interrogation. (R169, 1481)

On the issue of the voluntariness of Appellant's confession, Appellee attempts to do what Deputies McNulty and Wilbur did: violate Appellant's right to remain silent. At pages 19, 20, and 22 of its brief Appellee questions why Appellant did not "take the stand" at his suppression hearing to establish that he was coerced into confessing. Why should Appellant have taken the stand? It was the State's burden of proof to show that any admissions were freely and voluntarily made by Appellant. See cases set forth on page 42 of Appellant's initial brief. It was not Appellant's burden to prove anything.

At page 20 of its brief Appellee makes much of the fact that Deputy Wilbur testified that Appellant embraced Wilbur after Eugene Christian's body was found. Appellee queries, "Does a weeping embrace lead to a conclusion that Appellant was afraid Wilbur was going to kill him?" It must be remembered that, according to Rosa Mae Thomas, Wilbur threatened to kill Appellant <u>if they did not find the boy</u>. (R145) Once Eugene was found, the condition precedent to Wilbur carrying out the threat could not exist, and so Appellant no longer had to fear the death threat.

Appellee finds it "paradoxical" that Appellant's confession was induced by both threats and promises. (Brief of Appellee, p. 20) There is nothing paradoxical about it. Alternately wielding a "stick" and dangling a "carrot" is a well-known technique for obtaining confessions.

At pages 20-21 of its brief Appellee discusses several cases cited by Appellant in his initial brief, and then says that each of the cases "demonstrates an extreme example of the sort of coercion or promises that deserve outright reversal." (Brief of Appellee, p. 21) One of the cases to which Appellee refers is 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). In Fullard the court held the following remark by a detective to a burglary suspect to constitute an implied promise that the suspect would not be prosecuted if he confessed: "'[I]f I get the lawn mower back there won't be any problem.'" 352 So.2d at 1271. This remark is very similar to Detective Wilbur's statement to Appellant that there was no problem, he just needed to find Eugene. (R86) If "outright reversal" was "deserve[d]" in Fullard, then it is equally deserved here.

On the matter of the totality of the circumstances which surrounded the making of Appellant's confession, and affected the voluntariness thereof, Appellant would note, in addition to the facts mentioned in his initial brief, that he was handcuffed to a chair, with one hand free, during the hours he was being interrogated at the Pasco County Sheriff's Office. (R78)

Appellant would also ask the Court to consider Smith v. Zant, 855 F.2d 712 (11th Cir. 1988), in which the court concluded that the petitioner did not intelligently waive his Miranda[2] rights

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

because he was mentally retarded (with an IQ of 65), and under stress. Appellant here was of borderline intelligence, with a 78 IQ, and was also under stress (R755, 874, 1232-1234, 1242-1243, 1263, 1282-1283, 1286, 1290), thus calling into serious question his capacity to knowingly waive his rights and give a free and voluntary confession.

ISSUE III

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

Appellee says at pages 25-26 of its brief that the rule of Williams v. State, 110 So.2d 654 (1959) is different from section 90.404(2)(a) of the Florida Statutes. Appellee is wrong. As this Court noted in Peek v. State, 488 So.2d 52 (Fla. 1986), section 90.404(2)(a) codifies the Williams Rule. 488 So.2d at 54, footnote 2. The statute and the Williams Rule therefore are the same.

Appellee asserts at page 25 of its brief that collateral crime evidence is admissible if it is relevant to a material issue, and "it does not matter that it also tends to demonstrate the defendant's propensity for crime or that it places his character in evidence." However, collateral crime evidence is not automatically admissible merely because it is relevant; even relevant evidence is inadmissible

> if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or

needless presentation of cumulative evidence.

§ 90.403, Fla. Stat. (1987).

This Court has recognized that collateral crime evidence requires "special treatment" because it has a particular tendency to prejudice the jury against the accused and divert the jury's attention away from focusing upon the defendant's guilt or innocence of the crime charged. Craig v. State, 510 So.2d 857, 863 (Fla. 1987). This type of evidence is thus especially likely to qualify for exclusion under section 90.403 of the Florida Statutes.

Appellee's contention that Appellant has not raised "the issue of just plain prejudice" (Brief of Appellee, p. 31) is demonstrably incorrect. Apparently, Appellee failed to read page 52 of Appellant's initial brief.

