IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

v.

Case No. 80,941

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

Appellant contends that a special prosecutor should have been appointed because a former private investigator for the Public Defender's Office, who was assigned to John Henry's case originally, was employed by the State Attorney's Office as a trainer at the time of retrial. It is the state's contention that the trial court properly denied the motion to remove the State Attorney's Office in that the investigator did not either provide prejudicial information related to the pending criminal charge or personally assist in any capacity in the prosecution of the charge.

Appellant is once again challenging the denial of his motion to suppress confession alleging that it was coerced and taken in violation of his right to remain silent. Both of these claims were raised in the prior appeal and rejected by a majority of this Court. Appellant contends, nevertheless, that this Court's prior decision is not "law of the case" and does not control the outcome of the present appeal. He contends that a subsequent hearing or trial developed different facts and different issues and, therefore, the "law of the case doctrine" should not preclude a conclusion that varies with the initially adjudicated result. It is the state's contention that Henry has failed to establish the existence of material changes in the evidence or exceptional circumstances where reliance on the previous decision would result in manifest injustice. Therefore, this Court's prior finding that suppression was not warranted precludes

reconsideration of the claim. Even if reconsideration of this issue was warranted, the law is clear that a ruling on a motion to suppress comes to this Court clothed with the presumption of correctness and that the evidence should be viewed in the light most favorable to sustain the trial court's order. When taken in the light most favorable to sustain the trial court's ruling, there is sufficient evidence that the confession was voluntary. Accordingly, appellant is not entitled to relief on this claim.

Appellant also urges reversal of the sentence because the court in the Pasco county case concerning the murder of Suzanne Henry allowed evidence concerning the subsequent murder of Eugene. Appellant urges that this was error that makes reliance on the sentence as an aggravator in the instant case suspect. It is the state's contention that no error was committed in the other case and that even if it was , reliance on the sentence does not mandate reversal in the instant case in light of the other substantial aggravating factors.

Henry also claims the trial court erred in admitting evidence about the murder of Suzanne Henry in the instant case. This Court specifically held that this evidence was admissible. Furthermore, the evidence was only a small part of the trial and not a feature as alleged by appellant.

Again, appellant is raising a claim that was presented during the first trial and to which no objection was presented during the instant trial. He is contending that the prosecutor improperly impeached the testimony of Drs. Berland and Afield in

an alleged attempt to discredit their expertise. Appellant candidly admits that defense counsel did not object to any of the questioning. Accordingly, this claim is procedurally barred.

Appellant alleges that the standard jury instruction on reasonable doubt unconstitutionally dilutes the due process requirement of proof beyond a reasonable doubt. In Brown v. State 565 So. 2d 304 (Fla. 1990), this Court again reviewed the Standard Jury Instruction on reasonable doubt and held that when the Standard Jury Instruction is read in its totality it adequately defines "reasonable doubt." Accordingly, appellant is not entitled to relief on this claim.

On appeal, Henry is alleging that the trial court erred in not offering the jurors the opportunity to have Dr. Berland's testimony reread to them. It is the state's contention that this is a matter that was within the trial court's discretion and appellant has failed to show an abuse of that discretion. This Court has repeatedly held that a trial court need only answer questions of law, not of fact, when asked by a jury and has wide discretion in deciding whether to have testimony reread.

Appellant claims that the aggravating circumstances of felony murder is unconstitutional because it does not narrow the class of persons eligible for the death penalty and, in fact, creates a presumption that death is the appropriate sentence in cases of felony murder. Appellant's challenge to the "automatic aggravator" has been squarely rejected by both federal and state courts.

Appellant contends that the prosecutor erroneously was allowed to argue to the jury during penalty phase concerning the kidnapping of young Eugene. He contends that the prosecutor characterized it as a witness elimination and that this was improper in light of the fact that the jury was not instructed on that aggravating factor. Even if the claim was not procedurally barred, it is apparent from a review of the prosecutor's closing argument that the arguments by the prosecutor went solely to the aggravating factors that were presented to the jury.

Henry urges that despite the fact that he had previously been convicted of murdering two of his wives, and despite the kidnapping and brutal murder of Eugene, that when balanced against the mitigating factors, his sentence should be reduced to life. It is the state's contention that when this case is compared to other capital cases, that the death sentence was appropriately imposed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING DEFENSE MOTION TO REMOVE THE STATE ATTORNEY'S OFFICE FOR THE THIRTEENTH JUDICIAL CIRCUIT AND APPOINT A SPECIAL PROSECUTOR BECAUSE AN INVESTIGATOR WHO INTERVIEWED HENRY WHILE AT THE PUBLIC DEFENDER'S OFFICE WAS LATER EMPLOYED BY THE STATE ATTORNEY BECAUSE AN INVESTIGATOR WHO INTERVIEWED HENRY WHILE AT THE PUBLIC DEFENDER'S OFFICE WAS LATER EMPLOYED BY THE STATE ATTORNEY.

Appellant contends that a special prosecutor should have been appointed because a former private investigator for the Public Defender's Office, who was assigned to John Henry's case originally, was employed by the State Attorney's Office as a trainer at the time of retrial. It is the state's contention that the trial court properly denied the motion to remove the State Attorney's Office in that the investigator did not either provide prejudicial information related to the pending criminal charge or personally assist in any capacity in the prosecution of the charge.

