IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY, :

Appellant, :

vs. :

STATE OF FLORIDA, :

Appellee. :

Case No. 70,816

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

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

On January 16, 1986, a Pasco County grand jury indicted the Appellant, JOHN RUTHELL HENRY, for the first-degree murder of Suzanne E. Henry. (R.1253-54) On February 28, 1986, the State filed a Notice of Intent to Use Evidence of Other Crimes Committed by the Defendant. The other crimes were the alleged kidnapping and subsequent death of Eugene Christian on December 22, 1985, and the stabbing of Patricia Roddy on August 19, 1975. (R. 1266-67)

On April 9, 1987, defense counsel filed a Motion to Exclude Use of Evidence at Trial of Other Crimes Committed by the Defendant, alleging that none of the crimes cited by the State came within the purview of section 90.404(2)(a) of the Florida Statutes or were relevant to any issue before the court. (R. 1362) Defense counsel also filed a motion requesting a pretrial determination of the admissibility of this evidence because, without such a determination, defense counsel would be unable to effectively voir dire prospective jurors concerning their knowledge of these offenses and whether it would preclude potential jurors from being fair and impartial. (R. 1363-64) Following a pretrial proffer of Williams Rule testimony (R. 1425-1531) and a hearing on the motions (R. 1036-50), the trial court declined to make a pretrial ruling in the matter. (R. 1049-50)

On July 15 and September 25, 1986, defense counsel filed motions to suppress statements and admissions made by the defendant subsequent to his arrest. Grounds for the suppression were that (1) the Appellant, John Henry, was under the influence of cocaine and did not knowingly waive his right to remain

silent; (2) prior to such statements, an officer of the Pasco County Sheriff's Department advised Henry that if they did not find Eugene Christian, the officer would personally kill Henry; (3) the officers implied to the Appellant that all they were interested in was locating Eugene Christian; and (4) the statements were induced and/or coerced after Henry had advised that he wished to exercise his right to remain silent. (R. 1275, 1299) Following a hearing on September 30, 1986 (R. 1053-1248), the court denied the Appellant's motions to suppress, finding that the statements were made freely and voluntarily. (R. 1200, 1325)

John Henry was tried by jury April 20 through 24, 1987. During the trial, the judge reaffirmed his pretrial ruling admitting Henry's statements and admissions. (R. 600) He found that the collateral crime evidence concerning the death of Suzanne Henry's son, Eugene Christian, was admissible both as "res gestae" and pursuant to section 90.404 of the Florida Evidence Code, as evidence pertaining to motive, knowledge, identification, lack of mistake and intent. (R. 584-86) Following the State's case, the defense rested and moved for judgment of acquittal as to the first-degree murder charge. The motion was denied. (R. 698-99) On April 22, 1987, the jury found Appellant guilty as charged. (R. 1366, 1398)

The penalty phase of the trial commenced on the following day. (R. 1372-74) Defense counsel requested that the court instruct the jury to consider as mitigation (1) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) that the capacity

of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (3) any other aspect of the defendant's character or record and any other circumstance of the offense; and (4) that a recommendation of life imprisonment may be made even in the absence of proven mitigating circumstances. (R. 864) The State objected to the fourth requested instruction and the court refused to give it. (R. 866) The court instructed on the first three statutory mitigators. (R. 990-91)

The State requested as statutory aggravating factors that (1) the defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person; (2) the capital felony was especially heinous, atrocious or cruel ("HAC"); and (3) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification ("CCP"). (R. 867, 990) Defense counsel argued that instructing on both CCP and HAC would be impermissible doubling, or making two aggravating factors out of the same facts. (R. 867) He also objected to the giving of these two aggravating factors because neither were established by the evidence. (R. 867-867) The court overruled the objections (R. 878) and instructed on the three aggravating factors. (R. 990) The jury recommended death by a vote of twelve in its advisory opinion rendered on April 24, 1987. (R. 1402)

At sentencing on May 8, 1987, the judge sentenced John Henry to death by electrocution. (R. 1417-18) Written findings supporting the death sentence were filed on May 21, 1987. The trial court found three aggravating factors and found or at least

assumed three mitigating factors. (R. 1411-14)

The aggravating factors found were that (1) the defendant was previously convicted of another capital felony or felony involving the use or threat of violence; (2) the capital felony was especially heinous, atrocious or cruel; and (3) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The mitigators were (1) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) any other aspect of the defendant's character or record and any other circumstance of the offense. (R. 1409-14)

Defense counsel's Motion for New Trial (R. 1405-06) was denied May 12, 1987. (R. 1419) On July 2, 1987, John Ruthell Henry filed a Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Rule 9.030(a)(1)(A)(i) of the Florida Rules of Appellate Procedure. (R. 1420)

STATEMENT OF THE FACTS

A. GUILT PHASE

John and Suzanne Henry were married on October 31, 1983. Suzanne's five year old son, Eugene Christian ("Buggie"), lived with them. (R. 472, 638) Bonnie Cangro, Suzanne's sister, testified that, although John Henry and Buggie were not related, he and the child were very close -- like father and son -- and John Henry took the child everywhere with him. (R. 487-88, 495)

She described John and Suzanne Henry's relationship as "rocky." (R. 495) Once when Bonnie was present, Suzanne threatened John Henry with a knife because he tried to prevent her from going after someone else with it. Suzanne told Bonnie that she threatened her husband with a knife on another occasion. (R. 498-99) Bonnie said that John would sit on Suzanne's stomach and put his knees on her shoulders so she couldn't fight back. (R. 501)

Bonnie admitted that Suzanne was a tough person, fairly "good-sized" physically, who didn't take much guff from anyone. (R. 500) Her sister Dorothy concurred, adding that Suzanne was likely to get into physical fights when aggravated and would use a weapon if threatened. (R. 508-09) She was not afraid to fight back. In fact, Dorothy had seen Suzanne start a fight and threaten someone with a gun on more than one occasion. (R. 510)

John Henry was not living at the house at the time of Suzanne's death. (R. 474) He had not lived there for about one to three weeks. (R. 608, 855) A neighbor had earlier heard Suzanne Henry tell her husband, "I want you to get your Goddamn clothes out and stay the fuck out of my house." (R. 480, 485-86)

John Steven Mathis testified that on Sunday, December

22, 1985, he saw John Henry with Nathan Giles at Grant's place in Zephyrhills sometime between 12:00 and 3:00 in the afternoon. (R. 558, 561, 564) Henry borrowed or took his car, a 1978 Chevrolet with a small spare tire on one wheel. (R. 558-61, 564-65) Mathis observed that John Henry was smoking crack cocaine. (R. 564)

Suzanne's sister Dorothy testified that about 1:00 p.m. on that Sunday, December 22, 1985, John Henry stopped by the Presto convenience store where she was working. He bought a beer and asked if she had seen Suzanne. Dorothy told him she'd seen her husband taking Buggie home, so Suzanne must be home. (R. 507)

At about 11:00 or 11:30, Ray McAdams, who lived across the street, noticed a car pull up in front of the Henrys' house. A black male got out of the car, knocked on the door, and was admitted. Mr. McAdams could not identify him. (R. 476-478)

Marion Crooker, who lived next door, observed an old blue, green, or gray chevy outside the house about 1:00 to 2:00 that same afternoon. The car had a small space saver tire on one wheel. He saw Suzanne Henry's five year old son sitting in the car. (R. 480-82) He then saw a black person get in the car, throw something in the back, and drive away. (R. 482-84) He was not able to recognize the person who got into the car. (R. 484)

Suzanne also worked at a Presto convenience store. (R. 489) Her sister Bonnie always called to make sure that Suzanne got to work all right. When she called around 12:30 a.m. that Sunday night, Suzanne had never arrived at work. (R. 489) When Bonnie went to Suzanne's house, a light was on in the bedroom and she could hear the TV but the doors were locked. She returned in

the morning around 8:30 and found everything the same. (R. 490) About 3:00 Monday afternoon, she went back with the key and opened the door. (R. 490-91) She found her sister lying under a blanket on the floor and blood on the wall. (R. 491)

Bonnie went to the Presto store down the street where her sister Dorothy worked. Dorothy called the police. The two sisters then went back to Suzanne's house. (R. 491, 506) They immediately started looking for Eugene but were unable to find him. (R. 492) Mr. Crooker then told them that Eugene's father had taken him the day before. (R. 492) The sheriff's deputy gave Bonnie Suzanne's purse but her jewelry was gone. (R. 496)

Dale Neuner, formerly employed as a deputy sheriff with the Pasco County Sheriff's Office, responded to the call on December 23rd. (R. 512-13) He determined that Suzanne Henry was dead, notified communications, and secured the crime scene. (R. 514-15) Detectives Bill McNulty and Fay Wilber arrived and took over the investigation. (R. 516-17, 588-91) They searched for Eugene Christian, but were unable to find him. (R. 588-592)

Deputy Ferguson arrived shortly thereafter and took photographs of the crime scene which he identified at trial. (R. 519-21) The photographs were admitted over defense objection. (R. 527-29) They showed the living room with Suzanne Henry lying on the floor by the couch covered with a blood-drenched rug; blood splattered on the walls and photograph albums; and a Christmas tree. (R. 522-24) Other photographs showed Suzanne's body after the rug was removed. (R. 525) Photographs of Suzanne's head and torso taken at the autopsy were introduced to show the stab wounds in the shoulder and neck area. (R. 538) Over defense

objection, a video-tape taken and identified by Kenneth Locke, a crime scene technician, was played for the jury. (R. 545-56)

Ferguson identified a knife holder that was on the kitchen wall. One knife was missing. (R. 530-31) Wilber testified that they were unable to find the missing knife. (R. 591-92)

Rosa Mae Thomas testified that John Henry stayed at her house on Saturday night, December 21, 1985. (R. 566-67) On the following Monday night, about 8:00 p.m., he arrived at her house hungry. (R. 567) She fixed him some chili. Because he was tired and hungry, she knew he had been using cocaine. (R. 566)

John Henry invited Rosa to spend the night in a motel. She got some extra clothes for him and they started walking. John's brother, Willie Fred Henry, picked them up en route and drove them to the Florida Plaza. Because they did not have enough money to stay there, they finally stayed at the nearby Twilight Motel. (R. 569) John showered, changed clothes, and went to sleep on the bed. (R. 570)

Detective Wilber testified[1] that, after talking to John

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[1] In anticipation of a ruling on the admissibility of Williams Rule evidence, Detective Wilber testified out of the presence of the jury that it would be impossible to adequately describe the investigation leading to the arrest of John Henry, or his statements regarding the death of Suzanne Henry, without involving the death of Eugene Christian some nine hours later. (R. 579-82) The admissibility of this evidence was previously argued at a pretrial hearing, at which defense counsel requested a pretrial ruling so he could effectively voir dire prospective jurors concerning their knowledge of the death of the child. (R. 1036-50) The court denied the motion because a pretrial ruling would only be advisory and could change at trial. (R. 1049-50) At trial, the court found the evidence admissible under the res gestae theory and as Williams Rule evidence pertaining to motive, knowledge, identification, lack of mistake and intent. (R. 584-86)

Henry's brother and making several telephone calls, he and Detective McNulty located John Henry and Rosa Mae Thomas at the Twilight Motel. (R. 575-76, 594-95) Rosa Thomas answered the door. Detective Wilber identified himself and asked Henry to come out. (R. 596) Wilber advised him of his Miranda rights. Henry did not appear to be under the influence of any narcotics. (R. 597-98) He said he understood his rights and wished to talk to them.[2] (R. 599)

Wilber said that the primary concern at that time was to find Eugene Christian. (R. 599) He asked John Henry if he knew the child's whereabouts.[3] Henry said he did not. (R. 600) They then transported the Appellant to the sheriff's office in Dade City. His wet clothes, found hanging on the shower curtain rod in the bathroom, were taken into evidence. (R. 601-04)

John Henry was interviewed at the sheriff's office. (R. 604) One hand was handcuffed to a chair. (R. 607) Wilber provided coffee and cigarettes.[4] (R. 605) About 2:10 a.m., Wilber

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[2] The judge instructed the jury that the evidence they were about to receive concerning other crimes allegedly committed by the defendant should be considered only for the limited purpose of proving motive, intent, knowledge, identity and/or the absence of mistake or accident, and that the defendant was not on trial for a crime not included in the indictment. (R. 599)

3. Defense counsel objected, thus renewing his pretrial motion to suppress the Appellant's statements, on the basis of voluntariness. The court again denied it. (R. 600)

[4] Wilber said Henry had some cigarettes of his own. They were More cigarettes. A More cigarette butt was found in an ashtray on the rug on top of Suzanne Henry's body. (R. 606-07) This became significant when the prosecutor argued to the jury in both the guilt and penalty phase closings that John Henry sat and smoked a cigarette while he watched his wife die. (R. 731, 965)

again advised Henry of his rights. (R. 607) Henry continued to deny any knowledge of Eugene's whereabouts. He said he had not lived with Suzanne for about a week but had been back to visit Eugene about three times. He stopped at her house a little before noon on Sunday but no one was home. (R. 609)

