IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY

APPELLANT

v. Case No: 78,934

STATE OF FLORIDA

APPELLEE

_____/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
Assistant Public Defender
Criminal Court Complex
5100 144th Avenue North
Clearwater, FL 34620
(813) 464-6594

ATTORNEYS FOR APPELLANT

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Appellee.

_____/

STATEMENT OF THE CASE

The Grand Jury for the Sixth Judicial Circuit, indicted appellant, **John Ruthell Henry**, for Murder In The First Degree. (R867-868) Appellant was convicted and sentenced to death. He appealed to the Supreme Court of Florida which overturned his conviction and remanded the case for a new trial. see Henry v. State, 574 So. 2d 73 (Fla. 1991).

On October 7, 1991, a new trial was held before the Honorable Maynard Swanson, Circuit Judge. The jury listened to the testimony of the state's witnesses, saw the physical evidence presented, and heard the argument of counsel and the instructions of the court. The jury deliberated and found appellant guilty as charged. (R953) On October 10, 1991, the court reconvened for penalty phase proceedings. The jury listened to the testimony of the witnesses, saw the evidence and heard the argument of counsel. The court instructed the jury they could consider the following aggravating factors:

> 1. The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

2. The crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of robbery.

3. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel."Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. This kind of crime intended to included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The court also instructed the jury as to all eight statutorily defined mitigating factors. After a period of deliberation, the jury returned a 12 to 0 recommendation of death. (R954)

On October 18, 1991, sentencing was held before Judge Swanson. He imposed the death penalty, (R958-968) finding in aggravation that:

1. Defendant had previously been convicted of a felony involving the use or threat of violence to another person.

2. The defendant's commission of this murder was especially heinous, atrocious and cruel.

The court found no mitigating factors applied.

On November 7, 1991, appellant filed a Notice of Appeal. (R971) That appeal is now before this court pursuant to Florida Rule of Appellate Procedure 9.030(1)(A)(i) and Article V, section 3(b)(1) of the Florida Constitution.

STATEMENT OF THE FACTS

GUILT PHASE

Appellant, **John Ruthell Henry**, was charged with First Degree Murder. At his re-trial, pursuant to a mandate of the Florida Supreme Court the following testimony was presented:

Curtis Clark testified that appellant, John Henry, was married to his sister-in-law, Suzanne. As of December 22, 1985, they had been married approximately three years. (R292) On the night of December 21st, Suzanne's son, Eugene Christian, [nicknamed "Buggy"] had spent the night at Clark's house while his mother was at work. Suzanne picked Eugene up the next morning about 10:30 a.m. and Mr. Clark drove them home. Suzanne informed Mr. Clark she had evicted John Henry from the house and expressed anger about him. (R290) Mr. Clerk stayed until approximately 11:30 a.m. and then returned to his house. (R293-294)

Ray McAddams [1] testified that on December 22, 1985, he was living at 303 Collins Avenue in Zephyrhills, just across the street from the duplex where Suzanne Henry lived. (R297-298) At approximately 11:30 a.m., he had gone out to his truck to go and pick up his wife from church. (R298) A car pulled up in the yard of Suzanne Henry's house, a person got out and knocked on the door. The door opened and the person was admitted. Mr. McAddams then drove off to pick up his wife. Mr. McAddams admitted that the only identification he could make of the person was that he

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[1] Mr. McAddams testimony from the first trial was read to jury because he had died in the interim.

was black and male. (R299)

Marion Crooker [2] testified he lived at 302 Collins Avenue. (R301) Sometime between 1:00 and 2:00 p.m. on the 22nd, he heard the door slam at the duplex next door. He went to investigate and saw an old, blue-green Chevy with a space-saver spare tire on the right rear side parked outside. (R302) He saw Buggy sitting on the passenger side with his head down. Then someone got into the car with Buggy and drove away. Mr. Crooker could not say whether the person was a man or woman, only that he or she was black. (R304)

Mr. Crooker stated that he had previously witnessed an argument wherein Suzanne Henry told appellant to take his clothes and get out of the house, but could not say how long before the 22nd of December this had occurred. (R307-308)

Bonnie Cangrow, Suzanne Henry's sister, testified she had driven Suzanne to work on December 21st at the Presto Convenience Store. (R309) Suzanne had a ride to work the next evening, December 22nd, however, Bonnie called the store that night to check on her. When she was told Suzanne had never come to work, she went to her house on Collins Avenue. The house was locked, however, the bedroom light was on and the television was playing. Suzanne wasn't in bed, so she left. (R311) Bonnie returned the next day. Everything was still the same. Bonnie went to the house of her other sister, Dorothy, to ask if she had seen

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[2] Mr. Crooker's testimony from the previous trial was also read to the jury because he too had died.

Suzanne. Bonnie was also concerned that Eugene was nowhere to be found. (R312) When Dorothy reported she had not seen Suzanne either, Bonnie returned to Suzanne's house with the key. (R312)

She unlocked the door and pushed it open. A chair was lying on its side in front of the door. She saw blood on the wall and her sister was lying on the floor covered up. She shut the door and went and advised Dorothy she had found Suzanne dead. (R313)

Ms. Cangrow characterized Suzanne's and appellant's relationship as very rocky. She recalled one incident where she had found appellant sitting on top of Suzanne holding her down and slapping her on the face. (R316) Bonnie described Suzanne as a "big girl" about 5' 5" and 165 pounds who wouldn't lay down for anyone and would hit back. Ms. Cangrow stated that prior to December 22nd her sister, Suzanne had owned gold jewelry, however, after the 22nd she did not find any money or gold jewelry in Suzanne's house. (R318)

On cross-examination Ms. Cangrow recounted an incident where Suzanne had brandished a knife at a girl she had found appellant with. Appellant had stopped her from going after the girl. (R319-20)

Dorothy Clark, wife of Curtis Clark and the sister of Suzanne Henry and Bonnie Cangrow, testified that on December 23rd she had been at the convenience store where she worked, when appellant, John Henry, came into the store and bought a can of beer. Appellant asked if she had seen Suzanne that day. Mrs.Clark said she hadn't, but her husband had driven Suzanne home. (R323)

Later that same day, her sister Bonnie Cangrow came into the store hysterical, screaming that she had found Suzanne dead at her house. After calling the police, she and Bonnie both went to Suzanne's house and waited for the authorities to arrive. (R324)

Mrs. Clark described her sister as about 5' 6", on the heavy side and a tough lady who wasn't afraid to fight. (R326) She also agreed that the relationship between Suzanne and appellant was a rocky one. (R327)

Deputy Dale Neuner testified he was dispatched to Suzanne Henry's apartment on Collins Avenue around 3:45 p.m. on December 23rd. Ms. Henry's sister, Bonnie Cangrow, was waiting outside. Upon entering the house, Deputy Neuner saw the body of a white woman lying prone in the southeast corner of the living room. There were no other persons in the apartment.R329 The woman was cold and her body rigid. Her head and upper part of her body was covered with what appeared to be a throw rug.R330