A hearing was held on Henry's motion on July 15, 1991. At this hearing, investigator Gene Leonard testified that he was now employed as a director of training for the State Attorney's Office, Thirteenth Judicial Circuit. Mr. Leonard also testified that he was formerly employed with the Public Defender's Office and that in that capacity he conducted the initial interview with John Henry (T 1704). Mr. Leonard testified that he had not discussed Mr. Henry's case with any member, either attorney,

investigator or otherwise in the employee of State Attorney's Office. He also stated that he had not divulged anything that might have been told to him by Mr. Henry in his capacity as an investigator at the Public Defender's Office with anyone associated with the State Attorney's Office. Leonard testified that he was not in any way presently working on the case of State of Florida v. John Henry. Leonard further noted that in his capacity as training director of the State Attorney's Office, he did not have any investigative responsibilities. Leonard agreed that if anyone mentioned anything about Mr. Henry's case in his presence that he would say absolutely nothing and would essentially screen himself from anything whatsoever to do with the John Henry matter (T 1706). Thereupon, the trial court ordered Leonard to not have any conversation with any member of the State Attorney's Office, whether that be attorneys, investigators, employees, regarding the State of Florida v. John Henry. The court noted that would mean any discussion regarding this case, any discussion about the original trial of this case, any discussion about Mr. Henry, or anything he might have learned about Mr. Henry through his capacity as an investigator with the Public Defender's Office. The court ordered Mr. Leonard to essentially build a wall around himself regarding any discussion as to Mr. Henry or to this case (T 1709). Subsequently, the court denied the motion finding that the former investigator for the Public Defender's Office, now an employee of the State Attorney's Office, had not and would not discuss the matter with

any other member of the State Attorney's Office, under threat of contempt of court. (SR 480)

In general, a lawyer's ethical obligations to former clients generally requires disqualification of the lawyer's entire law firm where any potential for conflict arises. In State v. Fitzpatrick, 464 So. 2d 1184 (1985), this Honorable Court held that where the "law firm" is a governmental agency, "imputed disqualification of the entire State Attorney's Office is unnecessary when the record establishes that the disqualified attorney has neither provided prejudicial information relating to the pending criminal charge nor has personally assisted, in any capacity, in the prosecution of the charge." Id. at 1188. In Fitzpatrick, the disqualified attorney had had no conversations or contact with state attorney personnel regarding the defendant's case. Under those circumstances, this Court held that the entire State Attorney's Office need not be disqualified.

In Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court reiterated that the State Attorney's Office should not be disqualified if the former defense attorney had no contact with any State Attorney personnel regarding the defendant's case. In Castro, however, this Court ordered a new penalty phase hearing, where the former defense attorney, who had represented him in the same case, subsequently became a member of the State Attorney's Office and was called upon to assist in responding to motions against the defendant upon resentencing. This reversal was based solely upon this Court's determination that disqualification of

the entire State Attorney's Office is appropriate where the former Public Defender personally assisted the State Attorney's Office against his former client.

In the instant case, however, the trial court specifically found that the former Public Defender investigator, Gene Leonard, had in no way provided prejudicial information relating to the pending criminal charge or personally assisted in any way or capacity in the prosecution of the charge. Accordingly, the trial court properly denied the motion. See also Preston v. State, 528 So. 2d 896 (Fla. 1988); Reaves v. State, 574 So. 2d 105 (Fla. 1991).

Appellant argues that these cases are distinguishable from the instant case in that the instant case involves the prosecution of the same identical case as opposed to another charge. However, in Castro, the prosecutor was called upon to assist in a resentencing of the same identical case. Reversal was not based upon the fact that it was the same case, but, rather, upon the former defense attorney's assistance upon resentencing.

The real issue is whether the defendant is prejudiced by the private investigator's employment by the state attorney's office. Mr. Leonard is a private investigator not an attorney. Thus, even if he was privy to confidential information, the potential for prejudice is clearly diminished. This is especially true in light of the court's finding that Leonard had not and would not assist the State Attorney's Office in any way during the retrial.

Perhaps this explains why Henry does not contend that he was actually prejudiced in any way by Leonard's new position. (T 1708) In light of the foregoing, the state urges this Court to affirm the trial court's order denying the request for a special prosecutor.

ISSUE II

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

Appellant is once again challenging the denial of his motion to suppress confession. This is issue was raised in the prior appeal and rejected by a majority of this Court. Appellant contends that although this issue was raised in Henry's previous appeal, that this Court's prior decision is not "law of the case" and does not control the outcome of the present appeal. He contends that a subsequent hearing or trial developed different facts and different issues and, therefore, the "law of the case doctrine" should not preclude a conclusion that varies with the initially adjudicated result.

This Court has repeatedly held that all points of law which have been previously adjudicated become the "law of the case" and that reconsideration is warranted only in exceptional circumstances and where reliance upon the previous decision would result in manifest injustice. Preston v. State, 444 So. 2d 939, 944 (Fla. 1984); Green v. Massey, 384 So. 2d 24, 28 (Fla. 1980). Similarly, reconsideration may be warranted where a subsequent hearing or trial develops material changes in the evidence. Steele v. Pendaris Chevrolet, Inc., 220 So. 2d 372, 376 (Fla. 1969); Ball v. Yates, 29 So. 2d 729, 738 (Fla. 1946). It is the state's contention that Henry has failed to establish the existence of material changes in the evidence or exceptional

circumstances where reliance on the previous decision would result in manifest injustice. Therefore, this Court's prior finding that suppression was not warranted precludes reconsideration of this issue.