Detective Wilber was called out of the room and was gone for more than an hour, returning about 4:15 to 4:30 a.m. He again questioned Henry about Eugene. (R. 609) Henry denied any knowledge until almost 5:00 a.m. (R. 610)

At that point, Detective Wilber started to leave the room to get more coffee or something. He admitted on cross-examination that he was frustrated and said something like "John, if you don't want to talk about it, you know, piss on it. I'm going to go out. I'm going to find him somehow. I've got to." (R. 643) As Wilber put his hand on the door knob, Henry told him not to leave. He then said the boy was in the Knights Station area of Plant City and that Eugene was not alive. (R. 610-11)

John Henry accompanied Detectives Wilber and McNulty to Plant City. Wilber drove and McNulty was in the back seat. (R. 611-12) Officers Brady and Troy followed in another car. (R. 612) Henry directed them to turn at a flea market, then onto a dirt road at a chicken farm in a remote farming area approximately twenty miles from Dade City. (R. 614, 617) Henry directed them around to the back of the chicken farm where the car he had abandoned was stuck in the mud by a holding pond.[5] (R. 614-15)

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[5] The State introduced into evidence a photograph of the car stuck in the mud by the holding pond. (R. 615-16)

John Henry pointed out the area in which Eugene's body was located and Officers Brady and Troy commenced to search for him. Henry told Detective Wilber that he took Eugene out of the car, put him over a fence, and they walked through a pasture. (R. 619) He put Eugene over a second fence and they started walking again. (R. 619-20) When Henry thought he heard cars on the road, he and Eugene sat down and talked for awhile. (R. 620) When Wilber asked how he killed Eugene, Henry said he stabbed him with a knife, indicating the neck area. (R. 621)

While other detectives were searching, Detective Wilber and John Henry remained in the car. (R. 617-19) After awhile, Henry suggested to Wilber that they go over to a road on the north end of the property. They did so and were able to locate a canal. Henry told Wilber to stop there, that they could find Eugene about a hundred yards off the road and about ten to fifteen feet from the canal. (R. 619-20)

McNulty got out of the car and started looking for the body. Wilber and Henry stayed in the car and continued to talk about the events leading up to the stabbings. (R. 621-23) After they had been at that location for about an hour, the officers returned to the car. Wilber then suggested to Henry that they go find Eugene. Henry said "No, I can't." He said the other officers would beat him. (R. 625) After Wilber assured him this would not happen, Henry agreed to look for Eugene. (R. 625)

They got out of the car and went through dense shrubs and trees along the canal. By the time they came to where Henry said the body should be, it was starting to get daylight. Wilber proceeded another fifteen or twenty feet and spotted two small

feet in the bushes. (R. 626)

Detective Troy testified that he observed the child's body when it was found. The child was clothed and lying on his stomach. Detective Troy saw no blood around the child's body. (R. 660) He did not lift the body to look underneath it. (R. 661)

Detectives Wilber and McNulty and John Henry returned to Dade City. They stopped en route to buy More cigarettes and coffee for John Henry. (R. 626-27) When they arrived back at the sheriff's office, Henry told Wilber the whole story. (R. 627-28)

John Henry went to Suzanne's house to see if she would let him buy some Christmas presents for Eugene. Although he was nice to her, Suzanne was not nice. She was mad about Rosa and did not like him living with another woman. She started yelling and screaming and ordered him out of the house. When he didn't leave, she got a knife off the wall in the kitchen and threatened him with it. They started "tussling" and she cut him three times on the left arm.[6] Henry "freaked out." He got the knife from her and they fell on the sofa. At some point they fell on the floor in front of the sofa. He did not know how many times he stabbed her. (R. 623, 628-29, 632-33)

Dr. Joan Wood, the medical examiner, testified that Suzanne Henry died from multiple stab wounds to the larynx, voice box, trachea, windpipe and major vessels of the neck. (R. 692)

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[6] Over defense objection that he was not qualified as an expert in wound identification, the court permitted Wilber to testify that the three wounds on Henry's arm looked like scratches caused by briars or shrubs and that Eugene's body was found in an area where there were many shrubs and briars. (R. 629-31)

She found six stab wounds to the right side of the neck, one stab wound to the middle of the neck, four stab wounds to the left side of the neck, one over the back of the left jaw and one over the left shoulder. There were bruises on the neck, face, shoulder, knuckle, arm and inner leg. (R. 682-84)

The wounds to the left side of the neck slanted down and to the right and those to the right side of the neck slanted down and to the left. The wound in the middle of the neck went nearly straight back. (R. 688) Dr. Wood found no defensive wounds caused by the knife. (R. 689)

She could not determine the order in which the wounds occurred. (R. 690) In general, she thought that Suzanne would have become unconscious after three to five minutes and would have died in five to ten minutes. (R. 691) Loss of consciousness would have been progressive. (R. 695) Dr. Wood admitted that, depending on the order the wounds were inflicted, some of her conclusions might change. (R. 691)

John Henry told Detective Wilber that Eugene was in the bedroom watching TV and did not see anything. Henry covered Suzanne with a rug so Eugene would not see the blood. He went to the bedroom and carried Eugene out of the house, putting his head down in his shoulder so he wouldn't see his mother. (R. 628, 633)

Henry took Eugene to Plant City and bought him food and a coke. He bought cocaine (R. 633), and started back toward Zephyrhills. Just before the flea market, he saw flashing lights and thought someone was following him, probably the cops. (R. 634) He turned onto another road because he did not want to be stopped. He then turned into the chicken farm where he got the

car stuck. (R. 634) He carried Eugene over a fence, let him walk through a pasture, put him over a second fence and went to the area where they sat down. He thought he heard people talking. He smoked some cocaine. Eugene was lying in his lap. He took the knife and stabbed Eugene in the neck.[7] It did not take long for him to die. Before he laid Eugene down he put the knife to his throat to kill himself so that he and Eugene could be with Suzanne. (R. 635) He couldn't do it. (R. 637)

Henry reported that these events occurred between 9:30 and 11:30 p.m. in the evening. (R. 621) After stabbing Eugene, he got up and walked out into a field where he dropped the knife. He walked around a while and finally made it back to State Road 39. He walked to Rosa Mae Thomas's house in Zephyrhills, a distance of about ten or fifteen miles. (R. 623-24, 637, 639) John Henry did not arrive at Rosa's house until the next day after dark. (R. 637)

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[7] Wilber testified that there were four or five knife wounds in the same area of Eugene's neck. (R. 636) Over defense objection, the prosecutor introduced into evidence a photograph of Eugene Christian, taken at the autopsy. (R. 657) He said the photograph was introduced to show the location of the stab wounds and that they were stab wounds. Defense counsel observed that the location was not "identical." The court overruled his objection that the photograph would do nothing more than additionally inflame the jury. (R. 657) Upon request by defense counsel, the court gave a cautionary instruction concerning the limited use of the evidence. (R. 658)

B. PENALTY PHASE

Deborah Fuller was thirteen years old in August of 1975.[8] She testified that she lived in Dade City with her grandmother. Patty Roddy and her two children who were about four and two years of age lived with them. (R. 793, 796) Patty was getting a divorce from John Henry. (R. 797)

One day, John Henry came over and brought Patty some clothes. Patty walked out to the car with him. (R. 797-99) Deborah and her grandmother saw Henry pull Patty to the car.[9] Deborah called the police. When she returned to the door, Henry and Patty were struggling and Patty screamed. Patty's two children got in the car and were screaming. Deborah could hear John Henry hitting Patty in the chest. (R. 800) Henry got out of the car and walked away. (R. 801)

They tried to get Patty out of the car but couldn't. Deborah got a towel and started "dabbing up" the blood. The police arrived and Patty was dead. (R. 801) Dr. Joan Wood, the medical examiner, testified over defense objection that the autopsy report of Dr. Skinner, the now deceased medical examiner, indicated that the cause of Patricia Roddy's death was multiple

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[8] Defense counsel objected to the introduction of witness testimony concerning the events surrounding the Appellant's 1975 conviction for the second-degree murder of his first wife. He argued that, because the death penalty statute did not contemplate anything more than a certified copy of the conviction, testimony would be an improper non-statutory aggravating factor. The court overruled his objection. (R. 794-95)

[9] Gloria Nix, a neighbor, testifed that the grandmother had since died. (R. 801-02) She also testifed about the stabbing of Patricia Roddy. (R. 801-05)

stab wounds. There were thirty wounds on the head, face, neck, chest, hand, wrist, and arm. (R. 809-10)

Detective Wilber testified that he arrested John Henry for the stabbing of Patricia Roddy in 1975. He found Henry at his sister's residence. (R. 813-14) Henry came out of the woods with his hands up and said that he was the one Wilber was looking for. (R. 818) Although Wilber intended to await the arrival of the Dade City police, Henry advised him that for his safety he should get out of the area because there were other people in his sister's residence. Wilber and Henry left the area. (R. 818-19) Wilber believed that Henry may well have protected him from possible harm. (R. 819)

Wilber also testified, over defense objection, that he was in Tampa, Florida on April 15, 1987. He was present when John Henry was adjudicated guilty and sentenced for the murder of Eugene Christian. (R. 816)

Defense counsel called Nathan Giles, Jr. who testified that he saw John Henry about noon on December 22, 1985, at Grant's Pool Hall in Zephyrhills. (R. 841-44) He gave Henry $2.00 to give to John Mathis for oil, so that they could use his car to go to the store. (R. 843) John Henry said that he would be right back and disappeared behind the building. When he didn't return after ten or fifteen minutes, Giles went behind the building and found John Henry smoking crack cocaine. (R. 844) Henry's niece had some crack in her hand also. (R. 845)

They got in the 1978 Chevrolet that Henry had borrowed from Mathis, but Henry was not able to control the car. He could not keep it on the road. After a mile or so, Giles asked Henry to

stop at the Presto store so that he could go to the bathroom. When he did, Giles did not return because he didn't want to ride any further with Henry. He never saw John Henry again. (R. 846)

Rosa Mae Thomas testified that John Henry had been living with her for about three weeks on December 22, 1985. (R. 855) During that time, Henry used cocaine three or four times a day when he had money. (R. 856-57) After using cocaine on a daily basis for awhile, he would go to sleep for about three days. (R. 857) She saw him use cocaine more than once on the day before the stabbings and on the day before that. (R. 858) Sometimes Suzanne gave him money to buy cocaine. (R. 860) He spent whatever money he could get to buy it. (R. 859)

After the defense lay witnesses had testified, defense counsel advised the judge that the Appellant wanted to raise an issue with the court directly. (R. 878) John Henry told the judge that he did not feel he was being properly represented, that he would like the court to remove Mr. Focht and to "recommend" another lawyer. He said Mr. Focht was not bringing certain matters to the court's attention and was not going into details with witnesses in his behalf. He said that Mr. Focht had not called witnesses that would have testified if asked, had not brought up things he had requested, and was partial toward the victim. (R. 873-74) The court denied his request without inquiry, advising Henry that Mr. Focht had used good strategy and had done a commendable job of representing him. (R. 874)

Dr. James A. Fessler, a psychiatrist, testified for the State that he examined John Henry on February 19, 1987. (R. 770-

71) He reviewed records of Dr. Walter Afield and Dr. Robert Berland, who had examined Henry earlier, and a deposition of Detective Wilber. (R. 772) He found long term alcohol and drug abuse and a low-grade schizophrenic illness manifested by hallucinatory experience. (R. 777-78) He did not believe Henry was so emotionally disturbed that he could not adequately appreciate the criminality of his behavior. (R. 787-88)

Another psychiatrist, Dr. Daniel J. Sprehe, also testifying for the State, interviewed John Henry for about an hour in February of 1987, after reviewing reports of Drs. Berland and Afield and Wilber's deposition. (R. 822-24, 831) It was his opinion that Henry was able to distinguish right from wrong at the time of the killing. (R. 828) He did not think Henry was suffering from any severe mental or emotional illness at the time and believed his was able to control his behavior. (R. 828-29) He found no mental illness. (R. 829-31)

Dr. Robert M. Berland, a forensic psychologist, testified for the defense that in October of 1987 he had interviewed John Henry for over four hours, and that he had done extensive psychological testing on him for five and a half hours. (R. 875, 878) He reviewed police reports, depositions in the case, and hospital records. He also interviewed one of Suzanne Henry's sisters who knew John Henry. (R. 879)

Dr. Berland performed the Minnesota Multiphasic Personality Inventory ("MMPI"), the Wechsler Adult Intelligence Scale ("WAIS"), the Rorschach ("Ink Blot Test"), and the Bender-Gestault. (R. 879) One purpose of the testing was to determine whether John Henry was faking mental illness or trying to

manipulate the results of the interview. (R. 880-81) His analysis showed that Henry was not deceptive and that the test results were genuine. (R. 886, 891-92) Dr. Berland did not believe Henry was smart enough to fake the MMPI. (R. 905, 921)