John Mathis testified that in December of 1985 he was the owner of a 1978 Chevrolet. The vehicle was set apart by the fact it had a space saver spare tire on the right rear wheel. (R386) On December 22nd he had met appellant, **John Henry**, who had asked to borrow his car. Appellant took Mr. Mathis's car [whether it was with or without Mr. Mathis permission was never firmly established] and approximately a week later, the car was returned to Mr. Mathis by the police. (R388)

Mr. Mathis stated he had seen appellant smoke crack cocaine on occasion, however, he could not specifically recall seeing him

smoke it on the 22nd of December. (R390) [3]

Dr. Joan Wood, chief Medical Examiner, testified she examined the victim, Suzanne Henry's body at the scene around 7:00 p.m. on December 23rd. From the condition of the body she estimated the victim had been dead twenty-four to thirty-six hours. (R405) She counted thirteen stab wounds to the neck and left shoulder. The victim also had bruises on her face, neck, shoulder, arm and knee. (R407) There were no wounds that could be characterized as defensive wounds associated with a knife. (R412) She could not state in what order the wounds were inflicted and could not say over what period of time they were inflicted other than the victim was alive at the time. (R421) The victim would have survived five or ten minutes after all the injuries were inflicted and might have remained conscious three to five minutes of that time. (R422)

Rosa Mae Thomas testified she had known appellant, John Henry, for fifteen or sixteen years. She was aware appellant and Suzanne Henry were married, yet on December 21st appellant was living with her. (R429) Appellant had moved in with her after Suzanne threw him out of the house. (R430) She saw appellant on the morning of the 22nd and did not see him again until 8:00 or 9:00 p.m. on December 23rd. (R431) At that time, she fixed him something to eat, and he asked her to get him some extra clothes.

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[3] Mr. Mathis's testimony from the previous trial was read to the jury in lieu of his live testimony. Because of Mathis's inability to recall the events, the court declared him an unavailable witness.

They started walking and then caught a ride with appellant's brother, Willie Henry. She and appellant ended up taking a room at the Twilight Motel. (R432) She lay dozing on the bed while appellant took a shower. After fifteen or twenty minutes appellant came out, lay on the bed and also fell asleep. (R433) Around 10:00 p.m., Detective Wilbur came to the door. He called for appellant to come out, then handcuffed him and put him into the police car. (R435)

Ms. Thomas stated that Suzanne Henry was aware she was the other woman in appellant's life and had approximately five confrontations with her about that fact. (R435-436) Suzanne would call and tell Ms. Thomas she was not going to let her [Ms.Thomas] have him [John Henry]. (R430) On one occasion Suzanne was arrested in Ms.Thomas's front yard. Suzanne told Ms. Thomas she would rather see appellant rot in jail before she [Suzanne] would let her have him. (R437)

Willie Henry, appellant's brother, testified that on December 23rd he had seen his brother and Rosa Mae Thomas walking beside the road as he was driving by. Appellant waved and yelled to him. (R439) Willie Henry stopped to see what they wanted and appellant asked for a ride to the Florida Plaza Motel where he and Rosa Mae got out. (R440) Subsequently, Willie Henry was questioned by Detective Wilbur as to where he had taken appellant and informed him as to the location he had left appellant. (R441)

Detective William Ferguson testified he was dispatched to the Twilight Motel where he found appellant in the custody of

Detective Wilbur. (R443) Detective Ferguson examined the motel room, particularly the bathroom. There was wet clothing hanging over the shower rod. (R446) There were shoes on the floor, also soaking wet. (R447) In addition, there were two towels which had appeared to have blood on them. (R449)

Mary Cortese, a serologist, testified she analyzed several of the items for blood stains. She found human blood present on the shirt and towel found in the motel room bathroom, but was unable to establish a blood type. (R4454-4456)

Detective Fay Wilbur testified that Suzanne Henry's apartment was quite neat and nothing else had been moved or was in disarray, other than a knife missing from the knife rack in the kitchen. (R360,471-474) Dr. Wood had previously testified that a knife fitting the empty space in the knife rack would be consistent in size to the one used to stab Ms. Henry. No usable prints were found in the house. (R368) There were blood spatters on the wall and the drapes and a great deal of blood in the immediate area of the body. (R475)

Detective Wilbur's initial investigation led him to appellant at the Twilight Motel. At the motel, appellant did not appear to be under the influence of either alcohol or drugs. (R487) After advising appellant of his rights, he first asked if appellant knew where Eugene was. Appellant said he did not. (R491) Appellant denied having seen either Suzanne or Eugene since the previous Sunday. (R497) Detective Wilbur then told appellant if he would not help him find Eugene, he [Detective

Wilbur] would find him himself. At that point, appellant told him to wait and subsequently, appellant lead Wilbur and three other officers to the Knight's Station area of Plant City to a chicken farm. There they found a 1977 or '78 Chevrolet with a space-saver tire on the right rear wheel stuck in the mud. (R500) This was the vehicle that belonged to Mr. Mathis. The body of Eugene was found nearby in an area with large trees and thick undergrowth. (R502)

Afterwards, John Henry, told Deputy Wilbur he had gone to Suzanne's house to give a Christmas present to Eugene. While he was there, Suzanne had become very angry with him and told him to leave. (R503) She had gotten a knife and cut him, whereupon, he became enraged, overpowered, and stabbed her. Appellant could not recall how many times he had stabbed Suzanne. Detective Wilbur asked appellant to show him where Suzanne had cut him. Appellant showed him several scratches on his lower arm just above his hand. (R508) In Detective Wilbur's opinion, the scratches looked liked those one would get from shrubbery or thorns, not cuts by a knife. (R509) Detective Wilbur conceded that he had no photos of appellant's arm, explaining that in the photos he tried to take, the flash had burned out the image. (R518)

Appellant had covered up Suzanne's body, gotten Eugene from the bedroom, and left in the car. Appellant admitted to subsequently killing Eugene and throwing the knife away in the area where his body was found. (R505) Then he had walked back to Rosa Mae Thomas's house. (R509)

STATEMENT OF THE FACTS

PENALTY PHASE

After appellant, John Ruthell Henry, was found guilty of murder in the first degree, penalty phase proceedings were held. During the penalty phase, the following testimony was presented:

Debbie Fuller [4] testified that in August of 1975 she had lived at 513 Wilson Street with her grandmother, Irene Wilson, and Patty Roddy. (R680) Patty Roddy had been living with Fuller and her grandmother for a few weeks while she was in the process of getting a divorce from appellant, John Henry. (R681) On a day in August of 1975, appellant had come to the house. He had repaid Ms. Wilson some money he owed her and brought Patty some clothing she had requested. Appellant had told Patty these were the "last damn clothes she was ever going to get." He had then gone outside and Patty Roddy had accompanied him. (R682) Debbie warned her about going with appellant, but Patty laughed it off.

