IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY, :

Appellant, :

vs. :

STATE OF FLORIDA, :

Appellee. :

Case No. 70,816

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

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

The Appellant, JOHN RUTHELL HENRY, relies on the arguments and authorities presented in his Initial Brief to respond to the Answer Brief of the State of Florida, except for the following additions:

STATEMENT OF THE CASE AND FACTS

Appellant objects to and hereby corrects the following misstatements of fact by Appellee:

1. Contrary to Appellee's assertion, Bonnie Cangro, Suzanne Henry's sister, did not testify that Suzanne's purse and jewelry were taken from Suzanne's house or that, although the deputies later "returned" the purse, Suzanne's jewelry was never "recovered." (Brief of Appellee at 3-4) Instead, Cangro testified that after the sheriff's deputies arrived at Suzanne's house following the homicide, she was "given" Suzanne's purse. When asked where it came from, she said that the deputy "gave it back to me." (R. 496) There was no testimony that it was stolen or "taken from the house." If it had been found in Henry's possession, as Appellee has implied, certainly Detective Wilber would have testified about its recovery and Henry would have also been charged with felony murder.

Similarly, there was no testimony that Suzanne's jewelry was stolen. Cangro testified that Suzanne's jewelry was "all gone" and that she never found any jewelry. (R. 496) There was no evidence indicating a theft. Suzanne may have sold or pawned the jewelry herself prior to the homicide.

2. Appellee also misconstrued Wilber's testimony concerning Eugene Christian's death. Appellee stated that John

Henry's "guilty knowledge" about Suzanne's death was evidenced by "his statement that he had not wanted to kill Eugene, but he knew he had to because the cops had found Suzanne's body." (Brief of Appellee at 5) The record does not support this assertion.

The testimony in Appellee's first page reference (R. 582-83) is not even evidence. It is part of Detective Wilber's proffer (R. 579-583) in support of the State's argument that it would be impossible for Wilber to testify about Henry's statements without involving Eugene Christian's death. In proffer, Wilber said that Henry told him he saw some flashing lights and "knew the cops were after him at that time because he knew we had found Suzanne." (R. 583) He said that Henry also told him he "didn't want to kill Eugene at that time." (R. 583) Read in context, it is apparent that Wilber put these two statements together only to support the State's argument that Henry's admissions about the two stabbings were comingled in time. (R. 580-83)

The second page reference cited by Appellee (R. 634-35) also fails to suggest such a motive for Eugene's death. Again, Wilber is describing Henry's hallucinations and the eventual stabbing of Eugene. Wilber's final testimony in this regard was that Henry told him that he put the knife to his own throat after stabbing Eugene. He said that "Suzanne was dead and he wanted him and Eugene to be with her." (R. 635) There was absolutely no testimony that Henry "knew he had to" kill Eugene "because" the cops had found Suzanne.

3. Appellee asserted that the trial judge and defense counsel "instructed the jury that the appellant's identity was an

element of the crime." (Brief of Appellee at 5) The trial judge and defense counsel were actually reciting the standard jury instructions. They told the jury that the State must prove beyond a reasonable doubt that Suzanne Henry's death was caused by the criminal actions of John Henry. (R. 707, 747) This is an element of first-degree murder which cannot be omitted even when there is no question about it. Defense counsel then explained that he was not going to spend a great deal of time discussing the first two elements of the crime because it was the third element -- premeditation -- on which the case "is in fact determined." (R. 707)

Appellee has taken out of context defense counsel's statement that the jury could properly consider the Williams Rule evidence to prove identity and that it "may well prove identity." (Brief of Appellee at 5)[1] Defense counsel actually said:

> I'm submitting, he wants you to consider [the killing of Eugene] for a whole lot more than for what the Court is telling you to consider it for. In fact, what it may prove is identity. It may well prove that the vehicle, the boy, the whole nine yards, puts John Henry back at the house. And I would submit to you to consider it for that. I submit to you it tells you nothing, absolutely nothing about the state of mind, the formation of the intent that existed prior to the killing." (R. 736)

Read in its proper context, defense counsel was obviously arguing that the jury should consider the evidence **only** to show identity, which was already proven, and not to show prior state of mind.