The "new facts" as alleged by appellant consists of Detective Wilbur's testimony during a recent deposition that he said something to Detective McNulty that might have been construed as a threat against Henry. (T 1426 - 85). Wilbur testified that when Henry was arrested he was placed in a police car with the windows closed. Outside of Henry's presence, Wilbur told McNulty that "if he [Henry] had done something to the child he needs to die." During the original trial Wilbur said he did not remember making such a statement. Nevertheless, the record shows that this evidence was presented during the original trial. As appellant concedes, prior to the first trial in this case, Detective McNulty testified that while John Henry was in a patrol car outside the Twilight Motel and Rosa Thomas was standing on the sidewalk, Detective Wilbur came up to him (after talking with Henry in the patrol car) and said something like, "If he killed Eugene Christian, I'll kill him" or "If we can't find Eugene Christian, I'll kill him." McNulty testified that Wilbur was visibly upset and that Rosa Thompson must have heard the remark. (Defense Exhibit 3, Volume 15, page 14 - 16, 23). Appellant also concedes that prior to Henry's first Pasco County trial, McNulty had testified on deposition that Wilbur told him that, if he did not find Eugene Christian, he would kill John Henry. He said

they were about 10 - 15 yards from the police cruiser where John Henry sat and that the door may have been open. McNulty testified that both he and Wilbur were emotional and had tears in their eyes. (Initial Brief of Appellant, page 27) Thus, when compared to the evidence presented during the original trial it is clear that the recent admission by Wilbur does not constitute any substantial change in the evidence which would require this Court to ignore the "law of the case" and reconsider the issue. Clearly, this evidence was readily available prior to the first trial with the only difference being now that Wilbur says he stated outside of the presence of the defendant that if he killed Eugene Christian that he should die. This insignificant addition to the evidence does not materially change the facts before this Honorable Court on the initial appeal. There has been absolutely no showing that Henry heard the statement or that his confession was in any way coerced by Wilbur's statement. As this Court noted in the original appeal, Henry did not confess until several hours after his arrest. Accordingly, this Court's prior ruling should remain "law of the case" and the trial court's ruling should be affirmed.

Even if reconsideration of this issue was warranted, the law is clear that a ruling on a motion to suppress comes to this Court clothed with the presumption of correctness and that the evidence should be viewed in the light most favorable to sustain the trial court's order. Bonifay v. State, 18 Fla. Law Weekly S464 (Fla. September 2, 1993); Medina v. State, 466 So. 2d 1046

(Fla. 1985). Thus, even if Wilbur did make the statement, when taken in the light most favorable to sustain the trial court's ruling, there is sufficient evidence that the confession was voluntary. Accordingly, appellant is not entitled to relief on this claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS HENRY'S CUSTODIAL STATEMENTS BECAUSE THE OFFICERS DID NOT CEASE QUESTIONING HIM, OR ATTEMPT TO CLARIFY HIS REQUEST, WHEN HE TOLD DETECTIVE MCNULTY THAT HE DID NOT WANT TO TALK TO HIM.

As his third point on appeal, appellant is raising another issue that was reviewed by this Honorable Court in the prior appeal and upheld by a majority opinion of 4 - 3. Henry v. State, 574 So. 2d 66, 69 (1991). Henry is once again urging that his confession should have been suppressed because the officers did not cease questioning him or attempt to clarify his request when he told McNulty that he did not want to talk to him. Although, appellant recognizes that this Court has previously rejected this claim, he contends that this Court's prior ruling does not constitute "law of the case." He claims that while an opinion joined in by a majority of the court constitutes law of the case, that this Court's original opinion does not constitute a true majority and, therefore, was not binding on the lower court.

It is the state's position that a majority of the Court did agree that the confession was voluntary and, therefore, this Court's prior opinion constitutes "law of the case." Under the theory urged by Henry, the trial court would have been free to ignore a decision agreed upon by four justices of this Honorable Court simply because those same four justices did not agree on other issues presented in the prior appeal. This position is

untenable. The purpose of the "law of the case" doctrine is to preclude endless litigation of the same issues and to give finality to a higher court's decision. Valsecchi v. Proprietors Ins. Co., 502 So. 2d 1310 (Fla. 3 DCA, 1987). This Court's affirmance of the denial of the motion to suppress was agreed upon by four of its members. As such, it was and should be binding upon the lower court upon retrial and upon this Court on appeal. See, Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988) (Although death sentence might not be sustained today, Florida Supreme Court's previous affirmance of sentence was law of case on habeas petition and associated request for stay of execution).