Apparently Ms. Wilson had gone to the door and seen appellant pulling Patty to his car. (R683) Ms. Wilson yelled at appellant to let Patty go or she would call the police. Appellant replied," Call the damn police." Debbie meanwhile called for assistance. After calling the police, Debbie ran back to the door. Appellant had Patty in his car and they were struggling. Patty screamed. Her children got into the car and screamed that appellant was cutting their mother. (R684) Debbie

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[4] Debbie Fuller's testimony from the previous trial was read to the jury in lieu of her live testimony, the judge having found her to be unavailable due to her incarceration in another state.

ran to the back door, but by then Patty's screaming had stopped. She went outside where she could hear appellant hitting Patty on the chest. Debbie arrived at the passenger door of the car at the same time as a neighbor, Gloria Nix did. Appellant got out on the driver's side and walked away into the darkness. (R685) Only after Debbie reached in and touched Patty, did she realize Patty had been stabbed. (R686)

Gloria Nix testified she had lived across the street from Irene Wilson, Patty Roddy, and Debbie Fuller. She had heard an argument going on between appellant and Patty Roddy. She went outside and across the street to the car where they were arguing. Initially she thought appellant was hitting Patty. Gloria opened the car door and Patty's hand fell out. Appellant got out of the car and walked down the road. (R689)

Detective Wilbur testified he had been a patrol deputy back in August of 1975. He had arrested appellant after the murder of Patty Roddy. Appellant had ultimately pleaded guilty and been convicted of second degree murder. (R695)

Dr. Joan Wood testified she had reviewed the autopsy report prepared by the late Dr. Shinner, the former chief medical examiner. (R706) In his report, Dr. Shinner described thirty separate knife wounds that caused the death of Patricia Roddy. (R708)

Dr. Wood was also asked about the effect of crack cocaine on an individual. She explained that the maximum effect of the drug was attained in a few minutes and the significant effects had

worn off within an hour. (R713-714)

Dr. James Fessler, a psychiatrist, testified he had evaluated appellant, John Henry in 1987. Appellant had told him that he had bought some crack cocaine and smoked it before going to Suzanne Henry's on the day in question. (R720) At Suzanne's, they had argued about his involvement with another woman, she became angry and told him to leave. When he didn't, Suzanne got a knife and tried to stab him. Appellant received two or three small cuts on his arm. Appellant got the knife away from her, lost control and stabbed her in a rage an unspecified number of times. (R720-721) Dr. Fessler also agreed that the effects of crack cocaine hit people within the first few minutes and then tapered off very rapidly. (R722) From speaking to appellant about the incident, Dr.Fessler concluded that although appellant had some lingering effects of the cocaine, he was generally in contact with reality and was not thinking bizarrely when he went to Suzanne Henry's house. (R723) Dr. Fessler did not believe appellant was under the influence of any extreme mental or emotional disturbance at the time and was able to appreciate the criminality of his conduct. (R726)

Dr. Fessler stated that appellant's history included his recollection that he began drinking at age ten and was soon drinking a fifth a day. (R727) Appellant had also experienced auditory hallucinations, even when he hadn't been drinking or taking drugs. (R728)

Dr. Daniel Sprehe, a psychiatrist, testified he, too, saw

appellant in February 1987. Appellant told him he had been smoking crack cocaine, had borrowed a car and gone to see Suzanne, his estranged wife, about a Christmas present for a child. Suzanne let him in and they started talking. She brought up the subject of the girl he had been living with and an argument ensued. She asked him to leave, but he wanted to continue the argument. She got a knife and threatened appellant. He became angry, got the knife away from her and stabbed her several times, but he was not sure how many. (R737) Appellant also told him that his first wife, Patricia Roddy, had threatened him with a knife during an argument, he had grabbed it and killed her. (R738)

Dr. Sprehe stated that although appellant was angry and overwrought, he was not unable to control himself when he stabbed Suzanne. (R739) He was not suffering from any specific mental disorder. (R740) In his opinion, appellant's ingesting cocaine beforehand would have had a relatively negligible effect. (R739)

Stephanie Thomas, Rosa Mae Thomas's daughter, testified appellant, John Henry, had lived with her and her mother for five or six months in 1985. Appellant was pleasant to live with and she never witnessed any arguments between her mother and appellant. (R751) Appellant went out of his way to be nice to her and her brother, and she still felt affection for him. (R752)

Suzanne Henry, on the other hand, would come to their house and start altercations. On one occasion it appeared Suzanne had been drinking. She started fighting with appellant, although he

just told her to leave. Even after her mother had called the police and they had arrived, Suzanne continued. The police told Suzanne they would forget everything if she would just get in her car and leave, however, she continued telling Rosa Mae she would never have him [appellant] and telling appellant she would get him for this. (R753) Stephanie explained that Suzanne would always come to their house late at night and ask to speak to appellant, they would go outside and she would start an argument with him. (R754)

Rosa Mae Thomas testified she had known appellant since high school. (R758) When he moved in with her on a permanent basis, Suzanne Henry would come over to the house and argue with appellant. She said she would not let appellant stay, he was her husband and she was going to do what she wanted to. Suzanne wasn't even dissuaded when Rosa Mae advised her she was going to call the police. (R760) When the police tried to persuade Suzanne to leave, she accosted them. Rosa Mae estimated that Suzanne and appellant were almost equal in size. (R761) Appellant would tell Suzanne he didn't want to be with her any more, still she insisted she wouldn't give him up. When appellant threatened to call the police, she replied she did not care. Rosa Mae stated Suzanne Henry would offer appellant money, knowing he would use it to buy cocaine, as a sort of control over him or a way to get him to come back to her. (R772)

Rosa Mae described appellant, John Henry, as real nice, a good provider and handy around the house. (R762) He loved her

and her two children, also. He never assaulted her physically or her children. Rosa Mae admitted appellant had a problem with crack cocaine which made him act paranoid. (R763) Appellant also had an alcohol problem, and he would mix it with taking drugs, however, he would not drink or take drugs around her children. (R764)

SUMMARY OF THE ARGUMENT

I

The trial court erred in allowing testimony concerning the death of Eugene at appellant's hands. This homicide occurred some nine hours after Suzanne Henry's death, later in a neighboring county. This court's previous opinion specifically ruled that the evidence of Eugene's death was not admissible as *Williams* rule evidence. Even assuming it was marginally relevant on some other basis, its probative value was far exceeded by the prejudice it created in the minds of the jury. Because there was evidence that could have supported a verdict for a lesser degree of homicide, this error cannot be presumed to be harmless.

II

During the penalty phase proceedings, the trial court erred by allowing the state to use a transcript of the prior trial testimony of Debbie Fuller and by allowing the medical examiner, Dr. Wood, to testify from an autopsy report prepared by another doctor concerning the homicide of appellant's first wife, neither of which appellant had the opportunity to cross-examine or otherwise rebut. Furthermore, there was no overwhelming necessity to use such evidence, the testimony of Gloria Nix and Detective Wilbur being more than sufficient to support the aggravating factor in question.