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[1] Appellee mentioned these facts for the obvious purpose of bolstering the State's argument that the Williams Rule evidence was necessary to prove identity. (See Issue II)

ARGUMENT

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.

Contrary to Appellee's assertion, the physical evidence in this case was not inconsistent with John Henry's version of the stabbing. (Brief of Appellee at 10) Detective Wilber never said that the three cuts on Henry's arm "could not have been made with a knife." Instead, Wilber testified that, **in his opinion,** the cuts looked more like scratches than knife cuts. (R. 631, 648) Detective Wilber was not an expert on scratches and cuts. He could not possibly determine for certain that the cuts **could not have been made** with a knife.

Whether Suzanne cut Henry with the knife is really irrelevant. John Henry never said the knife wounds were deep or serious. (R. 629) He may have noticed the wounds later and surmised they were made during the struggle with Suzanne. The point is that he "freaked out" and stabbed his wife. (R. 629)

"A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) (victim stabbed 110 times); see also Hansborough v. State, 509 So.2d 1081 (Fla. 1987) (victim stabbed over 30 times). As in Mitchell and Hansborough, there was no evidence of premeditation in this case. The evidence indicates that Henry "freaked out" and inflicted the thirteen stab wounds while in a rage.

In both Mitchell and Hansbrough, the defendants were convicted of felony murder. Therefore, premeditation was not an

element of the crime of first-degree (felony) murder and was not an issue in the guilt phase portion of the trials. Accordingly, this Court did not decide whether the "frenzied" stabbings would have supported a conviction for first-degree premeditated murder.

In considering the heightened premeditation needed to support the "cold, calculated and premeditated" aggravating factor, however, this Court found that premeditation was not demonstrated by the "frenzied stabbing" of the victim. Mitchell, 527 So.2d at 182; Hansborough, 509 So.2d at 1086 (victim stabbed over 30 times). The holding that premeditation is not evidenced by a frenzied stabbing was not specifically restricted to the heightened form of premeditation required for the CCP aggravating factor. In this case, where a finding of premeditation was required for a first-degree murder conviction, the Mitchell and Hansborough holdings require acquittal as to premeditated murder.

Even if Henry was not **totally** out of control and was able to recognize that his actions would bring about Suzanne's death (brief of Appellee at 11), a mere **intent** to kill does not prove premeditation. "Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). It must exist in the mind of the perpetrator long enough to permit reflection, but does not have to be contemplated for any particular period of time. It may occur a **moment** before the act. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

As noted by Appellee, in Austin v. State, 382 F.2d 129,

136 (D.C. Cir. 1967), the court found error in the jury instruction that premeditation could be in the nature of hours, minutes, or **seconds**. The Austin 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." Although the Sireci court held that premeditation might occur a **moment** before the act, we are aware of no Florida case upholding a finding of premeditation which occurred only a **second** before the killing. In the instant case, Dr. Joan Wood testified that the wounds could have been inflicted in less than a minute if Suzanne was not struggling. (R. 696) She found no defensive wounds. (R. 689)

Appellee noted that "the manner in which the victim died indicates that this was not a situation where the appellant was running through the house, wildly chasing her with a knife." (Brief of Appellee at 11) This language is reminiscent of Wilson, in which this Court found premeditation precisely because the defendant was running wildly through the house, in that case with a hammer and scissors. Upholding the finding of premeditation as to the murder of Sam Wilson, the court noted that there was substantial evidence of an attack that "continued throughout the house, moving back and forth between bedroom and hall, finally ending with the fatal shooting in the living room. There was more than adequate time for any cloud on the appellant's mental faculties to have lifted . . ." 493 So.2d at 1022. In the instant case, the evidence showed that Suzanne was killed in the location where the struggled ensued, possibly in less than a minute. (R. 528, 667, 692, 696)

