IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY, :

Appellant, :

vs. : Case No. 80,941

STATE OF FLORIDA, :

Appellee. :

_____ :

101 pgs.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Appellant, John Ruthell Henry, was convicted of the first-degree murder of Eugene Christian in Hillsborough County, Florida, and sentenced to death on April 15, 1987. On January 3, 1991, this Court reversed Henry's conviction, vacated the death sentence and remanded for a new trial. Although a majority of justices concurred in each part of the majority opinion, which found no reversible error, each dissented from at least one part of it. Because a majority of the justices believed the conviction should be reversed, albeit for different reasons, the Court ordered a new trial. (R. 30-48) Henry v. State, 574 So. 2d 66 (Fla. 1991).

John Henry was retried August 24 - 31, 1992, the Honorable Susan C. Bucklew, circuit judge, presiding. (R. 359) On August 28, 1992, the jury found Henry guilty as charged. (R. 417, 436-37)

The jury recommended death by a vote of eleven to one. (R. 423) The trial judge sentenced Henry to death on October 16, 1992. (R. 438-40, T. 1526)) Written findings supporting the death sentence were filed on that date. (R. 441-47) A Motion for New Trial and a Renewed Motion for Judgment of Acquittal were denied. (T. 1498-99)

On September 16, 1992, Henry filed a Notice of Appeal to this Court. (R. 448) The Public Defender for the Tenth Judicial Circuit was appointed to represent him in this appeal. (T. 1528) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

STATEMENT OF THE FACTS

GUILT PHASE

The Appellant, John Henry, married Suzanne Henry about two years prior to the homicides. Suzanne had a son, Eugene Christian, who was five years old at the time of the homicide in December of 1985. John Henry had a very good relationship with Suzanne's son, Eugene. (T. 380-82, 394, 411) Henry and his wife had been separated for a week or two at the time of the homicides. (T. 450)

About 11:00 a.m. on December 22, 1985, John Henry stopped by the convenience store where Suzanne's sister, Dorothy Clark, was working. He bought a beer and asked if she had seen Suzanne. She told him that her husband had just passed by while taking Suzanne and Eugene home. (T. 383-84) Eugene (nicknamed "Bug") had spent the night at the Clark's house while his mother worked the night shift at a convenience store. (T. 367-75)

Nathan Giles testified that both he and John Henry had been heavy cocaine users. They both used cocaine on a daily basis and had been arrested for cocaine offenses. Giles saw Eugene Christian nearly every day because John Henry took him everywhere he went. (T. 745-46, 749) On the Sunday when Suzanne and Eugene were killed, he saw John Henry smoking crack cocaine behind Grant's Pool Hall in Zephyrhills with Henry's niece, Sharon Toomer. (T. 747) Sharon Toomer confirmed that she and Henry smoked cocaine together behind the pool hall that morning. (T. 768-69)

Henry and Giles borrowed a car from Steve Mathis. (T. 747) They went to a Presto food store where Giles got out of the car because he did not want to be with Henry while he was doing

cocaine. Giles quit using cocaine earlier that year. (T. 750)

Marion Crooker[1] lived next door to Suzanne Henry. He saw Eugene Christian sitting in an old green Chevrolet outside Suzanne's house about 1:00 that afternoon. The car had a small space saver tire on one wheel. (T. 415) He later saw someone get in the car, drop something in the back seat, and drive away. (T. 482-84) He was not able to recognize the person. (T. 417-18)

Suzanne's sister, Bonnie Cangro, received a call from the Presto Food Store, where Suzanne worked the night shift, because Suzanne did not show up for work that night. (T. 398) When Bonnie went to Suzanne's house around midnight, the TV was on but the doors were locked. She returned in the morning and found everything the same. (T. 399) That afternoon, Bonnie went to Suzanne's with the key and found her sister's body on the floor. (T. 401-03)

Detective Fay Wilber arrived at the scene about 4:30 p.m. (T. 425) He noted that Suzanne Henry had stab wounds around the neck and left shoulder area. (T. 430) They canvassed the neighborhood but did not locate Eugene Christian. (T. 431) They also began looking for Suzanne's estranged husband, John Henry. (T. 432)

Detective Wilber located John Henry and Rosa Mae Thomas at the Twilight Motel at about 12:30 a.m. (T. 434) Wilber arrested Henry and advised him of his Miranda rights. (T. 434-35) Henry did not appear to be under the influence of narcotics. He said he understood his rights and wished to talk to them. Wilber asked Henry if he knew the child's whereabouts. Henry said he did not. (T. 436)