Appellant also urges that even if this Court's prior ruling on this issue constitutes "law of the case", that this issue should be reexamined because the evidence in the instant case was different than it was in the first trial. As previously noted, all points of law which have been previously adjudicated become the "law of the case." Reconsideration is warranted only in exceptional circumstances and where reliance upon the previous decision would result in manifest injustice. Preston v. State, 444 So. 2d 939 (Fla. 1984); Green v. Massey, 384 So. 2d 24, 28 (Fla. 1980). Similarly, reconsideration may be warranted where a subsequent hearing or trial develops material changes in the evidence. Steele v. Pendaris Chevrolet, Inc., 220 So. 2d 372, 376 (Fla. 1969); Ball v. Yates, 29 So. 2d 729, 738 (Fla. 1946). It is the state's contention that Henry has failed to establish the existence of material changes in the evidence or exceptional

circumstances where reliance on the previous decision would result in manifest injustice. Therefore, this Court's prior finding that suppression was not warranted precludes reconsideration of this issue.

A review of the allegedly "new" evidence that is now being urged by appellant makes it clear that all of this evidence was available to the trial court during the first trial and to this Court upon appeal. Henry urges that a police report written by Detective McNulty at the time of the arrest indicated that Henry said, "I don't want to talk no more," as opposed to the evidence presented at the hearing on the original motion to suppress where McNulty testified that Henry said, "I am not saying nothing to you. Besides, you ain't read me nothing yet." Clearly, this is not 'new' evidence nor is it a material change in the evidence that would require this Court to reconsider its prior affirmance of the denial of the motion to suppress. Since appellant has presented no substantially new evidence that would require this Court to reconsider its prior opinion, this Court should affirm the trial court's order denying the motion to suppress.

Even if reconsideration of this issue was warranted, appellant is essentially asking this Honorable Court to make a factual finding contrary to that made by the trial court (and by this Court on the prior appeal.) The law is clear that a ruling on a motion to suppress comes to this Court clothed with the presumption of correctness and that the evidence should be viewed in the light most favorable to sustain the trial court's order.

Bonifay v. State, 18 Fla. Law Weekly S464 (Fla. September 2, 1993); Medina v. State, 466 So. 2d 1046 (Fla. 1985). Thus, even if there was a different statement presented in the police report and even if this statement had not been available during the first trial, when taken in the light most favorable to sustain the trial court's ruling, there is sufficient evidence that the confession was voluntary and that the officers scrupulously honored Henry's Miranda rights. Accordingly, appellant is not entitled to relief on this claim.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY DENYING DEFENSE MOTION TO EXCLUDE MENTION OF HENRY'S 1991 PASCO COUNTY CONVICTION FOR KILLING SUZANNE HENRY.

Appellant contends that it was error for the trial court to allow the state to introduce evidence during either the guilt or the penalty phase concerning Henry's 1991 conviction for the killing of his wife, Suzanne Henry. He contends that this Court's mandate in the Pasco County case required the trial court to exclude on retrial the collateral crime evidence concerning the murder of Eugene Christian. As the Pasco court did allow some evidence concerning the murder of Eugene, Henry contends that the conviction is suspect. Accordingly, he contends that it was error to allow evidence of this conviction. This argument is baseless as a matter of fact and law.

First, the state does not agree that this Court's mandate in the Pasco County trial required exclusion of all the collateral crime evidence concerning the murder of Eugene Christian. The opinion of this Court in Henry v. State, 574 So. 2d 73 (Fla. 1991) specifically left open the question of the relevancy and admissibility of evidence concerning the murder of Eugene in that case. The trial judge in the foregoing case limited the admission of evidence in compliance with this Court's mandate.[1] Furthermore, this Court specifically stated in the opinion in the

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[1] The state asks that this Court take judicial notice of its own files and records in Case No. 78, 934 in order to refute the factual basis for this claim.

instant case that the trial court did not err in admitting evidence from the Suzanne Henry murder, as it had to prove that Henry premeditated the murder of Eugene Christian and that he was kidnapping the child, rather than taking him lawfully. This Court further held that the facts of the second killing were so inextricably wound up that first to try to separate them would have been unwieldy and likely to lead to confusion.

And finally, as appellant concedes, the prosecutor was allowed to inquire concerning all three murders after the Court ruled that defense counsel had opened the door to such questioning. (T 587 - 588) Defense counsel stipulated and the court agreed that defense counsel had opened the door to allow the prosecutor to question Henry concerning the Pasco murder. On cross-examination, John Henry reiterated that he is currently under sentence in the Pasco County case.

Henry further argues that since the conviction for the murder of Suzanne Henry was used as an aggravating factor that in the event this Court should reverse the conviction in the Pasco County case, that he is entitled to a new penalty phase because the trial court considered the murder of Suzanne Henry in aggravation. To support this position, appellant relies on Long v. State, 529 So. 2d 286 (Fla. 1988), where this Honorable Court reversed and remanded for a new penalty trial in Hillsborough County because it vacated Long's conviction and death sentence in Pasco County. This Court made it clear in Long, however, that such error is subject to the harmless error analysis. In the

instant case, even if this Honorable Court should reverse the conviction for the murder of Suzanne Henry, there remains another conviction for the murder of Henry's first wife Patricia Roddy in 1975. In addition, the trial court also found that the capital felony was committed while the defendant was engaged in the commission of a kidnapping (R 443). Under these circumstances, Henry's sentence for the murder of Eugene should stand, regardless of the status of the sentence for the murder of Suzanne.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE EVIDENCE OF THE MURDER OF SUZANNE HENRY.