Appellee also argued that Henry's actions after the killing evidenced premeditation. (Brief of Appellee at 12) Appellee misread some of the testimony concerning this "evidence." Most notably, Appellee's assertion that Henry stole Suzanne's purse and jewelry is totally without support in the record. Suzanne's sister testified that, after the sheriff's deputies arrived at Suzanne's house following the homicide, she was "given" Suzanne's purse. (R. 496) The only logical conclusion from the context of this testimony is that it was found on the premises and well before Henry's apprehension. There was no testimony that it was stolen or that anything was missing from it. If the purse had been found in Henry's possession, certainly Detective Wilber would have included this fact in his testimony concerning Henry's apprehension and the evidence recovered. Furthermore, Henry was not charged with felony murder. (R. 1253)

Secondly, there was no testimony that Suzanne's jewelry was stolen. Her sister testified only that Suzanne's jewelry was "all gone." (R. 496) Suzanne may have given the jewelry to Henry to sell to buy drugs or may have sold or pawned it herself prior to the homicide. Other evidence in the case indicated that Suzanne sometimes gave Henry money to buy drugs. (R. 860)

Appellee's assertion that Henry "probably" smoked a cigarette is mere speculation, based only on the finding of an ashtray containing a cigarette butt on top of the rug covering the body. (R. 606-07) There was no evidence that Henry smoked the cigarette after killing his wife.

If all of Appellee's speculation were true, it would

still not prove that the stabbing was premeditated. After killing someone in a rage, a normal person would be frightened upon realizing what he had done. It would not be unusual in such a situation for the perpetrator to cover up the evidence and flee. Because Henry was the most obvious suspect, he would have been wiser to call an ambulance and plead accident or temporary insanity. Had he planned the stabbing, he might have done so.

Appellee's comparison of this case with Preston v. State, 444 So.2d 939 (Fla. 1984), is not supported by the facts. Preston took the victim to a field before killing her. He cut a crossmark into her forehead. 444 So.2d at 945-46. The court found that his deliberate use of a four or five inch knife to nearly decapitate the victim supported the finding of premeditation. 444 So.2d at 944. In the instant case, Henry used the weapon chosen by the victim or, if one disbelieves this story, a kitchen knife that was hanging on the wall. He did not arrive with a weapon. He stabbed Suzanne where he found her, and made no crossmarks nor nearly decapitating wounds.

Although the prosecutor speculated that Henry sat on his wife while stabbing her (R. 729-30), this was only a hypothesis. Even if it happened that way, it does not make this case similar to Preston, nor does it evidence premeditation. In fact, the reverse is true. Suzanne's sister testified that she had seen Henry sit on Suzanne before. Accordingly, it would be an automatic position for Henry to take, requiring no forethought.

Although the determination of premeditation is normally a jury question, the jury may disbelieve the defendant only when the State has presented contrary testimony. McArthur, 351 So.2d

972 (Fla. 1977). When there is no evidence that the murder was premeditated, acquittal of premeditated murder must be granted by the trial court. See McArthur, 351 So.2d at 976; Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986). The only version of the stabbing was the version given by John Henry to Detective Wilber. The physical evidence was consistent with this version. Thus, acquittal of premeditated 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.

A. Relevance

Appellee has asserted that the killings of Suzanne Henry and Eugene Christian were unique for purposes of identification because 1) an older model blueish-green Chevrolet with a small "space-saver" tire was observed at the scene of both crimes; and 2) both victims suffered repeated blows with the same knife. (Brief of Appellee at 16) Appellee ignores the fact that neither of these details had any probative value.

Appellee also argued that the collateral crime evidence was necessary because no witness identified Henry at the scene of the crime and there was no direct evidence linking Henry to the car. (Brief of Appellee at 17 & 20) Eyewitness identification was unnecessary because Henry confessed to and described his

wife's stabbing. Additionally, Appellee neglected to mention the testimony of John Steven Mathis that Henry borrowed his Chevrolet car with the "space-saver" tire on the morning of the crime. (R. 558-61) What happened to the car after the crime was irrelevant.