Dr. Berland determined that John Henry had been disturbed quite some time, that he suffered from major thought disorder or psychotic thinking, and that he had disturbed, unrealistic ideas in his head regardless of how he acted. (R. 886, 888) He found that Henry also had an affective disturbance. He was highly energized even though he had been in jail ten months. He showed an emotional or mood disturbance and character or antisocial problems. (R. 887) The WAIS showed no brain damage, indicating instead a genetically determined disorder, and a full scale IQ of 78, which is a borderline intelligence level. (R. 889-90) Dr. Berland's general diagnosis was that Henry had a "schizo affective disorder or bi-polar disorder." He was an "ambulatory or walking around psychotic," and could function in his daily life while entertaining really bizarre thoughts. Dr. Berland was satisfied that Henry had been psychotic since at least his late teens. (R. 892)

He said that these particular disorders cause paranoid thinking. (R. 893) Henry felt threatened by other people, that he was being followed, and had felt in particular danger from his deceased wife when she was alive. He was agitated and frightened when he knocked on her door the day of the stabbing and was frightened when she looked at him. (R. 901, 929-30) Dr. Berland said that Henry was among the small segment of the mentally ill

that are well-enough organized to hide most symptoms. (R. 893-94)

Dr. Berland testified that street drugs called psychoactive drugs, including alcohol, will make psychotic symptoms more severe. Cocaine (including crack) and amphetamines particularly tend to energize a psychotic person, make their delusions and hallucinations considerably more severe, and make it harder for them to control their impulses. (R. 894)

In Dr. Berland's opinion, John Henry's ability to conform his behavior to the requirements of law was substantially impaired at the time of the killing of Suzanne Henry. (R. 896) He said that Henry's disturbance was an extreme emotional disturbance. His diagnosis did not require the presence of cocaine. (R. 897-98, 932) He thought Henry did know the difference between right and wrong. (R. 928)

Dr. Walter Afield, a psychiatrist called by defense counsel, examined John Henry at the Hillsborough County Jail. (R. 935, 937) His diagnosis was that Henry had a rather severe problem with drug and alcohol abuse and was suffering from chronic paranoia. (R. 940) The level of illness was reasonably extreme. (R. 941) Prior to the stabbing, Henry had been seriously into alcohol and cocaine and was free basing cocaine. (R. 942) He agreed that Henry was not smart enough to be faking without his detection. (R. 943-94) In his opinion, at the time of Suzanne Henry's death, Henry was under the influence of extreme mental or emotional disturbance, with or without cocaine, and his ability to conform his behavior to the law was substantially impaired. He did know right from wrong, however. (R. 944-46)

The jury recommended death by a vote of twelve. (R. 995)

SUMMARY OF THE ARGUMENT

ISSUE I: The evidence of premeditation was circumstantial. The evidence relied upon by the State to prove this element was the medical examiner's testimony that Suzanne Henry had thirteen knife wounds. John Henry told Deputy Wilber that he stabbed his wife when he "freaked out" during an argument after she pulled a knife on him. His version was uncontradicted. Thus, the State introduced insufficient evidence to exclude every reasonable hypothesis of innocence of the element of premeditation. The trial court should have granted a judgment of acquittal as to first-degree murder and the charge should then have been reduced to second-degree murder prior to submission to the jury.

ISSUE II: The trial court admitted a myriad of collateral crime evidence concerning the Appellant's abduction and subsequent stabbing of his wife's five year old son, Eugene Christian. The evidence was admitted as part of the res gestae and as Williams rule evidence. Because it was not relevant to any material issue, the evidence should not have been admitted. Any probative value was substantially outweighed by danger of unfair prejudice.

ISSUE III: Defense counsel requested a pretrial ruling on the admissibility of the Williams rule evidence. The trial court refused to make a pretrial ruling. Therefore, defense counsel was unable to effectively voir dire prospective jurors concerning their ability to appropriately consider collateral crime evidence for its limited purpose, or concerning any bias that would cause them to automatically impose death if the defendant had killed a child. This violated Appellant's right to a fair, impartial jury.

ISSUE IV: The trial court erred by denying defense counsel's motion to suppress the Appellant's statements and admissions because they were not made knowingly and voluntarily. Appellant, who is psychotic and of borderline intelligence, was tired and coming down from a cocaine high. He made the confessions after Detective Wilber threatened to kill him and told him repeatedly that they were only interested in finding the child. Additionally, the detectives failed to cease interrogation when the Appellant advised that he no longer wanted to talk, thus violating his constitutional right to remain silent.

ISSUE V: During the penalty phase of the trial, the Appellant informed the judge that he was dissatisfied with his representation by court-appointed counsel. Specifically, he was displeased because his attorney did not present all of the lay witnesses and testimony he had requested. The trial court erred by summarily dismissing his complaint without conducting a Faretta inquiry or exploring the reasons for the Appellant's dissatisfaction. This was reversible error.

ISSUE VI: The trial court erred by finding that the homicide was cold, calculated and premeditated without pretense of moral or legal justification. The stabbing of the Appellant's wife occurred during a domestic dispute because Henry "freaked out." Furthermore, the Appellant had at least a pretense of moral and legal justification for the stabbing because his wife first threatened him with the knife. At least arguably, he killed her while defending himself.

ISSUE VII: The trial court erred by finding that the murder was heinous, atrocious or cruel. The victim lost consciousness within a few minutes. Her death was no more tortuous than most homicides. Additionally, the HAC aggravating factor is unconstitutionally vague and overbroad. Its application is the rule rather than the exception, violating the Eight Amendment.

ISSUE VIII: The sentence of death in this case is disproportional when compared to other capital cases in which this Court has reduced the sentence to life. The death of Suzanne Henry resulted from a domestic dispute. The Appellant later killed her child because of distorted thinking caused by chronic psychosis combined with crack cocaine usage. Additional mitigation is required because of the Appellant's low intelligence -- borderline retardation. This homicide is not one of the unmitigated ones for which death is the proper penalty.

ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL OF FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF PREMEDITATION.

At the close of the State's case, defense counsel moved for a judgment of acquittal, arguing that the prosecution failed to prove the element of premeditation.[10] The court denied the motion. (R. 698-99) The defense did not present a case. The jury found Henry guilty of first-degree murder. (R. 1366, 1398)

The issue at trial was not whether John Henry killed his wife but, rather, whether the killing was premeditated. The State presented no direct evidence that John Henry committed premeditated murder. Premeditation, of course, may be shown by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The pivotal question then is whether the fact that Henry stabbed his wife thirteen times is by itself sufficient to show premeditation, in the context of the surrounding circumstances.

As in any criminal case where the State attempts to establish guilt by circumstantial evidence, the evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977). The question is whether the evidence failed to exclude all reasonable hypotheses of innocence. Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied, 105 S.Ct. 303, 83 L.Ed.2d

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[10] The indictment charged only premeditated murder (R. 1253) and the jury was not instructed on felony murder. (R. 1380)

237 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). John Henry's version of the facts, as told to Detective Wilber, showed a total absence of premeditation, thus providing a reasonable hypothesis that the stabbing was not premeditated. The judge should have granted the defense motion for judgment of acquittal as to the first-degree murder charge.

In his confession to Detective Wilber, John Henry explained that he "freaked out" during a struggle with Suzanne after she threatened him with a kitchen knife. He did not know how many times he stabbed her. (R. 623, 628-29, 632-33) This, the only explanation of the stabbing, was introduced into evidence by the State, through the testimony of Detective Wilber.

Henry's explanation is supported by other evidence. He had been using cocaine regularly. He went to Suzanne's house to talk about buying Christmas presents for her son, Eugene. (R. 628) The circumstances suggest that Henry was emotionally upset because of his recent separation from Suzanne and Eugene just before Christmas. That he "freaked out" when Suzanne threatened him with a knife is a reasonable explanation.

Premeditation is defined by this Court in the often-quoted case of Sireci v. State, 399 So.2d 964 (Fla. 1981) as:

> a fully-formed conscious purpose to kill which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous

> difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

399 So.2d at 967 (citations omitted).

Dr. Joan Wood testified that Suzanne Henry died from thirteen stab wounds to the area of the neck and shoulder. (R. 682-84) She could not say how long it would have taken to inflict these wounds except that Suzanne Henry was alive when they were inflicted. (R. 695) She suspected that it would have taken no longer than a few minutes to inflict all thirteen wounds. (R. 695) They could have been done in less than a minute although it would be improbable if Suzanne were struggling. (R. 696-97) Dr. Wood found no defensive wounds from the knife. (R. 689)

Although Henry's repeated stabbing of his wife would support the hypothesis of premeditation or guilt, the evidence also supports a reasonable hypotheses of lack of premeditation, or innocence as to the first-degree murder charge. Evidence establishing only a suspicion or probability of guilt is not sufficient. McArthur, 351 So.2d at 976 n.12.

In State v. Bingham, 40 Wash. App. 553, 699 P.2d 262 (1985), aff'd, 105 Wash. 2d 820, 719 P.2d 109 (1986), the court considered a homicide committed by manual strangulation. That court noted that three to five minutes of continuous pressure on the windpipe would be required to cause death by strangulation. Although this would be sufficient time to permit deliberation, this evidence was insufficient to prove that the assailant

actually deliberated. The court concluded that:

> The fact of strangulation, without more, leads us to conclude that the jury only speculated as to the mental process involved in premeditation. This is not enough.

699 P.2d at 265. In its en banc affirmance, the Supreme Court of Washington stressed that "to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder." State v. Bingham, 105 Wash. 2d 820, 719 P.2d 109, 111 (1986). "Premeditation is a separate and additional element to the intent requirement for first degree murder." Bingham, 719 P.2d at 113.

Similarly, in Austin v. State, 382 F.2d 129, 136 (D.C. Cir. 1967), the court noted that "the crux of the issue of premeditation and deliberation is not the time involved but whether the defendant did engage in the process of reflection and meditation. . . . The 'appreciable time' element is subordinate, necessary for but not sufficient to establish deliberation."

In Austin, the defendant stabbed a woman whose nearly lifeless body was retrieved from a river mutilated and nude except for a piece of clothing around her neck. She died almost immediately from twenty-six major stab wounds, "culminating in a stab wound to the head, penetrating the brain, and lodging the broken blade in the skull." There were at least as many superficial lacerations to the body. 387 F.2d at 132.

Nevertheless, the Austin court held that the State failed to prove this was a premeditated murder rather than a murder committed in an orgy of frenzied activity, possibly heightened by drink. There was no evidence of prior threats. No

motive was suggested. 382 F.2d at 138-39. Remanding the case for entry of judgment of second degree murder, the court stated:

> The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and that these are in law only murder in the second degree. The Government's evidence sufficed to establish an intentional and horrible murder -- the kind that could be committed in a frenzy or heat of passion. However, the core responsibility of the court requires it to reflect on the sufficiency of the Government's case.

382 F.2d 129, 138-39 (D.C. Cir. 1967).

The planned presence of a weapon has been held adequate evidence to allow the issue of premeditation to go to the jury. Bingham, 719 P.2d at 113 (citation omitted); see also State v. Giffing, 45 Wash. App. 369, 725 P.2d 445 (Ct. App. Wash. 1986). In Austin, 382 F.2d 129, however, the court noted that the fact that the defendant used a knife was not probative of premeditation because he did not procure it specifically for that purpose. In the instant case, John Henry did not bring a knife. Suzanne removed the knife from a knife holder on the kitchen wall and threatened him with it. He took it away from her in the ensuing struggle. (R. 628-33) Thus, the fact that Henry used a knife was not probative of premeditation in this case.

We are aware of no Florida case in which premeditation has been based on nothing more than the number of stab wounds. In both Preston v. State, 444 So.2d 939 (Fla. 1984) and Nibert v.

State, 508 So.2d 1 (Fla. 1987), premeditation was based partially on the numerous stab wounds. In both cases, however, there was additional evidence of premeditation.

In Preston, the "virtually naked" body of a convenience store clerk was found in a field. The victim had been taken on a mile-and-a-half journey before being killed. A crossmark was cut into her forehead. 444 So.2d at 945-46. There were multiple stab wounds, the injuries were particularly brutal, and the woman's neck was almost completely severed. The deliberate use of a four or five inch knife to nearly decapitate the victim clearly supported the finding of premeditation. 444 So.2d at 944.

In Nibert, the victim was stabbed seventeen times. Nibert made the victim get on his knees during the stabbing. Some of the wounds were defensive. The evidence showed that Nibert had planned to rob the victim, which provided a motive, although there was no evidence that he did. 508 So.2d at 3-5.

Unlike the victims in Preston and Nibert, Suzanne Henry threatened the Appellant with the knife. This by itself suggests a "heat of passion" killing rather than a premeditated murder. See Forehand v. State, 126 Fla. 464, 171 So. 241 (Fla. 1936) ("heat of passion" killing is second degree murder). Henry had no motive for premeditated stabbing. He made no prior threats and was unarmed. Even if he intended to kill her, intent does not prove premeditation. Bingham, 719 P.2d at 113.