At page 29 of its brief Appellee asks if it is not the "height of illogic" for Appellant to suggest that Eugene Christian would not have been able to identify Appellant if called as a witness. Appellant suggested no such thing. Appellant merely indicated that very young children may not qualify as competent witnesses, see Bell v. State, 93 So.2d 575 (Fla. 1957), Arencibia v. State, 14 F.L.W. 624 (Fla. 3d DCA March 7, 1989), Davis v. State, 348 So.2d 1228 (Fla. 3d DCA 1977), and the record does not reflect that Eugene would have had sufficient maturity, understanding of what it means to take an oath and to tell the truth, etc. to enable him to testify at Appellant's trial.

Appellee basically argues that the killing of Suzanne Henry was relevant to the issue of premeditation and motive in the killing of Eugene Christian. These two concepts go hand-in-hand. If Suzanne Henry's homicide did not establish a motive, then it likewise did not establish premeditation. Presumably, the elimination of Eugene Christian as a witness to the Suzanne Henry homicide is the motive to which Appellee refers. But, as discussed in Appellant's initial brief, there is nothing in the record that establishes that Eugene saw or heard anything when his mother was killed; he was in another room watching television. (R603, 751)

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.

Appellee says that "Appellant appears to be arguing a position that allows him to benefit from his crime," because Appellant has raised the insufficiency of the evidence to establish a kidnapping. (Brief of Appellee, p. 35) This is absurd. Appellee has apparently forgotten that it was the State's burden to prove the elements of kidnapping, regardless of whether the alleged victim of the kidnapping, Eugene Christian, was deceased.

Also on page 35 of its brief, Appellee contends that Suzanne Henry's neighbor, Marion Crooker, "may not have heard the Appellant order [Eugene Christian] to remain seated under the threat of losing life or limb." Appellee engages in pure

speculation. There was no evidence whatsoever adduced at Appellant's trial to show that he threatened Eugene in any way, shape, or form.

Based upon its argument at pages 37-38 of its brief, it appears that Appellee desires a definition of "confinement." "Confinement" means:

> State of being confined; shut in; imprisoned. Confinement may be by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person.

BLACK'S LAW DICTIONARY 270 (5th ed. 1979).

"Confined" means: "Imprisoned; required to remain in one place." BALLENTINE'S LAW DICTIONARY 245 (3d ed. 1969).

The evidence presented below failed to establish that Eugene was involuntarily prevented from moving freely from place to place, which is the essence of the definitions quoted above.

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.

State v. Colbert, 522 So.2d 436 (Fla. 2d DCA 1988), cited by Appellee at page 40 of its brief, is not on point. In Colbert, the testimony which the jury wanted to rehear could not be read at the time, late on a Friday afternoon, because there had been a change in court reporters. The jury had already reached a decision on three of the four counts against the defendant. The question was whether a mistrial was required, or whether the trial court was correct in giving a modified Allen charge[3] to the jury. The district court of appeal held that the trial court acted properly in giving the Allen charge.

Appellant would also point out that neither Colbert, nor the other cases cited by Appellee in support of its position, Green v. State, 414 So.2d 1171 (Fla. 5th DCA 1982) and Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976), were cases in which the death penalty was imposed.

At page 41 of its brief Appellee emphasizes that Juror Epps was concerned about the time frame involved in premeditation. Appellee conveniently ignores the fact that Epps was concerned with other matters as well. Besides not believing the killing was premeditated, she felt Appellant was not in his right mind when he

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[3] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

killed Eugene. (R1156-1157) She felt he really loved Eugene, but was not able to recognize the right and wrong of what to do. (R1157) She felt he just panicked and blacked out. (R1157) Yet despite her many misgivings regarding Appellant's mental condition, which may have been shared by other jurors, Epps ultimately agreed to convict Appellant of both premeditated and felony murder. (R1179) Perhaps if she had been given the opportunity to rehear and understand the testimony of the mental health experts, as requested, the verdict would have been different.

At page 43 of its brief Appellee says that "the trial court did not totally rule out the reading of the testimony," but "indicated that it would have the tesitmony [sic] read if the jurors were unable to reach a verdict that evening." Appellee goes on to say that the jurors "promptly returned their verdict" the next morning. This entire passage is misleading. When the court said he might have the testimony read if the jury could not reach a verdict, he was talking only to counsel, not to the jury; the jury was in the jury room. (R1147)[4] Furthermore, the jury did not reach a verdict that night, but when defense counsel renewed their request the next morning for the testimony to be read, the court did not accede to the request. (R1168) The fact that the jury may have returned their verdict after only a short additional period

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[4] The procedure the court used to respond to the jury's request, by note rather than having the jurors conducted into the courtroom, was itself a violation of Florida Rule of Criminal Procedure 3.410, and error. Hildwin v. State, 531 So.2d 124 (Fla. 1988).

of deliberations is irrelevant. They had all night to think about a verdict, and had already been told by the court that he would not honor their request to rehear the expert testimony of the mental health professionals.