What happened to the knife afterward was also irrelevant. Moreover, the knife was never recovered. There was no evidence that Henry killed Suzanne and Eugene with the same knife other than John Henry's statement to Detective Wilber. Henry admitted stabbing Suzanne with a knife. The fact that Henry later killed a child with the same knife was not only irrelevant, but extremely prejudicial.

Appellee's assertion that the trial judge and defense counsel "instructed the jury that the appellant's identity was an element of the crime" is nothing more than a recitation of the fact that the jury was properly instructed on the elements of the crime of murder. Appellee has confused the "elements" of the crime with the "issues" in this case. Identity is always an element which the State is required to prove. That it is an element of the crime does not make it an issue of the case.

In this case, identity was not an issue. The defendant's confession was introduced and the defense presented no evidence in rebuttal; thus, the identity of the perpetrator was established. Although defense counsel instructed the jury that the State must prove that Suzanne Henry died as a result of the criminal activity of the defendant, he never suggested that this was not the case. Although he told the jurors that the Williams Rule evidence "may well prove identity" (brief of Appellee at 17), defense counsel went on to explain that he was not going to

spend much time discussing this element because it was premeditation on which the case "is in fact determined." (R. 707)

Appellee's "guilty knowledge" argument, based upon Henry's alleged statement that he did not want to kill Eugene but knew he had to, is illogical. (Brief of Appellee at 18) The identity of the perpetrator was never questioned and so called "guilty knowledge" does not prove premeditation. (See Issue I, supra at 8) Moreover, Henry never said he killed Eugene because he thought the cops had found Suzanne. (See "Statement of the Case and Facts," supra at 2)

Appellee has suggested that the collateral crime evidence was necessary to prevent the jury from speculating about what happened to the "only witness" to the crime, the weapon, and the car. (Brief of Appellee at 18) First of all, the evidence does not show that Eugene was a witness to the crime. In fact, the only evidence is that Eugene was in the bedroom, did not witness the murder, and was sheltered from viewing his mother when Henry carried him from the house. As to what happened to the weapon, it was never found. Although what happened to the car was irrelevant, its location could easily have been introduced without evidence about the child's death.

Contrary to Appellee's assertion, the collateral crime evidence was not inconsistent with Henry's hypothesis of innocence as to premeditated murder. The prosecutor's suggestion that Henry was getting rid of a witness when he killed Eugene was mere speculation. None of the details of Eugene's death showed any advance planning or any common scheme to kill both Suzanne

and her son, nor were they relevant to rebut Henry's defense.

B. The Main Feature

Appellee's assertion that only a page and a half of transcript (R. 609-611) intervened between the first mention of Eugene's disappearance and the statement that the child was dead is erroneous. Bonnie Cangro mentioned that they were unable to locate Eugene at Suzanne's house, but that a neighbor said he left with John Henry. (R. 492) Detective Wilber testified that he put out a BOLO for Eugene Christian shortly thereafter. (R. 593) Wilber testified that, after locating and mirandizing the Appellant, his primary concern was to find Eugene Christian. (R. 599) He presumed that Eugene was alive. (R. 600) His first question to Henry after reading him his rights was "if he knew the whereabouts of Eugene?" (R. 600) All of these references to the disappearance of Eugene occurred more than a page and a half before Henry's admission that Eugene was not alive. (R. 611)

Neither the number of pages of testimony nor the number of witnesses describing the collateral crime are determinative as to whether the testimony became the main feature of the trial. See Snowden v. State, 537 So.2d 1383, 1385-86 & nn.3-4 (Fla. 3d DCA 1989) (and cases cited within); Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982) (although collateral crime evidence took over twice as many pages of transcript, the evidence did not become a feature of the trial). In Townsend, wherein the defendant was charged with three murders, the collateral crime evidence involved six additional similar fact homicides. Unlike this case, which involved only one additional homicide, the six homicides in

Townsend necessitated numerous pages of testimony. Also, the jurors acquitted Townsend of one of the murders, making it apparent that they did not convict him for the collateral crimes.