In Smith v. Zant, 855 F.2d 712 (11th Cir. 1985), the retarded defendant stabbed Turner, an 82 year old grocery owner, seventeen times and beat him with a hammer. The Eleventh Circuit

observed that Smith's trial testimony indicated he may have thought the man was going to hit him with the hammer. "Turner's apparent (to Smith) intent to use the hammer might have aroused 'sudden passion in the person killing so that, rather than defending himself, he willfully kills the attacker, albeit without malice aforethough, when it was not necessary for him to do so in order to protect himself." 855 So.2d at 720 (citation omitted).

Although the prosecutor speculated that Henry sat on his wife while stabbing (R. 729-30), this was only a hypothesis. Even if accurate, it is not evidence of premeditation.[11] If he sat on her, it may well have been to prevent her from regaining the knife and stabbing him with it. The prosecutor also suggested that Henry smoked a cigarette and watched his wife die. (R. 731, 695) This too is no more than rank speculation.[12] If true, it would not prove Henry premeditated the murder but, rather, that he post-meditated it, perhaps considering how to protect the child from seeing his mother. See Austin, 382 F.2d at 138-39 (fact that defendant acted with deliberation after the murder was not evidence of premeditation).

In general, where there is substantial, competent evidence to support a jury verdict of guilt as to the offense charged, the question of whether the evidence was inconsistent

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[11] Suzanne's sister testified that Henry sat on Suzanne during an earlier fight. There was no evidence that he premeditated her murder that time. (R. 501)

[12] Although a cigarette butt was found in an ashtray on the rug covering Suzanne Henry's body (R. 606-07), there was no evidence that Henry smoked the cigarette after killing her.

with any reasonable hypothesis of guilt becomes a jury question. Heiney, 447 So.2d 210; Rose, 425 So.2d 521. Nevertheless, in a criminal conviction based solely on circumstantial evidence, it is the appellate court's duty to reverse the conviction when the evidence, even though strongly suggesting guilt, fails to eliminate any reasonable hypothesis of innocence. Jackson v. State, 511 So.2d 1047, 1048 (Fla. 2d DCA 1987); see also Horstman v. State, 530 So.2d 368 (Fla. 1988) (state failed to present substantial, competent evidence sufficient to enable jury to exclude every reasonable hypothesis of innocence).

In Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), the First District Court of Appeal discussed what appeared to be conflicting standards for reviewing the sufficiency of circumstantial evidence. The court stated that

> It has long been held in Florida that "where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."McArthur v. State, 351 So.2d at 976 n.12. . . . "In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false." McArthur, 351 So.2d at 976. (emphasis supplied). This last-quoted proposition has been the law in this state for at least sixty years. Holton v. State, 87 Fla. 65, 99 So. 244 (1924). . . .
>
> [N]either Heiney nor Rose has disturbed the long-standing principles enunciated in Mayo and McArthur. As we read Mayo and McArthur, the court held that a conviction returned by the jury could not be sustained by the court unless there was competent and substantial evidence "inconsistent with any reasonable hypothesis of innocence." In other words, it is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence. This must be so because

> "the version of events related by the defense must be believed if the circumstances do not show that version to be false." McArthur, 351 So.2d at 976. . . . Otherwise, there would be no function or role for the courts in reviewing circumstantial evidence . . . .

492 So.2d at 1347.

The jury may disbelieve the defendant only as to facts on which the State has presented contrary testimony. McArthur, 351 So.2d 972; Bunderick v. State, 528 So.2d 1247 (Fla. 1st DCA 1988). When there is no legally sufficient evidence to contradict the defendant's explanation, his version cannot be ignored. State v. Bobbitt, 389 So.2d 1094, 1098 (Fla. 1st DCA 1980), rev'd on other grounds, 415 So.2d 724 (1982).

In McArthur, 351 So.2d 972, the defendant's version of the incident was that the gun went off accidentally. Although the jury found it more likely that the defendant murdered her husband, this Court reversed the conviction. Because the circumstantial evidence was consistent with both possibilities -- murder and accident -- the defendant's version must be believed.

In this case, the only version of the stabbing was the version given by John Henry to Detective Wilber, introduced into evidence by the State. There was no evidence that Henry was lying. The other evidence was completely consistent with his version. Henry's version of the facts showed a total absence of premeditation, thus providing a reasonable hypothesis that the stabbing was not premeditated. The State failed to carry its burden because the circumstantial evidence was consistent with the possibility of innocence as to first-degree murder. Thus, a judgment of acquittal of premeditated first-degree murder must be granted and the conviction reduced to second-degree murder.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT THE APPELLANT KILLED EUGENE CHRISTIAN SOME NINE HOURS AFTER THE DEATH OF SUZANNE HENRY, IN VIOLATION OF THE WILLIAMS RULE AND SECTIONS 90.402, 90.403, AND 90.404 (2)(a) OF THE FLORIDA EVIDENCE CODE.

The main feature of John Henry's trial for the stabbing of his wife was the myriad of testimony concerning the Appellant's stabbing of his five year old stepson some nine hours after his wife's death, and the long search for the child's body. This evidence was admitted by the trial court, over defense objection, both as "res gestae" and "Williams rule" evidence.[13] (R. 584-86) Its admission was reversible error.

The collateral crime evidence should have been excluded because it was not relevant to any material issue. It showed only propensity and bad character.[14] It should also have been excluded because any probative value was far outweighed by the danger of unfair prejudice. See §90.403, Fla. Stat. (1985). Moreover, because the lengthy and detailed testimony concerning the child's death was suspenseful, emotional and sad, became the main feature of the trial. See Williams v. State, 117 So.2d 473, 475-76 (Fla. 1960) (evidence of subsequent crime by defendant

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[13] The court heard a pretrial proffer of collateral crime evidence. (R. 1425-1530) Although defense counsel requested a pretrial determination of admissibility, the court refused to rule, agreeing with the State that a pretrial ruling would only be advisory in nature, pending a trial ruling. (R. 1036-50)

[14] The judge held that it tended to show motive, knowledge, identification, lack of mistake, and intent. (R. 586) Defense counsel was granted a continuing defense objection to the Williams rule evidence. (R. 587)

which became the main feature of the trial was so disproportionate to issue of sameness that it may well have influenced verdict and should have been excluded even if relevant).

Detective Wilber described in great detail all of the events of the night of Henry's arrest, including the two or three hour search for the body of Eugene Christian.[15] According to Wilber, Henry was arrested around 12:30 a.m. (R. 596) When he denied knowledge of the whereabouts of Eugene Christian, he was transported to the sheriff's office in Dade City for further questioning. (R. 600, 604)

Henry continued to deny knowledge of Eugene's whereabouts until almost 5:00 a.m. (R. 610) He finally told Detective Wilber that the boy was dead and that his body was in the area of Plant City. (R. 610-11) This was when the jury first learned that the child had been killed.

John Henry accompanied four detectives to Plant City and directed them to a remote farming area where they found the car he abandoned stuck in the mud by a holding pond. (R. 614-15) Wilber described in minute detail the extensive search for the child's body. When the officers were unable to find the body at the first location, Henry directed them to a slightly different area. More than another hour after that, Henry got out of

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[15] The judge instructed the jury that the evidence they were about to receive concerning other crimes allegedly admitted by the defendant should be considered only for the limited purpose of proving motive, intent, knowledge, identity and/or the absence of mistake or accident on the part of the defendant, and that the defendant was not on trial for a crime not included in the indictment. (R. 599)

the car and assisted the officers. They finally located the child's body. (R. 619-20, 625) By then it was starting to get daylight. (R. 625) Wilber testified that they searched for but were unable to find the knife that Henry said he had thrown down in a field there. (R. 591-92)

Detective Troy testified that he observed the child's body when found. The child was clothed and lying on his stomach. Detective Troy did not see any blood. (R. 660) The purpose of this testimony is unclear and was not explained to the jury.

While other detectives were searching, Detective Wilber and John Henry remained in the car where Henry told Wilber some of the details of the stabbings of Suzanne Henry and Eugene. Wilber attempted to repeat to the jury the facts Henry told him in the sequence he first heard them in the car during the search. (R. 617-19) He repeated them all again when he described Henry's confession later at the sheriff's office. (R. 627-37)

Henry described for Detective Wilber his argument with and subsequent stabbing of his wife and how he carried the child from the bedroom so that he would not see Suzanne's body. (R. 628-633) He took Eugene to Plant City and bought him food and a coke. He also bought cocaine (R. 633); then started back toward Zephyrhills. He saw flashing lights and thought someone was following him. (R. 634) He turned into a chicken farm where he got the car stuck. (R. 634) He carried Eugene over a fence, let him walk through a pasture, put him over a second fence and went to the area where they sat down, with Eugene lying in his lap. He smoked some cocaine. He then took the knife and stabbed Eugene in the neck. It did not take long for him to die. Before he

laid Eugene down, he put the knife to his own throat so that both he and Eugene could join Suzanne, but couldn't do it. (R. 635-37)

Prior to the introduction of the above testimony and evidence, and in anticipation of a ruling on its admissibility, Detective Wilber testified, out of the presence of the jury, that it would be impossible for him to adequately describe to the jury the context of the investigation leading up to the arrest of John Henry, or his admissions, without necessarily involving the death of Eugene Christian because the child was involved in the earlier events. (R. 580-82) This assertion is illogical on its face. Contrary to the testimony of Fay Wilber, no doubt prompted by the prosecutor, there was no reason he could not have repeated Henry's admissions concerning the stabbing death of Suzanne Henry and his departure with Eugene, without continuing to describe the search for Eugene and the discovery of his body.

Although Henry briefly related the stabbing of his wife while he and Wilber were in the car during the search, the entire story was repeated at the sheriff's office later. Wilber could have related Henry's admissions about his wife's death, explaining that they were made after an all night custodial interrogation. In numerous cases, taped confessions are admitted into evidence only after excluding portions relating to other crimes admitted by the defendants. If the discovery of the car and the search for the missing knife were relevant, Deputy Wilber could have testified that John Henry led them to the car and told them that he threw the knife in a field there, without any mention of the death of and search for Eugene Christian. It is questionable

whether the location of the car and knife were even relevant because neither proved anything at issue concerning Suzanne Henry's death. The knife was never found and there was no proof that the same knife was used to kill Eugene Christian.

In addition to the testimony, a large photograph of Eugene Christian's face and neck, taken at the autopsy, was introduced into evidence, ostensibly to show the stab marks on the child's neck. (R. 656-68) The jury had already heard testimony that the child was stabbed five times in the neck. The photo showed nothing more. (R. 1532) A photograph of the dead child was unnecessary and tended merely to inflame the jury.

The trial court admitted the collateral crime evidence as part of the "res gestae" and as Williams rule evidence. "Res gestae has no clear meaning and has been criticized as a convenient ambiguity which is not only useless but harmful. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988) (citations omitted). Among the purposes for which collateral crime evidence may be admitted under the Williams rule, however, is to establish the entire context out of which the criminal action occurred. Lee v. State, 508 So.2d 1300, 1301 (Fla. 1st DCA 1987); see e.g., Heiney v. State, 447 So.2d 210 (Fla. 1984); Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed. 2d 115 (1979). Nevertheless, the evidence must be relevant. See Heiney, 447 So.2d at 218 (Boyd, J., dissenting).

The correct focus in determining the admissibility of any evidence is relevance to some point at issue. Bryan, 533 So.2d at 746. Evidence that establishes the entire context of the crime is still inadmissible unless it is relevant to a

material issue. Id. Even if relevant, the evidence is not admissible if it becomes the main feature of the trial, Williams, 117 So.2d at 475-76, or if its probative value is outweighed by the danger of unfair prejudice. §90.403, Fla. Stat. (1985).

Williams rule[16] or similar fact evidence is only a special application of the general rule that all relevant evidence is admissible unless excluded by a rule of evidence. The requirement that similar fact evidence contain similar facts is based on the relevancy requirement.

Evidence of other crimes is not always similar fact evidence governed by the Williams rule and §90.404(2)(a). Bryan, 533 So.2d at 746. Thus, dissimilar crimes are also admissible if relevant. Id. "The only limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its

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[16] The "Williams Rule," codified in the Florida Evidence Code at §90.404(2)(a), takes its name from the case of Williams v. State, 110 So.2d 654 (Fla. 1959), in which this Court held that similar fact evidence of a prior criminal act is admissible if relevant except to prove bad character or criminal propensity. Section 90.404(2)(a) of the Florida Evidence Code provides as follows:

> 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, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

probative value is substantially outweighed by undue prejudice." Bryan, 533 So.2d at 746.