III

The trial court should not have instructed the jury on the aggravating factor of homicide during the commission of a robbery, as it was obvious the evidence was totally insufficient to support that factor. Although the judge did not find this particular aggravating factor in his sentencing order, it must be presumed the jury did consider it in making their sentencing recommendation. As the court presumably gave great weight to the jury's recommendation, the court indirectly weighed the invalid factor.

IV

The trial court failed to expressly evaluate each non-statutory mitigating circumstance for which evidence was presented. These included that: appellant had been a good to and a good provider for Rosa Mae Thomas and her two children; appellant had a long-standing drug and alcohol problem; appellant and Suzanne Henry had a long-standing and stormy domestic relationship prior to the murder; and the homicide had been the culmination of a heated argument between Suzanne Henry and appellant.

V

The aggravating factor of heinous, atrocious or cruel was not established beyond a reasonable doubt so the trial court erred in finding it as an aggravating factor in imposing its

sentence of death for the homicide herein. The evidence did not support the conclusion that appellant stabbed Suzanne Henry with the intent to torture her or the desire to inflict pain or enjoy her suffering, assuming she even did suffer.

VI

Based upon proportionality review, this case requires a life sentence. This court has in numerous cases found that where the homicide in question arose from a lovers' quarrel/domestic dispute, that a death sentence is unwarranted, irregardless of the circumstances involved or even the jury's recommendation.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING THE HOMICIDE OF APPELLANT'S STEP-SON WHICH OCCURRED SUBSEQUENT TO THE HOMICIDE FOR WHICH APPELLANT WAS ON TRIAL.

According to the state's witnesses, on December 22nd an unidentified person was seen leaving Suzanne Henry's house with Eugene in a late-model blue-green Chevrolet with a space-saver spare tire on the right rear side. Suzanne Henry's sisters testified that when they found her body on December 23rd, Eugene was nowhere to be found, although he had last been seen at home with her. Detective Wilbur had questioned appellant after his arrest, concerning his knowledge of Suzanne's death and the whereabouts of Eugene. When appellant professed ignorance of both, Detective Wilbur ended the interview with the comment that if appellant would not help him find Eugene he would find him himself. Appellant then lead Detective Wilbur and other officers to a chicken farm in Plant City where they found a 1978 blue-green Chevrolet with a space-saver spare tire on the right rear wheel stuck in the mud, and Eugene's body in the thick undergrowth nearby. Appellant then admitted to stabbing Suzanne at her house in Pasco county, covering her body with a blanket, taking his step-son from the house and driving with him to Plant City in Hillsborough county where, approximately nine hours later, he stabbed him with the same knife he had used to kill Suzanne.

Prior to the state's case-in-chief, the defense made a

motion in limine to exclude any mention whatsoever concerning the homicide of appellant's step-son, Eugene Christian [nicknamed "Buggy"] which occurred after the murder of Suzanne Henry. The trial court refused the defense's request to disallow any mention of Eugene or his demise. However, it did prohibit the state from presenting testimony about the search for the body, the autopsy photo of Eugene or the manner in which Eugene was killed. Defense counsel made a standing objection to any reference by the state or its witnesses concerning Eugene. (R270-271) During the course of the trial, reference was made to Eugene being last seen at Suzanne's house on December 22nd, that he was missing from the house when Suzanne's body was discovered on December 23rd, that he left Suzanne's house on December 22nd with an unknown person, that appellant had lead police to the place where Eugene's body was found in the underbrush and appellant confessed to killing his step-son.

In the prior appeal of this case, [Henry v. State, 574 So. 2d 73 (Fla. 1991)] this court specifically held that the subsequent homicide of appellant's step-son was not admissible as *Williams* rule evidence.

> *"In this case, the killing of Eugene Christian was irrelevant to explain or illuminate the murder of Suzanne Henry. It did not prove motive, intent, knowledge, lack of mistake or, contrary to the state's assertion, identity, where the necessary factual points of similarity are totally absent. On this record, the fact that both victims were family members who were stabbed in the neck did not provide sufficient points of similarity from which it would be reasonable to conclude that the same person committed both crimes."*

However, this court's opinion left open the question whether the trial court could permit any reference to Eugene or his demise under the premise that it was an integral part of the entire criminal episode. Section 90.401 of the Florida Evidence Code provides:

> *Relevant evidence is evidence tending to prove or disprove a material fact.*

Section 90.402 further provides:

> *All relevant evidence is admissible, except as provided by law.*

Section 90.403 states that:

> *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.*

The notes accompanying the provisions declare that "nothing that fails to meet the tests of 90.401 and 90.403 may be admitted."

It is plausible, that the killing of Eugene was relevant to explain his absence as a witness, or to put the police investigation and appellant's subsequent statements into context. However, not only must evidence be relevant, it must be relevant to a material fact in issue. Since evidence of other crimes is inherently prejudicial to the defendant, only evidence actually needed to prove a material fact that is genuinely in dispute is admissible. If there is no bona fide controversy over the substantive fact that the evidence of the collateral crime is submitted to prove, then the probative value of such evidence has necessarily lessened in proportion to its prejudicial effect and should therefore be excluded. see Thomas v. State, 599 So. 2d 158

(Fla. 1st DCA 1992).

In the instant case there was no genuine controversy about who had killed Suzanne Henry. The whole theory of appellant's defense was that he had killed Suzanne in a blind rage during a quarrel in which she had attacked him with a knife. There was no necessity to make any reference to Eugene, his presence at Suzanne's home when the altercation in issue took place or his subsequent demise, many miles away and many hours later, at the hands of appellant. Without mentioning Eugene, the state still could have brought out the facts the blue-green Chevy was seen in front of Suzanne's house on December 22nd which was driven away by an unidentified person; when arrested appellant had blood on his clothing which he had attempted to wash out; that appellant subsequently lead the authorities to the blue-green Chevy which was stuck in the mud in an area with thick undergrowth; and appellant had admitted stabbing Suzanne and disposing of the knife in the area where the car was found.

The state's contention that appellant killed his step-son in order to eliminate a witness falls short because there is nothing in the record herein that indicates Eugene in fact witnessed the homicide. To the contrary, it is questionable whether Eugene would have gone apparently willingly enough with appellant, if he had actually seen appellant repeatedly stab his mother to death.