C. Unfair Prejudice

Even when collateral crime evidence has some probative value, it is inadmissible if its only relevance is to prove a fact for which the evidence is cumulative or unnecessary, and its probative value is substantially outweighed by the unfair prejudicial effect of the testimony. See §90.403, Fla. Stat. (1985); Williams v. State, 117 So.2d 473 (Fla. 1960). Appellee's argument that this is not a Williams Rule argument and was not preserved is without merit. The "feature" limitation of the Williams Rule is a "specific application of the more general proscription against prejudice outweighing probative value." Bryan v. State, 533 So.2d 744, 746 (Fla. 1988).

The argument was preserved by defense counsel's objections to the admission of the collateral crime evidence, both during trial and at the pretrial hearing. (R. 1036-50) More specifically, defense counsel argued that "to allow that evidence into court is so overwhelmingly prejudicial on the issue of whether Mr. Henry is guilty of murder in the first degree as to Suzanne, as to clearly and unequivocally render it inadmissible." (R. 586) He later objected to the introduction of the autopsy photograph of Eugene because it would "do nothing more than **additionally** inflame the jury." (R. 659)

Even if the evidence were admissible under the Williams Rule, "care must be taken . . . not to allow the introduction of

unduly prejudicial evidence simply because the evidence is admissible under a different rule." State v. Price, 491 So.2d 536 (Fla. 1986); accord Koon v. State, 513 So.2d 1253 (Fla. 1987). For example, in Price, this Court held that evidence of third-party threats, admissible to explain a prior inconsistent statement of the witness, should not have been admitted under that rule because its probative value was far outweighed by its prejudicial nature. 491 So.2d at 537.

D. Harmful Error

The overwhelmingly prejudicial nature of the Williams Rule evidence in this case is demonstrated by Appellee's assertion that "[t]he appellant brutally murdered a small helpless child, and should not be entitled to escape the particular prejudice inherent in such a crime . . . " (Brief of Appellee at 21) Appellee followed the above assertion with the argument that, even if erroneous, "there is no reasonable possibility that the admission of the similar fact evidence affected the jury's verdict." (Brief of Appellee at 21) This conclusion is belied by Appellee's own characterization of the evidence as inherently prejudicial and by Appellee's suggestion that Henry deserved to have the jury verdict affected by this collateral crime evidence.

It was this inherently prejudicial testimony that assured the State of a first-degree murder conviction for a crime that might well have resulted in a second-degree murder conviction but for the collateral crime evidence. Thus, there is more than a "reasonable possibility" that the error affected the verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE IV

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

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

Appellee pointed out that Detective McNulty interpreted Henry's statement that he did not want to talk to him to be directed at him personally, noting that John Henry and Detective Wilber "had known each other for some time, and were getting along well . . . ." (Brief of Appellee at 29) Although Henry and Wilber had indeed known each other for some time, it was only because Wilber had arrested Henry ten years earlier for the stabbing of his first wife, for which he spent seven years in prison. (R. 813-18, 1410) There was no suggestion that they had been in touch since that time. Certainly, then, McNulty would not presume that Henry wanted to talk only to Wilber because of some sort of kinship or long term friendship between the two.

Appellee's argument that any request to terminate an interrogation "was obviously clarified when Wilber readvised the appellant of his Miranda rights and asked the appellant if he wished to speak to Detective Wilber" (brief of Appellee at 30), ignores the fact that McNulty never told Wilber that Henry did not want to talk to him. Wilber could not possibly have "clarified" Henry's request when he did not know about it. Appellee's attempt to clarify Henry's request at this late date by characterizing it as a "desire not to speak with Detective McNulty" merely begs the question.