Accordingly, to determine whether the evidence concerning the death of and search for the body of Eugene Christian should have been admitted, we must first examine whether the evidence was relevant, other than to show bad character or propensity. If so, we must then consider whether it became a feature of the trial and whether its probative value was outweighed by unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

A. Relevance

The trial judge admitted the evidence under the Williams rule to show motive, knowledge, identification, lack of mistake, and intent.[17] (R. 586) The testimony should have been excluded, instead, because it was irrelevant and did not tend to prove any material fact at issue. It showed nothing more than propensity. It prejudiced the jury against the Appellant and added nothing toward the development of facts pertinent to the issue of guilt of the premeditated murder of Suzanne Henry.

An issue that collateral crime evidence is often used to show, and one for which the judge found it admissible, is

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[17] The prosecutor argued that the evidence was part of a continuous criminal episode; showed the Appellant's motive in killing Suzanne Henry by proof of guilty knowledge; and established the location of the only witness, the location of the murder weapon, the location of the car and body nearby, thus identifying the defendant as the person who killed Suzanne Henry. He argued that the evidence showed common scheme, intent, and lack of mistake.

identity. See e.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Thompson v. State, 494 So.2d 203 (Fla. 1986); Peek v. State, 488 So.2d 52 (Fla. 1986); Drake v. State, 400 So.2d 1217 (Fla. 1981). In all four of the above cases, this Court found that the collateral crime evidence was not sufficiently similar to establish identification because the crimes' common points were not so unusual as to establish a sufficiently unique pattern of criminal activity to justify admission of the collateral crime evidence. See Peek, 488 So.2d at 55.

In the case at hand, the only similarity was that both stabbings were committed with a knife and the victims were stabbed in the neck. These facts would fit many homicides. Attempting to apply the Peek court's analysis to our case, however, makes it clear that the evidence concerning the stabbing of Eugene Christian was really not "similar fact" evidence. If we consider each homicide an isolated incident, the only distinctive feature is the relationship between the victims -- mother and son. Thus, the only consideration should be relevancy.

If we had no other evidence of who was responsible for the death of Suzanne Henry, and the Appellant denied killing his wife but admitted stabbing her child, then the evidence would be relevant to show Henry's identity, because the child was with him after the stabbing. In that case, however, testimony that Henry took the child with him when he left his wife's house would do just as well to prove identity.

Moreover, identity was never an issue in the case. There was never any suggestion that anyone other than John Henry stabbed Suzanne. The only issue was premeditation. Thus, as

proof of identity, the evidence was cumulative at best. Although evidence need not be "necessary" to be admissible when relevant, Craig v. State, 510 So.2d 857 (Fla. 1987), if the only relevance is to prove a fact for which the evidence is cumulative and unnecessary, it should certainly not be admitted when it is extremely prejudicial, as in the case at hand. See §90.403, Fla. Stat. (1985) (prohibiting relevant evidence if probative value outweighed by needless presentation of cumulative evidence or unfair prejudice).

The stabbing of Eugene Christian was clearly not relevant to show Henry's motive for his earlier stabbing of his wife. It would strain one's imagination to come up with a theory that John Henry stabbed Suzanne because of some desire to later kill her child. Of course the prosecutor advanced no such argument.

There were no material facts in issue concerning knowledge, or absence of mistake or accident. The testimony concerning the death of Eugene Christian did not show guilty knowledge because the reason for the child's stabbing was unclear. Additionally, Henry did not deny knowing that he killed Suzanne in his confession to Wilber. Although the prosecutor suggested that Henry may have stabbed Eugene to get rid of the only witness, there is no evidence of this. In fact, the evidence that he did not kill Eugene at the scene suggests that he did not intend to kill him. The prosecutor's suggestion that Henry was getting rid of a witness is merely speculation.

Although intent may have been an issues in the case, the details of the stabbing of Henry's stepson shed no light on

whether Henry intended to kill Suzanne or whether her death was the result of a frenzied stabbing. None of the details of Eugene's death showed any advance planning to kill his wife or any common scheme to kill both Suzanne and her son.

The distinction between relevant and irrelevant evidence establishing the context of the crime is illustrated by the case of Craig v. State, 510 So.2d 857 (Fla. 1987). The defendant was convicted of killing a ranch owner for whom he worked and from whom he was stealing cattle. The evidence showed that his motives for killing the victim were his desire to take over the ranch and his fear that he had been caught stealing cattle. The court held that evidence of the cattle thefts was admissible to show the motive for the murder. 510 So.2d at 863. Evidence that he spent some of the money from the cattle sales on illegal drugs, however, was irrelevant, showing nothing but bad character. 510 So.2d at 864. It should have been excluded.

Such cases as Smith and Heiney are distinguishable because the collateral crime evidence was necessary to prove facts at issue. In Smith, 365 So.2d 704, the evidence of the subsequent murder of one of the accomplices was relevant to show motive because the men were fighting over $6.00 and the watch taken from the victim. The evidence placed the defendant at the scene of the crime in a car linked to the crime. Moreover, both murders were part of a single transaction -- the robbery. In the case at hand, each stabbing was a separate transaction with no logical connection showing motive or common scheme.

Similarly, in Heiney, 447 So.2d 210, the testimony that the defendant shot someone in Texas and was fleeing to Florida at

the time he committed the murder showed his motive to obtain the victim's money, credit cards and car. He was desperate, needed money, and wanted to avoid apprehension. The evidence tended to show that committed the murder. 447 So.2d at 214.

Generally, when collateral crime evidence is admitted to show the context of the crime, it is relevant to show motive. Smith and Heiney are examples. In the case at hand, however, the stabbing of Eugene Christian occurred nine hours later, under different circumstances, and failed to suggest any motive for the earlier stabbing which occurred during a domestic dispute. Thus, its admission cannot be justified to prove motive.

B. The Main Feature

Detective Wilber's detailed description of the questioning of John Henry kept the jurors in suspense as to whether the child was dead or alive. Once the jurors were told that the child was dead, they were led on a detailed journey to search for the child's body. The climax came when the officers spotted two small feet in the bushes. (R. 626) This testimony was followed by Detective McNulty's version and a few comments about the body by Detective Troy. The story was long and cumulative, and the ending sad. It eclipsed the brief, uninteresting description of Suzanne Henry's death.

The poignancy of the story, plus its length, suspense, and repetition, made the collateral crime evidence the main feature of the trial. There is no way that the jurors could deliberate the Appellant's guilt for killing his wife without being influenced by their knowledge that he took a trusting

little boy out in the woods and killed him.

C. Unfair Prejudice

Even when collateral crime evidence has some probative value, it is inadmissible if the limited probative value is substantially outweighed by the unfair prejudicial effect of the testimony. §90.403, Fla. Stat. (1985);[18] Heiney, 447 So.2d at 218 (Boyd, J., dissenting); Williams, 117 So.2d 473.

An example of evidence inadmissible under section 90.403 is provided by the Bryan case. The State introduced two items of collateral crime evidence. The first was that the defendant committed a bank robbery prior to the murder; the second, that he stole a boat. The court found the theft of the boat relevant to give the jury a full picture of how the defendant came in contact with the victim and the full extent of the crime -- the victim was a night watchman from whom the defendant borrowed tools to try to repair the stolen boat.

The photograph of the defendant committing the bank robbery, however, was probative only because it showed the gun used by the defendant to kill the night watchman. There was a plethora of other evidence that the defendant was in possession of the gun prior to the crime. Thus, its probative value was substantially outweighed by the danger of unfair prejudice. 533 So.2d at 747-48.

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[18] 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. (1985).

Rule 403 also prohibits relevant evidence if its probative value is substantially outweighed by confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Because the evidence really didn't tend to prove anything listed in the Williams rule cautionary instruction, the jurors were probably confused as to its purpose, and why they heard so much detail about it. Any probative value was needlessly cumulative because identity was not disputed.

The evidence here was particularly prejudicial because it involved the senseless killing of a small innocent child. The stabbing of Henry's sometimes violent wife with the knife she used to threatened him, although wrong, is somewhat understandable. The stabbing of a small helpless child is, at least to most people, unforgivable. It suggested to the jurors that Henry was "no good" and that he had a propensity for murder. §90.404(2)(a), Fla. Stat. (1985).

D. Harmful Error

"Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is 'presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'" Peek, 488 So.2d at 56.

In Jackson v. State, 451 So.2d 458 (Fla. 1984), the

trial court admitted testimony from a state witness that at some prior time the defendant had pointed a gun at him and bragged that he was a "thoroughbred killer." This Court could "envision no circumstance" in which the testimony could be "relevant to a material fact in issue." 451 So.2d at 461. Although the testimony showed that Jackson may have committed an assault and may have killed before, neither was relevant to the case. The Jackson court found that the evidence was precisely the kind forbidden by the Williams rule. Quoting from Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977), the Jackson court stated:

> There is no doubt that this admission would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

Without a doubt, the prosecution believed that the evidence that John Henry later stabbed his stepson would persuade the jury of Henry's guilt of the first-degree murder charge. It did. Without it, the jury might have found Henry guilty only of second-degree murder. For this reason, the error was not harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) (test is not sufficiency of the evidence but whether there is a reasonable possibility that the error affected the verdict). A new trial is required.

ISSUE III

THE TRIAL COURT ERRED BY REFUSING TO MAKE A PRETRIAL RULING ON THE ADMISSIBILITY OF EVIDENCE CONCERNING THE STABBING DEATH OF EUGENE CHRISTIAN WHICH RESULTED IN DEFENSE COUNSEL'S INABILITY TO PROPERLY VOIR DIRE PROSPECTIVE JURORS.

Prior to trial, the State filed a Notice of Intent to Use Evidence of Other Crimes Committed by the Defendant. One of these crimes was the alleged kidnapping and subsequent death of Suzanne Henry's five year old son, Eugene Christian, some nine hours after Suzanne's death on December 22, 1985. (R. 1266-67) Defense counsel filed a motion to exclude the evidence, alleging that none of the crimes cited by the State came within the purview of section 90.404(2)(a) of the Florida Statutes or were relevant to any issue before the court. (R. 1362) The court heard a proffer of the evidence. (R. 1425-1530)

Defense counsel also filed a motion requesting a pretrial determination of the admissibility of this evidence because, without such a determination, defense counsel would be unable to effectively voir dire prospective jurors concerning their knowledge of these offenses and whether it would preclude potential jurors from being fair and impartial. (R. 1363-64) Following a hearing on the motions (R. 1036-50), the trial court declined to make a pretrial ruling in the matter, agreeing with the State that it would only be advisory in nature pending a final determination at trial. (R. 1049-50)

During the trial, after very brief argument of counsel, the judge found that the evidence concerning the death of Suzanne Henry's son, Eugene Christian, was admissible under the res

gestae rule and under section 90.404 of the Florida Evidence Code, as evidence pertaining to motive, knowledge, identification, lack of mistake and intent. (R. 584-86) By this time, of course, it was too late for defense counsel to voir dire the jury as to the effect this evidence might have on their deliberations and any bias toward imposing the death penalty.

Meaningful voir dire examination is required by Florida Rule of Criminal Procedure 3.300(b). Subject to the trial court's control of unreasonably repetitive and argumentative questioning, "counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors." Stano v. State, 473 So.2d 1282, 1285 (Fla. 1986); Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1979), cert. denied, 388 So.2d 1114 (Fla. 1980); see also Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985). Counsel must be permitted to question prospective jurors concerning their feelings and attitudes. Poole v. State, 194 So.2d 903 (Fla. 1967) (bias against mercy in rape case).

This Court has consistently upheld the right to voir dire prospective jurors as to possible bias and prejudice. For example, in Lavado v. State, 492 So.2d 1322 (Fla. 1986), the court found that the trial court erred in refusing defense counsel's request to ask prospective jurors about their willingness and ability to accept the defense of voluntary intoxication. The court held that the restriction of this line of questioning denied Lavado his right to a fair and impartial jury.

In Thomas v. State, 403 So.2d 371 (Fla. 1981), the supreme court reversed and remanded for a new trial because the

trial court erred (1) in limiting the defendant's peremptory challenges contrary to an earlier stipulation and (2) in denying the challenge for cause of a juror who admitted in voir dire that he could not recommend mercy in the sentencing phase of a capital case. The court held that this bias [in (2) above] violated the requirements of both the United States and Florida constitutions that the accused be tried by an impartial jury. See also Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) (juror who would automatically vote for death is excludable for cause); Gore v. State, 475 So.2d 1205 (Fla. 1985) (trial court should have allowed defense counsel to propound questions to jury concerning their bias against recommending a life sentence).

In the case at hand, had defense counsel known in advance that the trial court would admit the collateral crime evidence, he could have voir dired the prospective jurors concerning their ability to limit their consideration of the collateral crime evidence to the purposes set out in the cautionary instruction. Additionally, defense counsel could have inquired whether a prospective juror would automatically impose death without considering any mitigating factors if the accused were known to have killed a small child.

As a practical matter, defense counsel would have had a weighty decision concerning what to ask on voir dire even if he had known that the evidence would be admitted. He would have had to weigh the possiblity that the judge would change his ruling during trial. Still, if one or more of the jurors would have been excused for cause or peremptorily based on such voir dire, the failure of the court to make a pretrial ruling was needlessly

prejudicial.