The murder of a small child is such a reprehensible act that any mention or inference thereof could only have served to

inflame the jury and prejudice them against appellant.During the course of the state's case-in-chief, the prosecutor fanned the flames when he questioned Detective Wilbur thusly:

> *Q: To your knowledge, based upon your investigation, was there anybody inside the residence other than John Henry and Suzanne at the time that John killed Suzanne?*
>
> *A: Yes*
>
> *Q: Who?*
>
> *A: Bug, Eugene.*
>
> *Q: The only potential witness?*
>
> *A: Correct.*

Appellant objected and moved for a mistrial which the court denied. (R510-511) Subsequently, the prosecutor fanned the flames of his earlier inquiry into a roaring blaze by commenting during his closing argument:

> *"Mr. Henry is not on trial today for anything having to do with that child. Nothing. Okay. You've got to understand that. However, I'm going to tell you that is also one more indication as to why this is not justifiable homicide, why this is not excusable homicide and why this is, in fact, a cold-blooded first-degree murder. There was one person in that house besides Suzanne and John. That's Eugene Christian.*
>
> *There is one - John Henry in his statement that Buggy was in the back bedroom while this happened. Common sense tells us that's not the case. We know that when Suzanne was in this situation before, that she was screaming. Bonnie Cangrow said she was screaming. And I submit to you that the only potential witness cannot testify because of the acts of John Henry. Guilty knowledge. If he wasn't afraid of what that person was going to say, then why did he kill him? Guilty knowledge."* (R599-600)

The prosecutor's argument is at fault because it had no basis in actual fact. It was based only upon his own surmise, that is Suzanne had screamed during a previous altercation with

appellant, therefore, she must have been screaming during this altercation. However, a neighbor who was called as a witness stated his attention was drawn by a door slamming, not screams.

There is no truly satisfactory rationale as to how or why the evidence of Eugene's death tends to prove a material fact at issue with respect to the charged offense. The admission of the evidence of Eugene's murder violated sections 90.403 and 90.401 in that the probative value was far outweighed by its inherently prejudicial nature. The admission of collateral crime evidence is presumed to be harmful error because of the danger the jury will take the bad character or propensity demonstrated as evidence of appellant's guilt of the crime charged. Whatever one might choose to think of appellant for his subsequent actions, the only charge for which he was on trial was the death of Suzanne Henry. Furthermore, there was evidence that could have supported a jury verdict that appellant was guilty of a lesser degree of homicide, therefore, it cannot be reasonably assumed that their awareness of Eugene's murder did not have any impact on their verdict. Knowledge of Eugene's subsequent demise at the hands of appellant made it impossible for the jury to logically and dispassionately determine appellant's innocence or guilt.

ARGUMENT

ISSUE II

DURING THE PENALTY PHASE PORTION THE TRIAL COURT ERRED BY ALLOWING THE STATE TO USE A TRANSCRIPT OF THE PRIOR TRIAL TESTIMONY OF DEBBIE FULLER AND ALLOWING DR. WOOD TO TESTIFY FROM AN AUTOPSY REPORT PREPARED BY DR. SHINNER CONCERNING HIS FINDINGS IN THE DEATH OF APPELLANT'S FIRST WIFE.

In the instant case during penalty phase proceedings, the state introduced the testimony of Debbie Fuller via a transcript of her testimony given at appellant's first trial in 1987. The state's rationale for using the transcript was that Debbie Fuller was unavailable, as she was incarcerated in another state. [5] Debbie Fuller's testimony was an eyewitness account of the death of appellant's first wife, Patricia Roddy, for which appellant had plead guilty to second degree murder. Defense counsel objected to presenting Fuller's testimony in this manner, especially as there was another witness who was available and would testify to essentially the same things. (R676-677) The state also presented the testimony of Dr. Joan Wood, the medical examiner. Over defense counsel's objection, (R705-706) Dr. Wood was allowed to testify about the injuries and cause of Patricia Roddy's death using the autopsy report, although Dr. Wood had not performed the autopsy, nor had she any personal knowledge of the

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[5] Although conceding there were procedures for obtaining the presence of witnesses incarcerated out-of-state, the state presented testimony to the effect they had made every effort to locate Fuller, but had only learned her whereabouts a few days before trial. This would have been an inadequate amount of time to go through the channels necessary for her to testify in Florida.

case. The state's rationale for allowing Dr. Wood to testify in this manner was that Dr. Shinner, who conducted the autopsy and prepared the report, had died and was therefore unavailable and the autopsy report fell under the business records exception to the prohibition against hearsay. Dr. Wood testified that Patricia Roddy had been stabbed numerous times in the neck and chest.

While hearsay evidence is permissible in penalty phase proceedings, it will be limited when the defendant is not granted the chance to rebut the hearsay statements.

> The Sixth Amendment right of the accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process clause of the Fourteenth Amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. [citation] This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). Engle v. State, 438 So. 2d 803 (Fla. 1983).

Appellant concedes that this court has held it appropriate in a penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use of violence to a person, rather than just presenting a cold judgment and sentence form. Testimony concerning the circumstances of the prior violent felony enable the jury to make an informed sentencing recommendation and arguably the testimony of Gloria Nix and Detective Wilbur was properly admitted in order for them to do so. However, there are limits.

Obviously, defense counsel did not have the opportunity

to cross-examine either Debbie Fuller [6] or Dr. Shinner.[7] While defense counsel did have the opportunity to cross-examine Dr. Wood, this was certainly not equivalent to questioning Dr. Shinner, especially as Dr. Wood had no knowledge of the case other than what she gleaned from the autopsy report.

Furthermore evidence that is irrelevant to the case at hand or whose value outweighs its probative value, will not be allowed. In Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this court held that it was error to admit a tape recorded interview of a victim Rhodes had previously been convicted of robbing and beating, wherein she described the earlier incident and its effect upon her. This court found that the use of the tape denied Rhodes his confrontation rights, was irrelevant and highly prejudicial and was unnecessary to support the aggravating factor in light of the judgment and sentence introduced and the direct testimony of the police officer who investigated the case.

As in Rhodes, id. there was no overwhelming necessity on the part of the state to use the transcript of Debbie Fuller's prior testimony or have Dr. Wood testify from Dr. Shinner's report in order to support the aggravating factor. The testimony of Gloria Nix and Detective Wilbur was more than sufficient to establish the fact of the prior conviction and the circumstances of the

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[6] It would appear from the record that the state only read the direct examination portion of Debbie Fuller's testimony and not the cross-examination.

[7] Dr. Shinner's actual autopsy report was never put into evidence.

crime, unless the state's sole aim was to put undue emphasis on it. For these reasons it was error to present the testimony in question to the jury.

ARGUMENT

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF HOMICIDE DURING THE COMMISSION OF A FELONY, BECAUSE THE EVIDENCE TO SUPPORT THE FACTOR WAS TOTALLY INSUFFICIENT.