The distinction Appellee attempts to make in its argument between factual matters that can be quickly and readily resolved by reading back testimony, and matters which are not capable of such expedient resolution, is untenable. The cases cited in the briefs do not explicitly hold that one type of testimony must be read back, while the other type need not be read back. Complex testimony such as that of the mental health experts herein is exactly the type of testimony which may require a second hearing to be fully understood.

Appellee says at page 42 of its brief that

> any reading of the testimony would have constituted an unnecessary delay that could only lead to further argument and confusion, rather than accurate fact-finding and resolution.

It is more likely that reading the testimony would have clarified matters for the jurors, rather than causing more confusion. They obviously thought so, or they would not have asked to hear it again. While the reading of the testimony would have caused a slight delay, this delay cannot accurately be termed "unnecessary" where a man's life is at stake!

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.

Appellee claims that the trial court gave an instruction "calling upon the jury to completely avoid considering the death of Suzanne Henry as an aggravating circumstance." (Brief of Appellee, p. 47) Appellant wishes Appellee had quoted this most definitive instruction in its brief. Apparently, Appellee's record on appeal differs from the record possessed by counsel for Appellant. In Appellant's record on appeal, the only instruction the court gave the jury at penalty phase regarding the Suzanne Henry homicide was a follows (R1326):

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

Far from directing the jury "to completely avoid considering the death of Suzanne Henry as an aggravating circumstance," the above instruction seems to encourage the jury to consider the death in conjunction with one or more other aggravating factors; certainly a reasonable juror could draw this inference. See Mills v. Maryland, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 384 (1988). If Appellee is actually aware of some other charge the court gave to the jury at penalty phase that truly removed the Suzanne Henry homicide from the jury's consideration as an aggravating circumstance, this should be brought to the attention of the court so that the record may be supplemented and/or corrected.

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.

Once again Appellee improperly criticizes Appellant for exercising his right to remain silent. (Brief of Appellee, p. 49)

Appellee also once again seems confused as to which party bears the burden of proof. At penalty phase the State is required to establish aggravating circumstances beyond a reasonable doubt by producing evidence, not speculation. See Johnson v. State, 438 So.2d 774 (Fla. 1983).

At page 50 of its brief, Appellee refers to Eugene Christian being "partially buried by tall grass and undergrowth when the officers found him." If Appellee is implying that Appellant partially buried Eugene to conceal his body, there is no support whatsoever in the record for such an implication. After stabbing Eugene, Appellant hugged him, then merely laid him down and began walking. (R605-606)

Appellee also incorrectly states at page 50 that Appellant drove his car to Zephyrhills. In fact, he drove to Plant City. (R603)

Where the facts that are known are susceptible to other conclusions than that an aggravating circumstance exists, that

circumstance will not be upheld. Peavy v. State, 442 So.2d 200 (Fla. 1983). This principle certainly applies to all three of the aggravating circumstances Appellant has challenged on appeal.

ISSUE X

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

Appellee attempts to have its cake and eat it too. In its discussion of Issue III the State emphasized how closely intertwined were the killings of Eugene Christian and Suzanne Henry. In its discussion of this issue the State takes exactly the opposite position, arguing that the connection between the two was so geographically and temporally attenuated that the killing of Eugene cannot be said to have arisen from the domestic dispute between Appellant and his wife. However, the fact remains that but for the homicide of Suzanne Henry, which resulted from her argument with Appellant, Eugene Christian would not have been killed.

With regard to Appellant's low IQ as qualifying him for a sentence less than death, in addition to the cases cited in Appellant's initial brief, he would refer the Court to Livingston v. State, 13 F.L.W. 187 (Fla. March 10, 1988). Although Livingston's jury recommended that he be put to death, this Court held death not to be an appropriate penalty for him, citing, among other factors in mitigation, Livingston's marginal intelligence.

CONCLUSION

Appellant, John Ruthell Henry, renews his prayer for the relief requested in his initial brief.

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 5th day of April, 1989.

Robert F. Moeller
ROBERT F. MOELLER

RFM/an