Effective voir dire is particularly important in a death case. In Hill v. State, 477 So.2d 553, 555 (Fla. 1985), a venireman, who reluctantly agreed that death should not always be imposed, entered the courtroom with the presumption, based in part on pretrial publicity, that death was the proper penalty for the defendant. This Court held as follows:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Id. at 556.

Although the court is not generally required to make a pretrial ruling on the admission of Williams rule evidence, in a death case involving collaterial crime evidence of a murder likely to evoke emotion and possibly abhorence, a pretrial ruling is crucial. In this case, the collateral crime evidence was extremely prejudicial. The court's refusal to make a pretrial ruling in effect violated the Appellant's constitutional right to a fair and impartial jury. If a new trial is not granted because the collateral crime evidence was erroneously admitted, it should be granted for this reason.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS MADE DURING CUSTODIAL INTERROGATION.

Custodial interrogation in a police-dominated atmosphere can easily result in self-incriminating statements without full warnings of constitutional rights. See Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). An interrogation at a station-house is inherently more coercive than an interrogation in a less suggestive setting. Drake v. State, 441 So.2d 1079, 1081 (Fla. 1983). Even more coercive is a custodial interrogation when one is tired, coming down from a cocaine high, and has just been arrested for first-degree murder.

On July 15 and September 25, 1986, defense counsel filed motions to suppress statements and admissions made by the defendant subsequent to his arrest. Grounds for the suppression were that (1) the Appellant, John Henry, was under the influence of cocaine and did not knowingly waive his right to remain silent; (2) prior to such statements, an officer of the Pasco County Sheriff's Department advised Henry that if they did not find Eugene Christian, the officer would personally kill Henry; (3) the officers implied to the Appellant that all they were interested in was locating Eugene Christian; and (4) the statements were induced and/or coerced after Henry had advised that he wished to exercise his right to remain silent. (R. 1275, 1299)

Following a hearing on September 30, 1986 (R. 1053-1248), the court denied the Appellant's motions to suppress. (R. 1200) In his ensuing order, the judge found that (1) there was

no deception by the officers that induced the Appellant's statements; (2) there was no invocation by the Appellant of his right to remain silent; (3) the Appellant was not under the influence of cocaine to the extent that it precluded a knowing waiver of rights; and (4) the statements were made freely and voluntarily and were not induced by threats of physical harm while in custody of the Pasco County Sheriff's Department. (R. 1325)

An inquiry into the validity of a defendant's waiver of his rights is twofold.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) (citations omitted).

Smith v. Zant, 855 F.2d 712, 716 (11th Cir. 1988). Thus, our twofold analysis is must be based upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused. Id. (citations omitted).

Accordingly, we will discuss each of defense counsel's contentions as they appear in the motions to suppress:

> (A) Henry was under the influence of cocaine and did not knowingly waive his right to remain silent.

Rosa Mae Thomas testified that, on the Monday following the homicide, John Henry arrived at her house about 8:00 p.m. (R.

567) She fixed him some chili. Because he was tired and hungry, she knew he had been using cocaine. She said that when he used drugs, he also drank beer. (R. 1136) When they arrived at the Twilight Motel that night, after stopping by two other motels at which they could not afford to stay (R. 569), John Henry took a shower, changed clothes, and went to sleep on the bed. (R. 570)

Between 10:30 (Rosa's testimony) and 12:30 (Wilber's testimony) that evening, Detectives Wilber and McNulty came to the motel. (R. 1062, 1136-37) Detective Wilber identified himself and asked Henry to come out. (R. 596) Wilber advised him of his Miranda rights. In Wilber's opinion, Henry did not appear to be under the influence of any narcotics. (R. 597-98) He said he understood his rights and wished to talk to them. (R. 599)

Rosa Mae Thomas testified that when Henry was awakened by the arrived of the deputies, he was still tired and showed signs of being under the influence of drugs or alcohol. (R. 1147) He had slept only about an hour. (R. 1137)

Wilber, whose primary concern was to find Eugene Christian (R. 599), asked John Henry if he knew the child's whereabouts. Henry said he did not. (R. 600) He was taken to Dade City and interviewed at the sheriff's office in a fairly large room with a desk and several chairs. (R. 604) One hand was handcuffed to a chair. (R. 607) Wilber provided coffee and cigarettes. (R. 605) The questioning continued all night. Henry had slept only one hour during nearly two days and had ingested a large quantity of crack cocaine.

Henry denied any knowledge of the whereabouts of Eugene Christian from the time of his arrest between 10:30 and 12:30

Monday night until almost 5:00 Tuesday morning. (R. 610) At that point, he broke down and told Wilber that the child was dead and that his body was in the Plant City area. (R. 610-11) Henry cried for about ten minutes. (R. 1071) When they finally located the child's body, Henry was very emotional. He hugged Detective Wilber and wept. (R. 1071-72)

The Appellant has an IQ of 78, which is a borderline intelligence level. (R. 889-90) Two of the four psychiatric experts at the penalty phase trial found that he was seriously psychotic. (R. 886-88, 940-42) A third expert (for the State) found low-grade schizophrenic illness manifested by hallucinatory experience. (R. 777-78) These three experts agreed that Henry had a long-term alcohol and drug problem. (R. 777-78, 894, 940) He told Wilber that he ingested crack cocaine throughout the afternoon and evening between the two stabbings. (R. 633-35)

In Smith v. Zant, 855 F.2d 712, the Eleventh Circuit reversed the denial of a suppression motion because the defendant was mentally retarded (IQ of approximately 65) and under severe stress when he gave the confession and was unable to intelligently understand and waive his Miranda rights. A psychiatric expert testified that a mentally retarded person commonly experiences a "shock response" when he encounters stress. 855 F.2d at 718; see also Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960) (deficient mental condition sufficient to render confession involuntary).

Even though Henry is only borderline retarded, with an IQ of 78, he was under substantial stress in addition to having

had almost no sleep for two days, little food, a lot of cocaine, and possibly alcohol. He had just walked ten to twenty miles from the Plant City area to the home of Rosa Mae Thomas in Zephyrhills. When he finally confessed that Eugene Christian was dead, he cried. (R. 1520) These factors alone make it unlikely that he made a knowing and intelligent waiver of his rights.

> (B) A detective from the Pasco County Sheriff's Department advised Henry that if they did not find Eugene Christian, the officer would personally kill Henry.

During his testimony at the suppression hearing, Detective McNulty, who was with Detective Wilber when John Henry was arrested, said that Detective Wilber told him that "if John Henry did anything to Eugene Christian, he would kill him." (R. 1091) Henry was seated in the back seat of a nearby patrol car at the time of the statement. (R. 1091-92) McNulty did not think Wilber intended Henry to hear him. (R. 1092) He said, however, that Wilber raised his voice and made the threat in an emotional manner. (R. 1120) Although Wilber was noticeably upset, McNulty thought the threat was a figure of speech. (R. 1114, 1119-20)

Rosa Mae Thomas testified that Detective Wilber went to the car where John Henry was seated and told him that, if they didn't find the boy, "he was going to kill him personally himself." (1139) Rosa was not familiar with this "figure of speech" and had never heard anyone use it before. (R. 1146)

Wilber testified that he was upset but did not recall making any such statement. He did not think he would have said anything of that nature but it was possible that he had. (R. 1060). He had no reason to want to kill Henry. (R. 1071)

There was further evidence that Henry may have been afraid the officers would hurt him. During the search for Eugene Christian's body, Detective Wilber suggested to Henry that he go with them to find Eugene. Henry said "No, I can't." When asked why, he said the other officers would beat him. (R. 625) After Wilber assured him this would not happen, Henry agreed to look for Eugene. (R. 625) By this time he had established a rapport with Wilber but was apparently still uncertain about the others.

Because of his chronic paranoia, Henry was probably more easily intimidated by threats. Even though Detective Wilber did not seriously intend to kill Henry, Henry may have taken the threat seriously. His intelligence was low. Perhaps like Rosa Mae Thomas he was unfamiliar with the figure of speech.

"[A] confession, to be admissible . . . must not be extracted by any sort of threat or violence . . . for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner. Bram v. United States, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897). The burden of proof is on the State to show the voluntariness of a confession. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972). If Henry's confession was based, in any way, on his fear of the officers, it was not voluntary.

(C) The officers implied to the Appellant that all they were interested in was locating Eugene Christian.

Throughout the night, while Henry was extremely tired and coming down from cocaine and alcohol, Detective Wilber kept telling him that all they wanted to do was find Eugene Christian.

The insinuation was that if he told them where the child was, he wouldn't be in trouble. There were apparently no questions asked about whether he killed his wife. This certainly drew his attention away his wife's death, making it seem inconsequential in comparison to the child's whereabouts.

Only when Detective Wilber started to leave the room around 5:00 in the morning, after reiterating that they had to find Eugene, did Henry break down and confess his complicity. Wilber admitted on cross-examination that he was frustrated and said something like "John, if you don't want to talk about it, you know, piss on it. I'm going to go out. I'm going to find him somehow. I've got to." (R. 643) As Wilber put his hand on the door knob, Henry told him not to leave. He became very emotional and told Wilber where the child's body was located. The dam was broken. He confessed to everything.

Coercion by law enforcement officers can be mental as well as physical. Before the state may use a defendant's statements as evidence, the defendant must under the totality of the circumstances have waived his rights, not only knowingly, but voluntarily. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) This means that the police may not obtain a confession by coercion and may not utilize techniques calculated to exert improper influence. Thomas v. State, 456 So.2d 454, 458 (Fla. 1984); Brewer v. State, 386 So.2d 232 (Fla. 1980). Due process forbids not only physical coercion but psychological persuasion. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). When interrogators turn to more subtle forms of persuasion, the defendant's mental condition

more subtle forms of persuasion, the defendant's mental condition is more significant. Id. (citation omitted). In this case, Henry was particularly susceptible to the coercion used by Detective Wilber because of his mental and physical condition. See Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) ("Christian Burial Speech" persuaded defendant to tell officers where the victim's body was located by taking advantage of defendant's religious beliefs).

Promises, like threats, render a confession involuntary. See e.g., Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (officer told defendant that victim not inclined to prosecute if property returned); Lawton v. State, 152 Fla. 821, 13 So.2d 211 (Fla. 1943) (defendant believed that he would not be prosecuted if he confessed); Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) (implied promise to help defendant get bond so she could care for her children who were being interrogated at sheriff's department). Although Wilber made no explicit promises, he repeatedly told Henry that the only thing they were interested in was finding the child. Wilber's emphasis on the child's whereabouts implied that the stabbing of his wife was of little importance. Because Henry stabbed her only after she pulled a knife, it is quite possible that he thought the officers assumed the killing was in self-defense and, therefore, he had nothing to fear.

In his distraught mental condition, Henry may have believed that if he told the officers where to find Eugene Christian, he would be freed. Because of his borderline intelligence level, he was especially likely to be taken in by coercive

tactics. His admissions were not the product of free will but were induced by psychological coercion. Therefore, the trial court erred in failing to suppress them.

(D) Henry's statements were induced and/ or coerced after he said he wished to exercise his right to remain silent.

After the detectives and Henry had arrived at the sheriff's department on the night of Henry's arrest, Detective Wilber left the interrogation room to make coffee. (R. 1094-95) Officer McNulty tried to start a conversation with Henry to establish a rapport. (R. 1095) He told Henry that he was aware that he had served time. Henry responded that he didn't want to talk to him anymore, adding that "besides, you haven't read me anything." (R. 1096) McNulty told him he was mistaken, that he had heard Detective Wilber read him his Miranda rights at the Twilight Motel. At that point, Wilber returned and McNulty left without telling Wilber what Henry said. (R. 1096, 1121) McNulty did not think Henry was exercising his Miranda rights. (R. 1121).

According to the bright line rule established by Edwards v. Arizona, 451 U.S. 471, 484, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." If the desire for counsel is equivocal, then the investigating official may "continue questioning for the sole purpose of clarifying the equivocal request." Long v. State, 517 So.2d 664, 667 (Fla. 1987). The

issue is not whether the defendant actually requests counsel but whether he desires counsel. Cannady v. State, 427 So.2d 723, 728 (Fla. 1983). Because Henry's response when McNulty attempted to talk to him was equivocal, McNulty should have sought to clarify Henry's meaning by inquiring whether he wanted a lawyer. Instead he left the room without telling Wilber about the incident.

In Long, the defendant said to the detective, "The complexion of things have sure changed since you came back into the room. I think I might need an attorney." The officers ignored the comment and continued the interrogation. 517 So.2d at 666. This Court reversed because the statement was equivocal and put the officers on notice that the only permissible further inquiry would be to clarify Long's request. 517 So.2d at 667.

In Kyser v. State, 533 So.2d 285 (Fla. 1988), the defendant asked the officer, when questioned about a murder, if they could talk about something else, adding that, "I think I want to talk to a lawyer before I talk about that and I hope you understand that." The officer left the room and another officer entered without speaking to the departing officer. The second officer proceeded to question Kyser about the shooting for several hours, even after the first officer returned. After being transported to Florida, Kyser was questioned by still another officer who was not informed about the prior request for counsel. Because there was no evidence that Kyser initiated the conversation after requesting counsel, this Court held that suppression should have been granted. 533 So.2d at 286.