Appellant also challenges the admission of collateral crimes evidence concerning the murder of Suzanne Henry. In the prior opinion in the instant case, this Honorable Court held with regard to this issue:

> "First, the trial court did not err in admitting evidence from the Suzanne Henry murder, as it had to prove that Henry premeditated the murder of Eugene Christian and that he was kidnapping the child, rather than taking him lawfully. Furthermore, the facts of the second killing were so inextricably wound up with the first that to try to separate them would have been unwieldy and likely to lead to confusion."

Id. at 70

While appellant acknowledges that this Honorable Court upheld the admissibility of the evidence concerning the murder of Suzanne Henry, appellant alleges that this evidence became a feature rather than an incident of this trial and, therefore, he was deprived of his right to due process and a fair trial.

It is the state's contention that no reversible error was committed. First, although defense counsel filed a pretrial motion to exclude evidence concerning the death of Suzanne Henry, counsel did not object to the admission of any of the testimony concerning Suzanne Henry until shortly before the state rested: (T 457 - 458)

> Q. Did you notice any similarities between the location that he had indicated to you he had stabbed Eugene Christian and the location

of the injuries that you observed to Suzanne Henry?

MR. FUENTE: I object.

THE COURT: Approach the bench.

[There was a discussion at bar as follows]:

MR. FUENTE: Your Honor, the psychiatrist, Mr. --

MR. CASTILLO: Doctor Sprehe is going to testify that at the time that Suzanne Henry was killed by the defendant, that he was able to formulate the specific intent and was sane at the time he killed her. And the location of the injuries to both of them are exactly the same type of nature and area.

And it's our position that that is circumstantial evidence of what his intent was, to kill, and that he had the ability to form the specific intent on Suzanne Henry, the manner in which he did that. That killing also appears to the right in the same area, location, and manner. They are saying he doesn't have that ability to form the intent. Our position is that he was in the same mental state and he had the ability and intent to accomplish what he did the second time in the same manner he did the first time.

THE COURT: What is the relevance?

MR. CASTILLO: I don't know if that is real clear.

THE COURT: I understand.

MR. FUENTE: Two things: Number 1, mental state is not an issue yet. There is no relevance.

Secondly, I believe that Suzanne Henry is starting to become a feature in this case. And I would object on relevance grounds at this point.

> THE COURT: That is my understanding still that intoxication is going to be a defense.
>
> MR. FUENTE: It probably will, yes.
>
> THE COURT: I am going to go ahead and allow the testimony.
>
> (R 456 - 458)

Further, defense counsel did not object to the admission of the photographs that appellant is now alleging were prejudicial. (R 406, 409, 1213 - 39) And finally, there was no objection to the prosecutor's closing argument that appellant is now alleging was prejudicial. Accordingly, it is the state's position that the failure to raise this objection to the trial court precludes appellate review. Appellant cannot premise error based upon challenges that were not presented to the trial court.

Further, as the trial court found, Henry himself opened the door to this examination by his testimony on direct examination admitting he had been convicted and sentenced to death for Suzanne Henry's murder. (R 587, 642) The prosecutor then asked the court if defense counsel had opened the door so that he could cross examine Henry on all three murders. The defense counsel and the court agreed that he could do so except that he could not go into appellate reversal. (R 587 - 88) Appellant contends that this did not mean, however, that any and all evidence concerning Suzanne's death was admissible. While that may or may not be true, it was incumbent upon defense counsel to object to the admission of any evidence that should have been excluded. Absent a timely objection by defense counsel, this claim is

procedurally barred. Even if this claim was properly preserved, it is without merit.

To support his claim of error, Henry relies on this Court's decision in Long v. State, 610 So. 2d 1276, 1280 (Fla. 1992) In Long this Honorable Court found that evidence concerning Long's prior murders had become a feature of the trial where the record showed that four hours were spent on the murders of other victims. Although the evidence of Suzanne's murder was inextricably intertwined with the evidence concerning Eugene Christian's murder, it did not become a feature of the instant trial.

Appellant uses the prosecutor's cross-examination of John Henry as an example of his contention that Suzanne's murder was a feature of the trial. He alleges that the prosecutor's cross-examination concerning the murder of Henry's first wife, Patricia Roddy, consumed four pages while his cross-examination concerning the murder of Suzanne Henry consumed seventeen pages. Appellant alleges that the state then took fifteen pages to cross-examine about the alleged kidnapping of Eugene Christian and only nine pages on the killing of Eugene Christian. Therefore, he contends, the state spent more time cross-examining Henry about the actual killing of his wife than he did about the killing of the child for which he was on trial. (Initial Brief of Appellant page 54). A review of the record, however, does not support this claim. The record shows that the prosecutor's cross-examination of Henry concerning the murder of Suzanne Henry, from the initial

confrontation through his taking Eugene, consisted of only six pages of cross-examination. (R 603 - 609) Conversely, the cross-examination of Henry regarding the events surrounding the murder of Eugene Christian, from the initial kidnapping through the murder, was thirty-five pages. (T 609 - 634) Clearly, this does equate with the proportion of collateral crime evidence presented in Long. Furthermore, the murders in Long were separate events whose facts were not inextricably intertwined.