Appellee's harmless error analysis is unclear and confusing. (Brief of Appellee at 31) For some reason, Appellee concluded that Henry's "initial statements were voluntary," but did not specify what these statements were or explain why they were voluntary. Henry made no incriminating statements prior to the invocation of his right to remain silent (his statement to McNulty). Thus, Appellee's assertion that the testimony about finding the abandoned car near Eugene's body was admissible as a product of the initial statements makes no sense.

Appellee's argument that John Henry's "subsequent confession" was admissible (assuming an earlier Miranda violation) because his initial statements were voluntary is even more mind boggling. Assuming that the "subsequent confession" is the one made after Eugene's body was found (R. 627), this confession should have been suppressed because it resulted from the discovery of the child's body, which was the fruit of the illegal interrogation after Henry (at least arguably) attempted to exercize his right to remain silent. Without Henry's admissions, the State could not have proved its case.

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.

Appellee's argument that John Henry did not challenge the competency of his attorney is a weak attempt to circumvent the requirement of a Faretta hearing. (Brief of Appellee at 33) Henry told the court he "was not being properly represented." He

requested a different court-appointed lawyer. (R. 873-74) A Faretta hearing is especially important when the defendant requests a different court-appointed lawyer. Hardwick v. State, 521 So.2d 1971, 1074 (Fla. 1988).

A Faretta inquiry is required no matter when the defendant complains about his court-appointed counsel or asks to proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Hardwick, 521 So.2d 1971. The Appellant could not possibly have made this motion before trial because he did not then know that his lawyer would not represent him properly during the trial. He did not know that his lawyer would not call witnesses he requested during penalty phase. He cannot be denied his constitutional right to a Faretta inquiry merely because he did not attempt to exercise it before the incidents giving rise to the right occurred.

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.

Just because John Henry sat on his wife on two prior occasions so that she couldn't fight back does not **prove** that he did so while stabbing her. Although the crime scene technician testified that Suzanne's wounds were **consistent** with such a posture, this does not **prove** that it happened that way. The medical examiner testified that there were no defensive wounds. (R. 528) If Henry had his knees on Suzanne's shoulders and moved

her head back and forth with his hand, Suzanne's hands would have been free. It would seem that she would have tried to protect her neck and face; however, there were no defensive wounds on her arms or hands.

Even if Henry sat on his wife while stabbing her, this is not evidence of premeditation. Because he had done it before, it would be the most probable position for him to take, requiring no forethought. Certainly, there was no suggestion in the record that the Appellant went to Suzanne's house with a preconceived plan to sit on her.

Appellee asserted that the factual conclusions that Henry sat in the room and smoked a cigarette after covering the body, and that Eugene Christian was able to hear the stabbing, are **logical** conclusions. Actually they are only possibilities; there are other equally logical conclusions. It is equally logical to suppose that Suzanne also smoked More cigarettes and had left the cigarette butt in the ashtray earlier, or that Henry smoked the cigarette while talking with his wife before the stabbing. He probably put the ashtray on the blanket to hold the blanket in place. There is absolutely **no logical reason** why he would put the ashtray on top of the body while using it to smoke a cigarette. Additionally, the evidence suggests that, upon realizing that he had killed his wife, Henry **quickly** covered the body, grabbed Eugene, and left the house.

The theory that he smoked a cigarette after the stabbing conflicts with the theory that Eugene heard the stabbing. If Eugene had heard the stabbing, Henry would have been in an even bigger hurry to take Eugene and leave the house. Certainly,

if Eugene were aware of his mother's death, he would have been upset and crying. Henry would have taken him away quickly to avoid attracting attention or further upsetting the boy, of whom he was quite fond. (R. 487-88)

Although Appellee asserts that the physical evidence conflicted with the Appellant's statements, and that the judge was therefore entitled to disregard the Appellant's version of the murder, Appellee does not specify how the evidence and the Appellant's version differed. Any discrepancies were minor. The Appellant never said whether he sat on his wife while stabbing her. Whether the three wounds on the Appellant's arm were made with the knife is still unknown and makes little difference.