At the conclusion of the penalty phase proceedings, the court instructed the jury as to the aggravating factors they could consider in making their penalty recommendation. The state requested that the court give the instruction that the homicide was committed during the commission of a robbery. In response the court stated:

> *"In that this is an advisory sentence only, on the request of the state, the court will grant the request. I do not hereby find that there is necessarily any evidence presented which would support either. My feeling being on this type of jury instruction, I have an obligation to pretty much give whatever either of you want. Ultimately the decision will be mine to make. I make it very clear. I'm not hereby finding these circumstances do exist."*

Over defense counsel's objection, (R779) the court instructed the jury:

> *Aggravating circumstance number two, which you may consider: the crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of robbery.* (R822)

Appellant urges error in the fact the trial judge instructed the jury as to an aggravating factor for which he recognized from the outset, the evidence was totally and completely insufficient. There was simply no evidence that appellant took the money and or jewelry the deceased allegedly had in her purse. The only

evidence was the testimony by Suzanne Henry's sisters that at some unspecified time prior to her murder, Suzanne had money and gold jewelry which she customarily kept in her purse, but after her death, no money nor jewelry was found in her house or her purse.

Needless to say, the assumption that appellant killed Suzanne Henry in order to take her money and jewelry presupposes the fact she had money and or the jewelry on the day in question. This was never established. Ostensibly, appellant had no funds prior to the murder, but had at least enough money to purchase drugs and rent a motel room afterwards. However, this assumes the fact appellant could not have obtained the money from any other source. This, too, was never established.

It could be argued that even assuming there was no basis for the aggravator, any error is harmless because the trial court did not find it to be an aggravating factor when it imposed sentence. However, in light of two recent United States Supreme Court cases, this proposition is erroneous.

In Sochor v. Florida, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), the United States Supreme Court held that:

> *... there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence.*

Because a Florida trial court is required to give great weight to the jury's recommendation of life or death, the Eighth Amendment prohibition applies equally to what the jury is allowed to consider during its penalty deliberations. In Espinosa v.

Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court of the United States decided that if a weighing state, such as Florida, chose to place capital sentencing authority in two authorities [the judge and jury] rather than just one, neither authority could be permitted to weigh an invalid aggravating factor. The court reasoned that although the trial court did not directly weigh any invalid aggravating circumstance, it had to be presumed the jury did so, because they were so instructed.

Furthermore, it had to be presumed the trial court followed Florida law and gave great weight to the jury's recommendation. By doing so, the trial court indirectly weighed the invalid factor the jury presumably found. see also Johnson v. Singletary, 18 Fla. L. Weekly S90 (Fla. January 29, 1993).

Likewise, this court has held that instructing the jury as to what is obviously an invalid aggravating factor constitutes reversible error, even though the trial judge in his sentencing order omits this particular factor from his findings. Omelus v. State, 584 So. 2d 563 (Fla. 1991) The question now becomes whether this error was harmless beyond a reasonable doubt. In arguing to the jury that the murder was committed during the course of a robbery the prosecutor discussed the evidence thusly:

> *"I invited your attention to that indicating to you that I believe the evidence would show, and I believe it does now show, that John Henry went to that house for one reason and one reason only, and that was to obtain funds with which to purchase cocaine. We know now that on the morning of December 22, 1985, John Henry had no money. We know now that on the morning of December 22, 1985, John Henry did not use cocaine. When the defendant spoke with Detective Wilbur on the night of the 24th--the morning of the 24th, he indicated to*

Detective Wilbur that he purchased cocaine after he killed Suzanne Henry. The first time that we hear of him purchasing cocaine prior to killing Suzanne Henry is almost a year-and-a-half later when this defendant is talking to Dr. Fessler, Dr. Sprehe and extensively to others. That's the first time. You heard the testimony of John Stephen Mathis during the trial. This is a person who owned the blue car, the person from whom John Henry got the blue car to drive to the house at 306 Collins Avenue. Mathis said that he knew Henry used cocaine, but he didn't know--he wasn't sure whether or not he was using it that day. We know from Rosa Mae Thomas that he was not using it that day because he didn't have any money with which to buy it. We know from Rosa Mae Thomas that Suzanne had, in the past, offered him money to buy cocaine and had offered him cocaine. When Rosa Mae Thomas was not around to borrow money from, Suzanne was. So on December 22nd sometime around 11:00, 11:30, Mr. Henry went to Suzanne Henry's house, he said, to talk about Christmas presents. Ladies and gentlemen, he's got a coke habit he's had since "83,'84,'85. Whenever he had money to buy cocaine, he bought cocaine. He didn't have any money to buy cocaine. He certainly didn't have money to buy Christmas presents. But he went to Suzanne Henry's house, went into the house. And if there was an argument in the house, the argument was not over Buggy, the argument was not over Christmas presents, the argument was over money, money with which to purchase cocaine. You know from Bonnie Cangrow and you know from Detective Wilbur that when Suzanne's purse was returned, there was no money in it. Some of the costume jewelry was still present, but the gold jewelry was gone. Bonnie told you that she had not recovered Suzanne's gold jewelry. Detective Wilbur told you had found no indication of jewelry in the house at the time he was doing the investigation at the scene. After the murder, John Henry had money to buy cocaine. Rosa Mae Thomas--I said: Rosa, did you ask him where did he get the money to buy cocaine? She said: Yes, I asked him. What did he say? I don't remember. I refreshed her recollection from some previous testimony she had given. I said: Rosa, do you remember giving these--this answer? Do you remember asking him where did you get the money for the cocaine and he said he sold some jewelry? And her response was: Yes, but it was his jewelry. Ladies and gentlemen, it wasn't his jewelry, it was Suzanne Henry's jewelry that he sold, sold for money to buy cocaine, the cocaine he purchased after he killed Suzanne Henry. Robbery is the taking of money or other property by the use of force, violence, assault or placing in fear the victim. And I suggest to you,

ladies and gentlemen, that force, violence, assault and placing in fear is exactly what happened to Suzanne Henry for the purpose of getting money to buy cocaine. It had nothing to do with Christmas presents, it had nothing to do with Buggy, it had to do with a craving inside John Henry. And that's why Suzanne Henry is dead. That's exactly why." (R799-802)

The defense in its argument, took issue with this assertion by the state and pointed out there was simply no basis in fact for the prosecutor's contention that it was a homicide committed in the course of a robbery and such was pure speculation or conjecture. (R817) Furthermore, the very facts set forth by the prosecutor are equally suspectable of the conclusion that the money or jewelry could have been taken by appellant as an afterthought upon realizing the victim was dead. see Clark v. State, 609 So. 2d 513 (Fla. 1992) Even the trial judge in his sentencing findings stated:

"However, this Court finds that the only evidence supporting a theory of robbery, to-wit: the victim's jewelry was missing after her murder and defendant had enough money after the murder to buy cocaine, is not sufficient to prove the elements of robbery by any standard." (R959)

Since the trial judge properly did not include robbery as an aggravating factor in imposing the death sentence, the issue that must now be determined is whether allowing the jury to consider this factor requires a new sentencing proceeding. Although the circumstance where no mitigating factors are found usually justifies imposition of a death sentence, because of the state's emphasis on the robbery factor during its sentencing phase argument and the fact the trial court failed to give consideration to several non-statutory mitigating circumstances

for which evidence was presented [see Issue IV], it cannot be said the error was harmless under the *DiGuilio* standard.