Appellant also contends that the evidence concerning the murder of Suzanne Henry and Patricia Roddy became a feature of the penalty phase. Clearly, even if this evidence had not been admissible during the guilt phase, which this Court had previously concluded that it was, this evidence was relevant and admissible during the penalty phase of the trial to support the aggravating factor of prior violent felony. This Court has repeatedly held that the facts and circumstances of the prior murders was relevant to the sentencing proceeding. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

And, finally, appellant contends that because the trial court did not give a limiting instruction to the jury on collateral crime evidence, that the evidence cannot be harmless. Again, defense counsel did not request such an instruction and therefore cannot predicate error based on the failure to give same.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY ALLOWING A PROSECUTOR TO IMPEACH THE TESTIMONY OF DRS. AFIELD AND BERLAND.

Again, appellant is raising a claim that was presented during the first trial and to which no objection was presented during the instant trial. He is contending that the prosecutor improperly impeached the testimony of Drs. Berland and Afield in an alleged attempt to discredit their expertise. Appellant candidly admits that defense counsel did not object to any of the questioning. Accordingly, this claim is procedurally barred. Holton v. State, 573 So. 2d 284 (Fla. 1990).

Nevertheless, appellant contends that the prosecutor's arguments constitute a fundamental error. The prosecutor's remarks were within the limits of proper cross-examination and do not constitute reversible error. Henry, supra.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY DENYING A DEFENSE OBJECTION AND PROPOSED INSTRUCTION AND INSTEAD GIVING THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT.

Appellant alleges that the standard jury instruction on reasonable doubt unconstitutionally dilutes the due process requirement of proof beyond a reasonable doubt. The jury in the instant case was instructed as follows:

> "A reasonable doubt is not a possible doubt, it is not a speculative doubt, it is not an imaginary doubt, it is not a forced doubt. And such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.
>
> On the other hand, if, after carefully considering, comparing and weighing the evidence there is not an abiding conviction of guilt, or if, having a conviction, it is one which is not stable, but one which waivers and vacillates, then the charge is not proven beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable." (T 1135 - 1136).

This instruction as given to the jury was from the Florida Standard Jury Instructions. This Court has previously approved use of this standard instruction. In re Standard Jury Instructions (Criminal), 431 So. 2d 594 (Fla.), as modified on other grounds, 431 So. 2d 599 (Fla. 1981); Rotenberry v. State, 468 So. 2d 971 (Fla. 1985), receded from on other grounds, Carawan v. State, 515 So. 2d 161 (Fla. 1987); Williams v. State, 437 So. 2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984). In Brown v. State 565 So. 2d 304 (Fla. 1990), this Court again

reviewed the Standard Jury Instruction on reasonable doubt and held that when the Standard Jury Instruction is read in its totality it adequately defines "reasonable doubt."

Most recently, this claim was presented to the Fourth District Court of Appeals in Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992), wherein the Court held:

> "Appellant's allegations of error in giving the standard reasonable doubt instruction is principally founded on the United States Supreme Court's holding in Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), which found a reasonable doubt instruction approved by the Louisiana Supreme Court was unconstitutional. That instruction was clearly subject to interpretation by a juror as authorizing conviction by a degree of proof below that mandated by due process. Id. 111 S.Ct. at 328, 330.
>
> Nothing in the Cage opinion, however, causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable. We also note that jury prior to the United States Supreme Court opinion in Cage Florida's reasonable doubt instruction was again examined and upheld by the Florida Supreme Court in Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990)." Id. at 158.

Thus, although appellant is attempting to equate the phrase "Not a possible doubt, speculative, imaginary, or forced doubt" with the phrase "actual substantial doubt" as found improper in Cage, supra, there is absolutely no support for this claim. When the instruction is considered as a whole, it becomes clear that

no reasonable juror could have interpreted the instruction to allow a finding of guilt based on the degree of proof below that required by the due process clause. Accordingly, appellant is not entitled to relief on this claim. Accord, Brown, supra.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY REFUSING TO READ BACK BERLAND'S TESTIMONY TO THE JURY, AS THE JURY REQUESTED.

During the jury deliberations in the instant case, the jury sent back a series of questions. Among these questions was a request to have Dr. Berland's testimony given to them. (R 1156) The trial judge conferred with the attorneys as follows:

> "THE BAILIFF: Your Honor, they have another question.
>
> THE COURT: Okay. Just ask them to bring us the question before your bring us the jury.
>
> [Question handed to the Court].
>
> THE COURT: Could we get Doctor Berland's testimony, narrative from his accounts of the day, specifically?
>
> I don't understand what the last part of that "'narrative from his accounts of the day.' I guess what they want is the narrative from, I don't know what.
>
> MR. CASTILLO: What Mr. Henry told.
>
> MR. WELLS: Told Doctor Berland; right.
>
> THE COURT: Well, I am hesitant to do that. We had a number of doctors to talk about his testimony is not typed up. And that none of the testimony of any of the witnesses have been transcribed. So we can't just give it to them. They are going to have to rely on their recollection of Doctor Berland's testimony, as well as the testimony of the other witnesses who testified.
>
> MR. FUENTE: Judge, by way of comment, I as anyone else don't want this to go any longer than necessary. In support of Mr. Henry I would like the jury to know that if they were to ask the Court, the testimony cold be read back to them.