The majority of the evidence was very consistent with the Appellant's version. There was evidence that Suzanne threatened others with weapons. (R. 500-510) The marriage was "rocky" (R. 495) and Suzanne had ordered John Henry out of the house in no uncertain terms. (R. 480, 485-86) A knife was missing from the knife rack. (R. 530-31) Suzanne's body was found by the sofa where Henry said they struggled. (R. 522-24, 628-29, 632-33)

The **only** version of the stabbing was the version given to Detective Wilber by John Henry. There was nothing about Henry's version that was unbelievable. If the judge disregarded it, he made up his own version based on nothing more than mere speculation. A finding of CCP cannot be based on speculation.

Applying the factors that Appellee cited from Swafford v. State, 533 So.2d 270 (Fla. 1988), it is clear that the CCP aggravating factor was not established. (Brief of Appellee at

37-38) There was **no** advance procurement of a weapon; there **was** provocation; and there was **no** appearance of a killing carried out as a matter of course. 533 So.2d at 277.

Appellee's attempt to compare this stabbing with Henry's stabbing of Patricia Roddy ten years earlier does not show a prearranged design. Interestingly, the prosecutor did not even speculate as to such a connection. Instead, it shows that Henry, who suffered chronic paranoia (R. 892-93), was triggered by similar feelings of rejection when he lost his wives and stepchildren. If Henry had planned the murder, he would not have stopped to tell Suzanne's sister he was going to her house (R. 507) and he would have taken a weapon. Both stabbings evidence extreme feelings of rejection and uncontrollable anger -- not a "preconceived plan to kill." Accordingly, the judge's finding of heightened premeditation was clearly error.

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.

Appellee's statement that two psychiatrists testified that the Appellant did not suffer from "any ongoing mental illness or emotional dysfunction" is clearly incorrect. (Brief of Appellee at 43) In addition to Drs. Berland and Afield, the defense experts, one of the State's experts, Dr. Fessler, also found chronic mental illness. Dr. Fessler testified that Henry suffered from long term alcohol and drug abuse and low-grade schizophrenic illness manifested by hallucinations. (R. 777-78)

Only Dr. Sprehe found no mental illness. (R. 829-31) In light of the lengthy and detailed testimony of the other three psychiatrists, all of whom agreed that Henry suffered from at least some mental illness, Dr. Sprehe's testimony is highly questionable. In fact, it is unbelievable.

The trial court's soliloquy, in rejecting the mental mitigators, ignores the testimony of Drs. Afield and Berland that Henry's diagnosis did not require the presence of cocaine. (R. 897-98, 932, 944-46) Accordingly, his analysis is not even applicable to a determination of the mental mitigators. Like the Appellee, the trial judge mischaracterized the testimony of Dr. Fessler, finding a "split" of opinion between the four medical experts. While there may have been a split as to whether Henry was able to appreciate the criminality of his behavior, the verdict as to whether he suffered emotional disturbance was three to one in favor of some impairment.

Despite Appellee's argument to the contrary, Henry's stabbing of his wife was a "heated domestic dispute." He not only knew the victim but was married to her. The fact that Henry stopped to see Suzanne's sister on the way to her house and did not arrive with a weapon show clearly that he did not go there to kill her. All of the evidence in the case points to a frenzied stabbing by a psychotic and rejected husband in the heat of a domestic dispute. The death penalty is not proportionally warranted.

CONCLUSION

For the above reasons, and those argued in the Initial Brief of the Appellant, JOHN RUTHELL HENRY respectfully requests this Court to reverse his conviction and to remand for a new trial for second-degree murder. If the Court does not grant this relief, Appellant requests that this Court reverse and remand for entry of a judgment of guilt for second degree murder or, alternatively, order a new trial for first-degree murder. As a lesser alternative, Appellant asks this Court to vacate his sentence of death and remand for the imposition of a life sentence or, if none of the above is granted, to award him a new penalty trial before a jury impaneled for that purpose, and a new sentencing.

Respectfully submitted,

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Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL., 33602, by U.S. mail, this 6th day of June, 1989.

A. ANNE OWENS