Because appellant's sentence of death was grounded for the most part on the questionable jury recommendation, it cannot stand, as it was imposed in violation of the requirements of due process and contrary to the protections against cruel and unusual punishment. Amendments VII and XIV, U.S. Constitution; Art. I, §§ 9, 17, Fla. Const. A new sentencing hearing before a new jury is mandated.

ARGUMENT

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO CONSIDER ALL NON-STATUTORY MITIGATING FACTORS FOR WHICH EVIDENCE WAS PRESENTED, WHEN IT IMPOSED SENTENCE.

Appellant contends the trial court erred by failing to consider all non-statutory mitigating factors for which evidence was presented when it imposed its sentence of death. At trial the court instructed the jury as to all the statutory mandated mitigating factors. During penalty phase proceedings, the defense had presented evidence pertaining to several non-statutory mitigating circumstances, specifically: appellant had been good to and a good provider for his "significant other" Rosa Mae Thomas and her children [Rogers v. State, 511 So. 2d 526 (Fla. 1987)]; appellant had a long-standing substance abuse problem with drugs and alcohol [Hall v. State, 541 So. 2d 1125 (Fla. 1989), Demps v. Dugger, 874 F. 2d 1385(11th Cir. 1989)]; appellant and Suzanne Henry had a long-standing and stormy domestic relationship prior to the murder [Ross v. State, 474 So. 2d 1170 (Fla. 1985), Herzog v. State, 439 So. 2d 1372 (Fla. 1983)]; and there had been a heated argument between the victim and appellant which culminated in appellant's decision to kill the victim [Herzog,id., Chambers v. State, 339 So. 2d 204 (Fla. 1976)]. This evidence was for the most part, uncontroverted by the state. Upon imposing the sentence of death, the trial court addressed each statutorily mandated mitigating factor, but made no mention of the non-statutory mitigating factors other than to

say, "No other circumstances in mitigation of defendant's conduct are found." (R964)

Florida Statute 921.141(3) requires "specific written findings of fact based upon [aggravating and mitigating] circumstances." Furthermore, the United States Supreme Court has held in Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982):

> *...just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.*

This court, too, has specifically held that when addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant and determine whether the alleged mitigating factor is supported by the greater weight of the evidence. After the mitigating factor has been found to exist, the court, in the case of non-statutory mitigating factors, must determine whether it is truly of a mitigating nature. Lastly, the court must decide if the mitigating factor or factors are of sufficient weight to counter-balance the aggravating factors found. Campbell v. State, 571 So. 2d 415 (Fla. 1990) [8]; Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Lamb v. State, 532 So. 2d

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[8] Appellant would specifically call to the court's attention that the proceedings in the instant case took place approximately a year after this court's decision in Campbell,id.

1051 (Fla. 1988) and Rogers v. State, 511 So. 2d 526 (Fla. 1987).

The trial court did not address the mitigating factor that appellant was a good provider for and good to his "significant other", Rosa Mae Thomas and her children. Rosa Mae testified that she had known appellant since high school, and he had lived with her and her two children for five or six months after Suzanne Henry had kicked him out of their house. Appellant had never been physically abusive toward her, or her son and daughter. (R762-763) Stephanie Thomas, Rosa Mae's daughter, testified that appellant had gone out of his way to be nice to her and her brother. (R752)

Although the court specifically rejected the premise that appellant had been under the influence of drugs at the time he killed Suzanne Henry, it did not address the fact of appellant's long-standing problems with alcohol and use of crack cocaine. (R727,763-764)

In addition, the court did not address the circumstances of appellant and Suzanne Henry's long-standing domestic disharmony and that the homicide was the result of a quarrel with the deceased. Even Suzanne Henry's own family agreed that their relationship had always been rocky and that Suzanne had evicted appellant from the house. (R290,307-308,316,327) Furthermore, Suzanne was a large woman who was not passive and would retaliate physically. (R318,327) One of Suzanne's sisters even recounted an incident where Suzanne had brandished a knife at a girl whom she had found with appellant. (R319-320) Rosa Mae Thomas

testified that after appellant had moved in with her, Suzanne would call and tell her that she wasn't going to let her have appellant. (R430,437) Rosa Mae's daughter, Stephanie, stated Suzanne would come to their house and start trouble. (R753-754) On one occasion Suzanne had been taken into custody in Rosa Mae's front yard after she had started a fight with appellant and refused to leave, even when asked to do so by the police. (R753,760-761) Rosa Mae accused Suzanne of giving appellant money knowing he would use it to buy crack cocaine and using it as a method of trying to control him or get him back. (R772) This testimony was uncontroverted by the state.

When dealing with mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance the defense has alleged and decide whether it has been established by a greater weight of the evidence. A mitigating factor need not be proven beyond a reasonable doubt. Next, the court must weigh the aggravating circumstances against the mitigating circumstances and must expressly consider in its written order each established mitigating circumstance. Although the weight to accord the mitigating factors is within the domain of the trial judge, once a mitigating factor is established, it cannot be summarily dismissed as having no weight whatsoever which is what the trial court did here. Campbell, id. A trial court is required to consider any and all relevant mitigating evidence presented to it in its sentencing order.

It is readily apparent the trial judge did not consider as mitigating factors the sentencing phase testimony of Rosa Mae Thomas and Dr. Fessler relating to appellant's drinking problems or the testimony relating to his use of crack cocaine. Furthermore there was evidence the killing was the result of an angry dispute in which both the victim and appellant had difficulty in controlling their emotions and was the culmination of a long-standing abusive and emotionally charged relationship. The trial court erred by not specifically addressing all the non-statutory mitigating circumstances for which evidence was presented and by not considering these circumstances collectively as a significant mitigating factor. Ross v. State, 474 So. 2d 1170 (Fla. 1985).

ARGUMENT

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS OR CRUEL WHEN THE EVIDENCE OF THAT AGGRAVATING FACTOR WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

Appellant argues there were insufficient facts to warrant the trial court instructing the jury on the aggravating factor of heinous, atrocious and cruel, and furthermore the trial court erred in finding this factor was established by the evidence and then using it in the weighing process.

Dr. Joan Wood, chief Medical Examiner, testified she examined the deceased, Suzanne Henry at the scene. She observed numerous stab wounds in the area of her neck and left shoulder. There were no wounds she could characterize as defensive, that is associated with fending off a knife. Dr. Wood could not state in what order the wounds were inflicted and could not say the amount of time they were inflicted other than the victim was alive at the time. While the deceased might have survived five or even ten minutes after all the wounds were inflicted, she might only have remained conscious for three to five minutes after the wounds to the major blood vessels in the neck.