THE COURT: Yes. Okay. Then I will just leave it with Doctor Berland.

MR. FUENTE: I'm sorry?

THE COURT: Then I will say, 'Okay.' I won't make a general statement. I will just tell them as far as this question is, that there is not a transcription of it that we can hand to them. Ask them to rely on their recollection of the testimony. Any problem with answering it that way?

MR. FUENTE: No. No. I didn't suggest any problem with that. I do suggest that --

THE COURT: I won't do that. I understand what you are saying. Don't make a blanket statement. We won't read back any statement.

MR. FUENTE: The converse. I would like the Court to tell them if they need it, the testimony can be read back to them.

THE COURT: I don't think I will say anything, one way or another. Bring the jury in."

(R 1156 - 1158)

The jury was then brought back in and the court instructed them as follows:

"The fourth question is: Could we get Doctor Berland's testimony narrative from his accounts of the day? (Specifically).

None of the testimony has been typed up. So it's not anything that we can just hand over and give to you. So I will ask you, again, that you will need to rely on your recollection of Doctor Berland's testimony as to this, as to the narrative of his accounts of the day."

(R 1170)

On appeal, Henry is alleging that the trial court erred in not offering the jurors the opportunity to have Dr. Berland's testimony reread to them. It is the state's contention that this is a matter that was within the trial court's discretion and appellant has failed to show an abuse of that discretion. This Court has repeatedly held that a trial court need only answer questions of law, not of fact, when asked by a jury and has wide discretion in deciding whether to have testimony reread. Coleman v. State, 18 Fla. Law Weekly S 26 (Fla. 1993), citing, Kelley v. State, 486 So. 2d 478 (Fla.), cert. denied, 479 U.S. 871 (1986). See also, Haliburton v. State, 561 So. 2d 258 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991).

Nevertheless, appellant contends that because the trial court in the instant case did not offer to have the testimony read to the jurors, that he has abused his discretion. In support of this proposition, appellant relies on Roper v. State, 17 Fla. Law Weekly D2554 (Fla. November 13, 1992). In Roper, the Fifth District reversed where the trial court refused to offer the jurors the opportunity to have the testimony read to them. The court stated:

> "We believe the trial judge's response to the jury's question may well have led the jury to conclude that their *only* recourse was to rely upon their 'collective recollections and remembrances' as to the cross-examination of the minor. Rather than weighing the pros and cons of having the cross-examination read back to the jury as did the trial judge in Simmons [Simmons v. State, 334 So. 2d 265 (Fla. 3d DCA 1976)] the trial judge here merely focused upon the word 'see' (as

> distinguished from 'here') in the jury's request and deafly side-stepped the problem. As we see it, he employed a semantic shell game effectively negating an option allowed the jury under Rule 3.410. At the very least, the trial judge should have apprised the jury that a method was available to have the cross-examination, or specific portions of it, read to them. Then if the jury requested it, the trial court could have weighed that request in light of any applicable considerations." Id. at 2555.

In the instant case, however, the trial judge did make an analysis at to the pros and cons of having the testimony given to the jury. The Court noted that he was hesitant to have only Dr. Berland's testimony read to them that because a number of doctors talked about Henry's accounts of the day. The court further noted that Dr. Berland's testimony alone was very lengthy. The court did not, as suggested by appellant, merely focus in on the fact that the jury had asked to see a typewritten version of Dr. Berland's testimony. Rather, it was merely one of the issues considered by the court in determining the proper course of action.

Furthermore, although defense counsel requested of the court that he tell the jury that the testimony could be read to them, defense counsel did not object to the procedure used by the trial court. In fact, a review of the dialogue between the court and defense counsel makes it clear that the court thought his response resolved all of the issues before them. (R 1158) Accordingly, not only was the procedure used by the trial court appropriate, defense counsel's failure to make a clear and

unmistakable objection to the procedure used by the trial court waives this claim for review.

Furthermore, error, if any, is harmless in the instant case. Unlike the testimony in Roper that was critical to the case before the jury, the testimony of Dr. Berland concerning the narrative of Henry's day was only one of numerous witnesses who testified about Henry's accounts for the day. In light of the substantial evidence of guilt, there is no reasonable possibility that the trial court's failure to tell the jury that the testimony could be read to them after the deliberations had begun contributed to appellant's conviction. State v. DiGuilo, 491 So. 2d 1129 (Fla. 1986). Accordingly, error, if any, was harmless beyond a reasonable doubt.

ISSUE IX

WHETHER 'FELONY MURDER' AGGRAVATING FACTOR IS UNCONSTITUTIONAL BECAUSE IT CONTAINS AN ELEMENT OF FIRST DEGREE MURDER.

Appellant claims that the aggravating circumstances of felony murder is unconstitutional because it does not narrow the class of persons eligible for the death penalty and, in fact, creates a presumption that death is the appropriate sentence in cases of felony murder.