Similarly, in Belcher v. State, 520 So.2d 303 (Fla. 3d

DCA 1988), the officers did not communicate the defendant's request. Defendant Belcher, after denying the murders for nearly four hours, said to the officer, "I don't want to talk to you any more." The officer stopped the questioning and left the room.

He called another officer, however, and informed him that Belcher no longer wanted to talk to him. The other officer arrived about an hour later and told Belcher he wanted to hear his side of the story. After thinking about it for five minutes, Belcher confessed.

As did McNulty in the case at hand, the first officer in Belcher testified that he thought Belcher meant only that he no longer wanted to talk to him and did not intend his statement to apply to other police officers. He never asked Belcher to clarify his statement, however. The appellate court affirmed the suppression of Belcher's confession because his right to terminate questioning was not scrupulously honored. See Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 321 (1975) (admissibility of statements obtained after suspect has cut off questioning depends on whether the suspect's "right to cut off questioning" was "scrupulously honored").

As did the officers in Belcher and Kyser, Detective McNulty left the room without reporting Henry's equivocal statement to Detective Wilber. Henry should have been questioned no further until his equivocal request was clarified. The detectives failed to ask Henry if he wanted to terminate the interrogation or if he wanted a lawyer. The fact that Wilber again read Henry his rights before continuing questioning does not cure the problem. Only if Henry had reopened the conversation would

the officers have been justified in continuing their questioning.

The case of Drake v. State, 441 So.2d 1079 (Fla. 1983), is also instructive in the case at hand. Drake was approached at his work site and taken to the sheriff's department. Although he was not under arrest, he was informed that he was a suspect in a murder case. During the subsequent interrogation, he at first denied any knowledge of the crime, as did John Henry. When confronted with the fact that he had been seen leaving the bar with the victim, however, he said they left to smoke marijuana. At this point he requested a lawyer. The officers tried to call Drake's lawyer but were unable to reach him. They then convinced Drake to repeat what he had already told them on tape, but did not stop the questioning there. 441 So.2d at 1080.

Drake did not request a lawyer until he did not like the turn the interrogation was taking. Id. This Court held that once Drake had expressed his desire to have counsel, the only permissible additional inquiry would be to clarify an equivocal request. Id. (citing Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979)). In our case, had McNulty attempted to clarify what John Henry meant and offered to provide a lawyer, Henry might have agreed that indeed he did want one.

The error was obviously harmful. The only direct evidence concerning the details of the stabbing of Suzanne Henry was provided by the Appellant's admissions. Because the court should have granted the Appellant's motion to suppress his admissions, the case must be reversed and remanded for a new trial.

ISSUE V

THE TRIAL COURT ERRED BY FAILING TO CONDUCT THE CONSTITUTIONALLY REQUIRED INQUIRY WHEN THE APPELLANT REQUESTED THAT HIS COURT-APPOINTED COUNSEL BE REMOVED AND REPLACED.

Article I, section 16, of the Florida Constitution guarantees defendants in criminal prosecutions the right "to be heard in person, by counsel or both." The federal constitution provides the same right. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A violation of the right to proceed pro se is inherently prejudicial. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). "The right is either respected or denied; its deprivation cannot be harmless." 465 U.S. at 177 n.8, 79 L.Ed.2d at 133, n.8.

During the penalty phase of John Henry's trial, after the defense lay witnesses had testified, John Henry told the judge that he was not being properly represented. He asked the court to remove Mr. Focht and to "recommend" another lawyer. Henry's actual request was as follows:

> MR. HENRY: Good morning. Yeah, I would like to bring it to the Court's attention that as of this moment I feel I am not properly being represented and I wish to ask the Court to remove Mr. Focht from being my attorney and I would like to be, if it's possible, to be recommended to another attorney because I feel that there's things that's not being brought to the Court's attention concerning me that he's not bringing up, going into details concerning witnesses in my behalf. Some of the witnesses have not been brought forward that I felt that would have came forward if it had been brought to their attention.
>
> Also, there's things that haven't been brought up that I have requested my attorney to bring up that he have failed to bring up and I feel that, also, in this case, that it

being partiality shown towards the victim.

> My main concern is that myself and Mr. Focht, the things that I have requested of him to bring up and he just haven't. And I just feel like I'm not being properly represented.

(R. 873-74) By "recommend," it can be inferred that the Appellant meant "appoint," because the Appellant was indigent.

This Court has held that when a defendant is dissatisfied with his court-appointed counsel and seeks to have new counsel appointed, the defendant "[i]s presumed to be exercising [his] right to self-representation. He should be so advised and the trial court should forthwith proceed to a Faretta inquiry." Jones v. State, 449 So.2d 253, 258 (Fla.), cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984); see also Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988). A Faretta inquiry is particularly important when the accused indicates that his actual desire is to obtain different court-appointed counsel, which is not his constitutional right. Hardwick, 521 So.2d at 1074. Failure to conduct such an inquiry is reversible error. Id.

Judge Ulmer's summary denial of Henry's request was also reversible error because the court failed to determine whether Henry had any basis for his complaints. See Scull v. State, 533 So.2d 1137 (Fla. 1988) (court required to examine reasons given by defendant to support motion to discharge counsel). John Henry told the judge that his court-appointed counsel was not bringing certain matters to the court's attention. He complained that Focht had not called witnesses that would have testified and had not presented matters he requested. (R. 873-74)

The judge denied his request without inquiry. He never

attempted to determine whether Henry had good cause for his complaints. He made no inquiry as to which witnesses Henry thought Mr. Focht should have called and why. This was error. Scull, 533 So.2d 1137; Williams v. State, 532 So.2d 1341 (Fla. 4th DCA 1988). As did the defendant in Williams, John Henry gave a few "reasons" during his comments to the judge, but the judge failed to examine his reasons. The Williams court found that the failure to inquire further was reversible error. 532 So.2d at 1343.

Judge Ulmer did not ask the Appellant whether his complaint included the guilt phase of the trial, during which the defense did not present a case. He did not ask whether Henry had wanted to testify or to present evidence during guilt phase. Nor did he inquire whether Henry wanted to take over and represent himself for the remainder of penalty phase. Instead, the judge told Henry that Mr. Focht had used good strategy and had done a commendable job of representing him. (R. 874)

The judge did not explain to Henry his right to represent himself nor did he conduct even a rudimentary Faretta hearing. He did not inquire into Henry's mental condition, age, education, and experience with the law, or explain the dangers of self-representation, as is required by Faretta. Unlike the defendant in Scull, 533 So.2d 1137, Henry's complaints did not "dissipate." He did not later abandon them by stating that he was happy with his representation. Thus, the error in this case was not harmless. The trial court's denial of Henry's request for new counsel, without inquiry, was reversible error of constitutional dimension. Faretta, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562; Hardwick, 521 So.2d 1071.

ISSUE VI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY TO CONSIDER AND BY FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Over defense objection, the trial court instructed the jurors that they could consider the factor that the homicide was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification. (R. 867, 990) In his written findings in support of his imposition of the death penalty, the trial judge found this statutory aggravating factor. (R. 1410) In so finding, he stated, in relevant part, that:

> Based upon evidence introduced during the course of trial, the Court finds that this heightened form of premeditation required to constitute this aggravating circumstance exists. The testimony of the Medical Examiner and the photographs introduced during the course of the trial and the testimony of Bonnie Cangro regarding a fight between the Defendant and Suzanne Henry which she had previously witnessed, establish that the Defendant in order to kill Suzanne Henry, pinned the victim's arms to the floor with his knees so that she would be unable to fight, controlled her head with his hand so that he would be able to more accurately place his wounds and while in this position of control, ferociously killed Suzanne Henry. It should be parenthetically noted that there is some evidence to support the proposition that upon inflicting the numerous stab wounds and after covering the body of Suzanne Henry, that the Defendant sat in the same room and smoked a cigarette. As further evidence of the "cold" nature of the offense, the evidence indicates that the minor son of the victim was so near to the location of the victim when the wounds were inflicted, that he at least heard the attack and it is abundantly clear that the Defendant was aware of the presence of this child at the time he was killing the child's mother.

(R. 1411)

The judge made three factual conclusions in his order, none of which were established by the evidence. Certainly, a fact relied on to establish an aggravating factor cannot be based on speculation when aggravating factors are required to be established beyond a reasonable doubt. See Harmon v. State, 527 So.2d 182, 188 (Fla. 1988); Peavy v. State, 442 So.2d 200 (Fla. 1983).

Although the prosecutor speculated that Henry sat on his wife with his knees on her shoulders, (R. 729-30), this was only a hypothesis. There is no evidence which proves that Henry sat on his wife while stabbing her. The stab wounds and testimony from Suzanne's sister that he sat on her during a prior fight indicate that this is one possible theory. Suzanne's own sisters testified that she was a fighter, not afraid to fight back, and that she had threatened John Henry and others with knives and guns. (R. 501-10) Even if Henry did sit on her, it may well have been to prevent her from regaining the knife and stabbing him with it. Thus, the judge erred in finding this fact established beyond a reasonable doubt.

The judge also adopted the prosecutor's suggestion that Henry smoked a cigarette and watched his wife die. (R. 695, 1411) This too is rank speculation.[19] Even if true, it would not prove Henry premeditated the murder but, rather, that he post-meditated it. The judge erred by relying on such unsupported speculation in finding this aggravating factor.

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[19] Although a cigarette butt was found in an ashtray on the rug covering Suzanne Henry's body (R. 606-07), there was no evidence that Henry smoked the cigarette after killing her.

The judge also erred in speculating that that the child was so close that he at least heard the attack. John Henry told Detective Wilber that Eugene was in the bedroom watching television and saw nothing. If he had the door shut, he may have heard little or nothing. Even if he heard the argument, there is no reason he would have known it was a stabbing. He was used to screaming because the evidence showed that there were a lot of altercations, including threats with knives and weapons, around the house. Perhaps he tuned them out. The fact that he was close enough to hear does not establish that he did hear the stabbing; even if it was probable, it wasn't proven.

The trial court's instruction on the "cold, calculated and premeditated" aggravating factor invited the jury to speculate about what happened. Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984). In Thompson, this Court declined to speculate about possible reasons for the hold-up killing. The Thompson court stated that:

> No evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape. None of the numerous witnesses testified or even suggested that the discussions they held with the appellant concerning the robbery contemplated the murder of the station attendant.

456 So.2d at 446.

This Court has uniformly held that a finding of the "cold, calculated and premeditated" aggravating factor requires

that the State prove, beyond a reasonable doubt, a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. Compare Preston v. State, 444 So.2d 939 (Fla. 1984) (although victim, who had witnessed convenience store robbery, was marched 500 feet at knife point, nearly decapitated by fatal slash across throat, and stabbed numerous times, "cold, calculated and premeditated" factor unsupported) with Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (factor upheld where defendant held victims at gun point for hours, made them strip, and beat and tortured them). The "cold, calculated and premeditated" aggravating factor is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987).

In Nibert v. State, 508 So.2d 1 (Fla. 1987), this Court affirmed that the "cold, calculated and premeditated" aggravating factor requires cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain first-degree murder conviction. The victim in Nibert was stabbed seventeen times. Nibert made the victim get on his knees during the stabbing. Some of the wounds were defensive. Nevertheless, the court found the "cold, calculated and premeditated" aggravating factor inapplicable.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), the defendant first attempted to smother the victim with a pillow. When this failed, the defendant strangled the victim to death with a telephone cord. The body was then taken to a remote location and disposed of by drenching it with gasoline and setting it

on fire. Even this did not establish the "cold, calculated and premeditated" aggravating factor.

In Rogers v. State, 511 So.2d 526 (Fla. 1987) (receding from Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984)), this Court concluded that "calculation" consists of a careful plan or pre-arranged design. Unrebutted testimony showed that John Henry lost control and stabbed his estranged wife during a domestic altercation after she pulled a knife. There was absolutely no evidence of a "prearranged design."

Appellant's action, as described to Detective Wilber, was undoubtedly committed in the heat of passion aroused by the domestic altercation, and worsened by Henry's psychotic state and recent drug abuse. The victim threatened the Appellant with the knife. See Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986) (murder resulting from "heated domestic confrontation" was most likely upon reflection of short duration and would not support CCP aggravating factor). As this Court stated in Garron v. State, 528 So.2d 353 (Fla. 1988), finding the CCP aggravating factor inapplicable to the shooting of the defendant's step-daughter while she was calling the police, "[t]his case involves a passionate, intra-family quarrel, not an organized crime or underworld killing." Id. at 361.