None of the defendant's acts occurring after the victim is unconscious can support a finding that the offense was heinous, atrocious or cruel. Cochran v. State, 547 So. 2d 928 (Fla. 1989). There was nothing in Dr. Wood's testimony to contradict the conclusion that Suzanne Henry was rendered unconscious within minutes after the first wound was inflicted as opposed to

concluding that she suffered pain until she finally expired. Therefore, the state failed to prove beyond a reasonable doubt that the offense was heinous, atrocious or cruel.

The aggravating factor of heinous, atrocious or cruel is appropriately found "only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or the enjoyment of the suffering of another." Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The evidence herein does not establish that appellant stabbed Suzanne Henry with the intent to torture her or with the desire to inflict a high degree of pain or to enjoy her suffering, if any.

The facts herein support the conclusion that appellant succumbed to anger and rage when Suzanne Henry attacked or attempted to attack him with a kitchen knife and responded instinctively by stabbing her. That appellant was seemingly unaware of how many times he had actually stabbed the victim is indicative of the fact he acted in a state of frenzy.[9] Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987).

The trial court erred in finding this aggravating factor to exist and then utilizing it in the weighing process. Under the facts of this case, it cannot be presumed that the error was

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[9] When stab wounds are both close and plentiful,this is indicative of frenzy. The greater the number, the greater the probability that the "overkill" represents a loss of control by the attacker. The perpetrator may not even remember the event. *Forensic Sciences*;copyright 1990; Matthew Bender,New York; edited by Cyril H. Wecht,M.D., J.D.;vol.II p.25-42 through 25-46

harmless, ie., the court would have imposed the death sentence even absent the aggravating factor. In light of the trial court's failure to adequately address several non-statutory mitigators for which evidence was adduced and the fact there would have been only one statutory aggravating factor remaining, it can only be assumed the error was harmful. Thus, the court's error in considering this factor mandates appellant's death sentence be reversed and remanded for re-sentencing.

ARGUMENT

ISSUE VI

BASED UPON PROPORTIONALITY, THIS COURT SHOULD REDUCE APPELLANT'S SENTENCE TO ONE OF LIFE IMPRISONMENT.

Assuming this court finds the aggravating factor of heinous, atrocious and cruel to be invalid, this would leave one aggravating factor [commission of a prior violent felony] as well as, several non-statutory mitigators for which evidence was adduced, but were not adequately considered by the court in its sentencing order.

Because of the uniqueness of death as a punishment it is necessary to engage in a review of proportionality of the circumstances of the instant case with other capital cases to determine if death is an appropriate penalty. It is not merely a comparison of the number of aggravating versus mitigating factors. Tillman v. State, 591 So. 2d 167 (Fla. 1991). It is an inherent part of this court's review process in capital cases to insure proportionality among death sentences. Caruther v. State, 465 So. 2d 496 (Fla. 1985); Booker v. State, 441 So. 2d 148 (Fla. 1983); Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

Although the trial court was arguably correct in finding that no **statutory** mitigating factors existed, there is no indication the court considered several, significant, **non-statutory** mitigating circumstances. There is certainly evidence in the record that could have supported finding the non-statutory circumstance such as the heated argument between the appellant

and Suzanne Henry climaxed in either appellant's conscious,if brief, resolution to kill the deceased or his instinctual, reflexive response to her attack or attempted attack with a knife. Or the fact that the appellant and Suzanne Henry had a long-standing abusive domestic relationship that existed prior to the murder, see Herzog v. State, 439 So. 2d 1372 (Fla. 1983), Chambers v. State, 339 So. 2d 204 (Fla. 1976) Furthermore, the trial court disregarded appellant's chronic alcohol and cocaine use, as well as, the more positive qualities he exhibited when in the company of Rosa Mae Thomas and her children.

The trial court should have found these non-statutory mitigating circumstances existed and in light of those, the sentence of death was disproportional when compared with other capital cases where this court has vacated the death sentence and imposed life imprisonment. As Justice Barkett stated in Porter v. State, 564 So. 2d 1060 (Fla. 1990) [concurring in part and dissenting in part]:

> *... I believe, however, that proportionality review mandates reversal of the [death] penalty. ... I do not suggest there is an "unrequited love" exception to the death penalty. Nonetheless, this court consistently has accepted as substantial mitigation the inflamed passions and intense emotions of such situations. In almost every other case where a death sentence arose from a lovers' quarrel or domestic dispute, this court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation. see Blakely v. State, 561 So. 2d 560 (Fla. 1990); Amoros v. State, 531 So. 2d 1256 (Fla. 1988); Garron v. State, 528 So. 2d 353 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987), Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State,*

474 So. 2d 1170 (Fla. 1985); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Blair v. State, 406 So. 2d 1103 (Fla.1981); Phippen v. State, 389 So. 2d 991 (Fla. 1980); Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Halliwell v. State, 323 So. 2d 557 (Fla. 1975); Tedder v. State, 322 So. 2d 557 (Fla. 1975) see also the recent cases of Maulden v. State, 18 Fla. Weekly S179 (Fla. March 25, 1993) and White v. State, 18 Fla. L. Weekly S184 (Fla. March 25, 1993).

The case of Fead v. State, id. is of particular significance because it too involves circumstances very similar to those in the instant case. In Fead, id. the defendant was charged with and found guilty of the first degree murder of his girlfriend. Fead had shot his girlfriend during the course of a violent argument. The cause of the argument was the fact the girlfriend had been dancing with other men at a bar earlier that day. Like appellant in the instant case, Fead had also killed another woman several years before which had resulted in a second degree murder conviction. Likewise, the court in Fead found two aggravating factors, no statutory mitigating factors and gave almost no weight to the non-statutory mitigators. This court held that the imposition of the death penalty was disproportional.

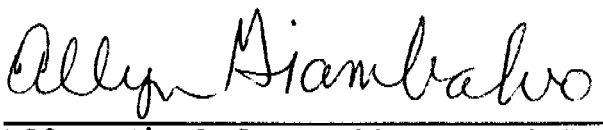
As stated in Songer v. State, 544 So. 2d 1010 (Fla. 1989), this court has affirmed death sentences supported by one aggravating circumstance **only** in cases involving nothing or very little in mitigation. Certainly the mitigation evidence presented herein was much more than that.

CONCLUSION

Appellant, John Ruthell Henry, respectfully asks this Honorable Court to vacate and his conviction for first degree murder and remand the case for a new trial, or to reduce his sentence of death to a sentence of life imprisonment, or in the alternative, to grant him a new penalty phase proceeding before a new jury, or to order a new sentencing hearing before the judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 2002 North Lois Avenue, Tampa, Florida 33607 and to John Henry, Inmate No: 053105, Florida State Prison, P.O. Box 747, Starke, Florida 32091 this 28th day of June, 1993.



Allyn Giambalvo, Attorney at Law
Florida Bar No: 239399, For
J. MARION MOORMAN, PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
5100 144th Avenue North
Clearwater, Florida 34640
(813) 464-6594