Appellant's challenge to the "automatic aggravator" has been squarely rejected by both federal and state courts. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n. 15 (11th Cir. 1986); Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983); Stewart v. State, 588 So. 2d 972 (Fla. 1991); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988); Clark v. State, 443 So. 2d 973 (Fla. 1983); Menendez v. State, 419 So. 2d 312 (Fla. 1982); White v. State, 403 So. 2d 331 (Fla. 1981). In Lowenfield, supra, the United States Supreme Court observed that as long as the required narrowing process occurred in a capital case, the fact that an aggravating circumstances duplicates one of the elements of the crime does not make the death sentence constitutionally infirm. The Court observed that in the State of Florida, the definition of a capital offense is narrowed by the finding of aggravating circumstances at the penalty phase. Therefore, the United States Supreme Court has already sanctioned the permissibility of using what appellant would describe as an "automatic aggravator" and no constitutional infirmity appears.

Appellant also makes the now-familiar complaint concerning the jury instructions in this case. He contends that error under Espinosa v. Florida, 505 U.S. ____, 112 S.Ct. ____, 120 L.Ed.2d 854 (1992), appears in this case due to the jury instructions given. However, it is beyond dispute that the failure to raise objection as to the jury instructions given precludes appellate review. See e.g., Davis v. State, 18 Fla. Law Weekly S 385 (Fla. June 24, 1993); Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, ____ U.S. ____, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). Although, defense counsel did file a pretrial objection to the aggravating circumstance, he did not object to the jury instructions. (R 141, 1171-77, 1187) Thus, in accordance with the well-established precedent of this Honorable Court, appellant's Espinosa claim must be rejected as procedurally barred.

Furthermore, based on the forgoing arguments, the jury instruction correctly stated the law. Accordingly, even if this claim was not procedurally barred, Appellant is not entitled to relief.

ISSUE X

WHETHER THE TRIAL JUDGE ERRED BY ALLOWING THE PROSECUTOR TO ARGUE THAT THE KILLING WAS A WITNESS ELIMINATION -- A STATUTORY AGGRAVATOR ON WHICH THE JURY WAS NOT INSTRUCTED.

Appellant contends that the prosecutor erroneously was allowed to argue to the jury during penalty phase concerning the kidnapping of young Eugene. He contends that the prosecutor characterized it as a witness elimination and that this was improper in light of the fact that the jury was not instructed on that aggravating factor. First, this claim is procedurally barred because there was no objection to the statements made by the prosecutor during closing argument to the jury. Thus, absent fundamental error, appellant is not entitled to relief based upon the prosecutor's statements. Holton v. State, 573 So. 2d 284 (Fla. 1990).

Furthermore, even if the claim was not procedurally barred, it is apparent from a review of the prosecutor's closing argument that the arguments by the prosecutor went solely to the aggravating factors that were presented to the jury. The factors concerning the kidnapping of Eugene went to the weight that the jury should afford the aggravating factor of 'during the course of the kidnapping.' Throughout the instant brief appellant argues that the kidnapping was not particularly egregious and did not warrant the imposition of the death penalty. The prosecutor's argument with reference to the facts clearly undermines that argument. As such, the prosecutor's arguments

were relevant to the claim and do not constitute fundamental error. However, even if the prosecutor's arguments were erroneous, the error was clearly harmless in the instant case. State v. DiGuilio, supra.

ISSUE XI

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

Henry urges that despite the fact that he had previously been convicted of murdering two of his wives, and despite the kidnapping and brutal murder of Eugene, that when balanced against the mitigating factors, his sentence should be reduced to life. It is the state's contention that when this case is compared to other capital cases, that the death sentence was appropriately imposed.

As this Court has consistently held, "our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Hudson v. State, 538 So. 2d 829 (Fla. 1989); Menendez v. State, 419 So. 2d 312 (Fla. 1982). This Court further noted in Hudson, that where there is no error in the trial court's consideration of the aggravating and mitigating circumstances, this Court's function is not to reweigh the evidence and come to a different conclusion than did the trial court. Despite appellant's claim that this is just another domestic case, a consideration of the circumstances of this case in light of similar decisions, supports the trial court's imposition of the death penalty.

In Hudson, supra, this Court rejected Hudson's contention that this was a domestic confrontation, where the evidence showed

that Hudson was in a home where he had no right to be, at night, and armed with a knife, apparently expecting to find someone at home. The court noted that contrary to Hudson's contention, these facts could easily be seen as demonstrating more than slight premeditation. In the instant case, Henry, armed with a knife, took Eugene many miles and hours away from the supposed angry exchange between himself and Suzanne Henry.

Similarly, in Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990), this Court rejected Occhicone's claim that the murders were the result of a domestic confrontation. This Court noted that the case involved substantially more than a passionate obsession; it was a culmination of threats to terminate the parents standing between Occhicone and his former girlfriend. Similarly, the murder of young Eugene in the instant case was not the result of some passionate obsession committed in the heat of anger. Rather, the murder was committed many hours after the murder of Suzanne and many miles away from the site of the kidnapping.

And, finally, in Freeman v. State, 563 So. 2d 73 (Fla. 1990), this Court affirmed Freeman's sentence where the facts showed that Freeman had two statutory aggravating circumstances, including a prior murder. In the instant case, the defendant had two prior convictions for murder before ending the life of young Eugene. Again, when these facts are compared with similar cases, this Honorable Court should affirm the sentence entered by the trial court.

CONCLUSION

Based upon the foregoing the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 30 day of December, 1993.

CM Sabella
OF COUNSEL FOR APPELLEE.