The State's primary argument in support of this aggravating factor was the number of stab wounds -- thirteen. The prosecutor argued in closing that "you've got to infer premeditation from that." (R. 964) The fact that Suzanne was stabbed

thirteen times does not show premeditation for a first-degree murder conviction, let alone the "heightened" premeditation needed for a finding of the "cold, calculated and premeditated" aggravating factor.[20] See e.g., Nibert, 508 So.2d 1 (although victim stabbed seventeen time, evidence failed to show that murder was "cold, calculated and premeditated").

The burden is upon the State to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So.2d 444, 446 (Fla. 1984); Peavy, 442 So.2d 200, 202 (Fla. 1983). The burden is not on the defendant to prove that he lost control, acted in panic or unjustifiable self-defense or for any other unknown reason. The State presented no evidence that John Henry contemplated killing Suzanne when he went to her house. He first stopped and asked her sister where to find Suzanne, which indicated no such plan. He was unarmed. Although perhaps Suzanne had a motive to want to kill John Henry (he was living with another woman), he had no motive to kill her.

The prosecutor argued that there was no legal or moral justification, adversely comparing the case to a mercy killing of a terminally ill and suffering patient. (R. 967) This argument is ridiculous and ignores Florida law. If the "cold, calculated

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[20] Joan Wood, medical examiner, found six stab wounds to the right side of the neck, one stab wound to the middle of the neck, four stab wounds to the left neck, one over the back of the left jaw and one over the left shoulder. The wounds to the left side of the neck were down and to the right, and those to the right side of the neck were down and to the left. The wound in the middle of the neck went nearly straight back. (R. 688)

and premeditated" aggravating factor applied to every homicide that was not a mercy killing, few homicides would escape it.

In Cannady v. State, 427 So.2d 723 (Fla. 1983) this Court found that the defendant had a "pretense" of moral or legal justification because he consistently said that he killed the victim only after the victim jumped at him. Even though the accused was the only source of this testimony and the victim was a quiet, unassuming minister, there was no evidence to disprove it. Id. at 730-31.

Similarly, in Banda v. State, 13 F.L.W. 451 (Fla. July 14, 1988), the court held that the "cold, calculated and premeditated" aggravating factor was erroneously found because the evidence suggested that Banda killed the victim to prevent the victim from killing him first. This testimony was supported by evidence that the victim was violent and had made threats against Banda. Thus, there was a colorable claim of self-defense.

The case at hand is similar to Banda. Henry's admissions to Detective Wilber, which were not disproved, showed a claim of self-defense. Henry said that Suzanne pulled a knife on him during an altercation and he "freaked out" and stabbed her to death with her knife. Because the only evidence showed that she started the violence by pulling the knife, Henry had at least a pretense of moral and legal justification for defending himself. As in Banda, his version was supported by the testimony of Suzanne's two sisters that she was sometimes violent and had previously threatened her husband with a weapon.

We do not know which aggravating factors the jurors found. Nevertheless, it is likely that some of the jurors found

the "cold, calculated and premeditated" aggravating factor. All twelve jurors recommended death. Had the jury been properly instructed, it is possible that fewer jurors would have recommended death. The advisory opinion can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). For this reason, Henry's death sentence is unreliable under the Eighth Amendment.

Moreover, the trial court erred in actually finding this factor and in relying on it to impose the death penalty. Because the judge erroneously found the "cold, calculated and premeditated" aggravating factor, and also the "heinous, atrocious or cruel" aggravating factor (see Issue VII), if the conviction is affirmed, the case must be remanded for a new sentencing.

ISSUE VII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY TO CONSIDER AND BY FINDING IN AGGRAVATION THAT THE HOMICIDE WAS HEINOUS, ATROCIOUS OR CRUEL.

In his order finding that the murder was "heinous, atrocious or cruel," the trial court stated that:

> The evidence presented reveals conclusively that Suzanne Henry was stabbed no less than 13 times. The majority of these wounds were inflicted on the right and left side of the victim's neck. The testimony of the Medical Examiner revealed that the victim lived for as long as ten (10) minutes following the stabbing. The evidence shows clearly that the murder was committed in a fashion that caused the victim unnecessary and prolonged pain.

(R. 1410) This description says nothing more than that the victim was stabbed thirteen times in the neck. That is the sum total of evidence on which the judge based his finding that the "heinous, atrocious or cruel" aggravating factor applied.

The only way that the Appellant could have killed his wife more rapidly would have been to have used a different weapon -- perhaps a gun. But this would have required that he plan the murder in advance. He used the weapon that his wife picked out. She took the knife from a holder on the kitchen wall and threatened him with it.

Perhaps he could have stabbed her in the heart so that she would have died more quickly, but he really didn't have time to stop and think about the best way to kill her without causing a lot of pain. She was probably struggling and he had to hold her down which limited his access to her body parts. Had he put thirteen stab wounds in her face or arms, she probably would have lived much longer and suffered much more. The fact that there

were no defensive knife wounds (R. 689) indicates that she became unconscious and died quickly. Contrary to the judge's reasoning, Henry's method of stabbing her did not prolong the pain, but shortened it.

There are lots of other murders that are much more "heinous, atrocious or cruel." In some of them, this aggravating factor was found inapplicable. For example, in Demps v. State, 595 So.2d 501 (Fla. 1981), the defendant and codefendant stabbed the victim, a fellow prisoner at Florida State Prison, seventeen times. He was rushed to two different hospitals before he died.

In Jackson v. State, 451 So.2d 463 (Fla. 1984), the defendant shot the victim in the back, then drove to a remote area, wrapped him in plastic bags and shot him again before putting him in the trunk while still alive. The court found the HAC aggravating factor inapplicable because "the record contains no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time. Therefore, he was incapable of suffering to the extent contemplated by this aggravating circumstance." 451 So.2d at 463.

Similarly, in the case at hand, Suzanne Henry was conscious only a few moments according to estimates by the medical examiner. (R. 691) Suzanne probably remained conscious for three to five minutes. Two minutes would be the minimum although the loss of consciousness would have been progressive. (R. 695) The lack of defensive wounds (R. 689) suggests that she was conscious a very short time.

The judge stated in his order that Suzanne might have

lived for as long as ten minutes. While this is accurate, it's irrelevant. In accordance with Jackson, once the victim loses consciousness, he or she cannot suffer the pain contemplated by the "heinous, atrocious or cruel" aggravating factor. 451 So.2d at 463.

There are various other case involving stabbings, in which the trial court judge did not find the "heinous, atrocious or cruel" aggravating factor. See e.g., Williamson v. State, 511 So.2d 289 (Fla. 1986) (victim stabbed repeatedly); Kelley v. State, 486 So.2d 578 (Fla. 1986) (victim stabbed several times and shot); Provence v. State, 337 So.2d 783 (Fla. 1976) (eight stab wounds). Certainly there are many other cases involving multiple stabbings which were not found to be heineous, atrocious, or cruel by the trial court, in which the defendant was sentenced to life.

In Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious or cruel" was unconstitutionally vague and overbroad under the Eighth Amendment because the language gave the sentencing jury no guidance as to which first degree murders met the criteria. The Court noted that the Oklahoma Court of Criminal Appeals had not adopted a limiting construction which could cure its overbreadth. Consequently, the sentencer's discretion was not channeled to avoid the risk of the arbitrary imposition of the death penalty. The ordinary person could honestly believe that every intentional taking of human life is "especially heinous." Maynard, 108 S.Ct. at 859.

Florida's statute gives no more guidance than does Oklahoma's. A reasonable juror might well conclude that this aggravating circumstance applied to all murders unless there was a question of self-defense or accident. Although this Court adopted a limiting construction of the "heinous, atrocious or cruel" aggravating factor, see Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), application of the factor has become the rule rather than the exception. See Mello, Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984). Furthermore, the standard jury instructions do not include the definitions which supposedly narrow the applicability of the HAC factor.

In the present case, unconsciousness and death occurred relatively quickly. The crime was less torturous to the victim than most stabbings and many other homicides. Thus, the finding of the "heinous, atrocious or cruel" aggravating factor was based on speculation that the crime was particularly torturous. It failed to meet the constitutional standard of proof beyond a reasonable doubt. Its finding violated the Eighth Amendment.

ISSUE VIII

A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE IMPRISONMENT.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court noted that the death penalty was reserved by the legislature for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this court's function in capital appeals is to review the case in light of other decisions and determine whether the punishment is too great. 283 So.2d at 10. The stabbing of Suzanne Henry is not one of the most aggravated first-degree murder cases.

The sentencing judge found three aggravating circumstances. One of them (cold, calculated, and premeditated) and possibly two (heinous, atrocious, and cruel) were erroneously found. Even if the heinous, atrocious and cruel aggravating factor is held to be proper, it is not deserving of much weight when compared to other capital cases.

The third aggravating factor, that John Henry had been convicted of two other violent felonies, is admittedly deserving of great weight. Nevertheless, it is not deserving of so much weight that no amount of mitigation would overcome it. The trial judge stated in his order that even if he had not found the other two aggravating factors, this one alone merited the death penalty. Like similar boiler-plate language in guidelines decisions, this reasoning cannot hold up under this Court's scrutiny. For one thing, it shows that the trial court's reasoning was not well

thought out. He was overcome by emotion.

The court assumed the establishment of the three mental mitigators on which he instucted the jury. These included the two "mental mitigators." Three of the four psychiatric experts testified that Henry was psychotic or schizophrenic. The death penalty has been upheld in very few cases where the mental mitigators were found. See e.g, Fitzpatrick v. State, 527 So.3d 809 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Miller v. State, 373 So.2d 882 (Fla. 1979, on remand, 399 So.2d 472 (Fla. 2d DCA 1981).

There are many cases in which the defendant's sentence was reduced to life where there was another victim killed or seriously injured in conjunction with the capital felony. In Holsworth v. State, 522 So.2d 348 (Fla. 1988), the defendant burglarized the mobile home of a mother and her daughter. Holsworth stabbed both, killing the daughter. Three years earlier he had attacked another woman in her mobile home during the early morning hours. The court noted that Holsworth's conduct was affected by drugs and alcohol. He also had a psychological disturbance. This Court reduced Holsworth's sentence of death to life imprisonment.

Other comparable cases are Norris v. State, 429 So.2d 688 (Fla. 1983), and Amazon v. State, 487 So.2d 8 (Fla. 1986). In Norris, two elderly women were beaten during the burglary of their residence and one died. Amazon was a particularly atrocious double murder of a mother and her eleven-year-old daughter who were stabbed during the burglary of their home. A sexual

battery accompanied the homicides. In both cases, this court reduced the sentences of death to life imprisonment.

The advisory jury recommendation in Wilson v. State, 493 So.2d 1019 (Fla. 1986), was death. The defendant killed his father and a five-year-old cousin while attempting to murder his stepmother. The court found two aggravating circumstances -- a prior conviction of a violent felony and that the homicide was heinous, atrocious or cruel. They were not balanced by any mitigating factors. The court concluded that murders caused by heated domestic confrontations do not warrant the death penalty.

In Garron v. State, 528 So.2d 353 (Fla. 1988), the defendant shot his wife and his step-daughter who was telephoning the police. Citing Wilson, this Court found that the imposition of death for the killing of the step-daughter was not proportionally warranted. As in this case, the record showed "clearly a case of aroused emotions occurring during a domestic dispute. While this does not excuse appellant's actions, it significantly mitigates them." 528 So.2d at 361.

Also noteworthy is a comparison between the complete lack of mitigation in Wilson and the substantial amount of mitigation in the case at hand. John Brown had an IQ of 78, was chronically psychotic, and was under the influence of crack cocaine. He was under a lot of stress, having recently separated from his wife and stepson. He loved his stepson, Eugene Christian, and showed great remorse over his death. He broke down sobbing at the sheriff's department when he finally admitted that Eugene Christian was not alive. He broke down again when the child's body was found.

The stabbing of Suzanne Henry was caused by a domestic disturbance. John Henry attempted to discuss buying Christmas gifts for Eugene. Suzanne accused him of living with another woman. She pulled a knife on him. At this point he became agitated, lost control, and stabbed her thirteen times.

The killing of the five year old child resulted from this domestic disturbance and John Henry's mental and emotional state, which worsened from his use of crack cocaine immediately preceding the incident. The stabbing of his first wife, ten years earlier, also resulted from a domestic dispute. Henry was convicted of second-degree murder. The death penalty is not generally considered appropriate in the case of a homicide resulting from a heated domestic dispute. Garron, 528 So.2d 353; Wilson, 493 So.2d 1019.

In Masterson v. State, 516 So.2d 256 (Fla. 1987), the defendant murdered two people in their apartment. There were four aggravating factors and the trial court found nothing in mitigation. On appeal, this Court found that mitigating evidence of honorable military service, post-traumatic stress disorder and substantial drug and alcohol consumption on the day of the murders was sufficient to require a reduction of the death penalty to life in accordance with the jury's recommendation.

Although the jurors recommended death in the case at hand, the recommendation most likely resulted from their shock and abhorrence when hearing about the stabbing of Henry's small stepson. As discussed in Issue II, this collateral crime evidence became the main feature of the trial. It was sad and