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[1] Pursuant to stipulation of counsel, the prior testimony of Marion Crooker, deceased, was read to the jury. (T. 412)

They transported John Henry to the sheriff's office and interviewed him. One hand was handcuffed to a chair. Wilber provided coffee. Henry continued to deny knowledge of Eugene's whereabouts. (T. 437-39) At some point in the early morning hours, Wilber gave up and told Henry that he was going to go find the boy himself. Detective Wilber started to leave the room. As Wilber put his hand on the door knob, Henry told him not to leave. He said they needed to go to Plant City; that the boy was in the Knights Station area and was not alive. Henry's composure was quiet and subdued. He seemed upset and wanted to go find the boy. (T. 439-50)

John Henry accompanied the detectives to the Knights Station area of Plant City. He directed them to turn at a flea market, then onto a dirt road at a chicken farm in a remote farming area approximately twenty miles from Dade City. He directed them to where the abandoned car was stuck in the mud by a holding pond. (T. 440-41) While other officers were searching, Detective Wilber and John Henry remained in the car. (T. 443) After Wilber assured him that the other officers would not hurt him, Henry got out of the car and directed them to where the child's body was found. (T. 444, 449) Wilber, another detective and Henry returned to the sheriff's department where Henry told Wilber the whole story. (T. 449-50)

John Henry went to Suzanne's house to see if she would let him buy some Christmas presents for Eugene. Suzanne became very abusive, got a knife from the kitchen and ordered him out of the house. They started "tussling" and fell on the sofa. At some point they fell on the floor where he stabbed her and covered her with rugs and towels. (T. 451)

Eugene was in the bedroom watching TV. Henry carried the child out of the house, putting his head down on Henry's shoulder so he wouldn't see his mother. (T. 451) Henry took Eugene to Plant City and bought him food and a coke. He bought some crack cocaine. He started back toward Zephyrhills, intending to take Eugene to one of his aunts' houses. (T. 453-54)

He saw what he thought were police lights behind him and suspected that the cops must have found Suzanne. He turned onto another road and then turned into the chicken farm where he got the car stuck. He carried Eugene over a fence, they walked through a pasture, he put Eugene over a second fence, and went to a wooded area where they sat down. He smoked some cocaine. Eugene was lying in his lap. He talked to Eugene a while and then stabbed him in the neck. (T. 455-56) Henry said he wanted Eugene to be with Suzanne. He contemplated killing himself so they could all be together but couldn't do it. (T. 459) Henry gave Eugene a hug, put him on the ground, got up and walked out into a field where he walked around in circles for awhile and dropped the knife. (T. 459, 468) He walked around awhile and finally made it back to the road. He walked to Zephyrhills, a distance of about ten miles. (T. 468)

Dr. Lee Miller, associate medical examiner, performed an autopsy on Eugene Christian. (T. 477) He found five stab wounds to the neck, one of which was fatal. (T. 480) He said it probably took but a few minutes for Eugene to bleed to death. (T. 490)

Sergeant John Marsicano, Hillsborough County sheriff's office, narrated a video tape of the murder scene, showing the victim's body, for the jury. (T. 491-504) The deputies were unable to find

the murder weapon or anything else of evidentiary value. (T. 503)

Rosa Thomas testified that she had known John Henry about 25 years and he had been her boyfriend for eight years. (T. 513) He was her boyfriend in December of 1985 and was staying at her house. (T. 514) He had a full-time job and an income. She knew he was a cocaine addict and had seen him under the influence many times. (T. 522-23) Henry had a good relationship with Eugene Christian. When he stayed at her house, he cared for Eugene on weekends. (T. 526)

Rosa Thomas testified that John Henry stayed at her house on Saturday night, December 21, 1985. (T. 514) On the following Monday night, about 8:00 p.m., he arrived at her house. (T. 515) He appeared to be high. She could tell by his eyes that he had been drinking and could smell cocaine on him, and he admitted it. (T. 525, 529) She decided to spend the night at a motel with him. (T. 518) She was afraid he might hurt himself otherwise. (T. 527) Henry did not tell Rosa what he had done the previous day. (T. 520)

John Henry testified that he and Eugene Christian were very close. There was nothing he would not do for the child. They spent a lot of time together. (T. 554-56) He took care of Eugene a lot while Suzanne was working. (T. 557) Even after he and Suzanne separated, he saw Eugene as much as possible. He would pick Eugene up to spend the day with him. (T. 559-60)

During his marriage to Suzanne Henry, they had a number of fights, both verbal and physical. In the beginning, the fights were not related to his relationship with Rosa Thomas. When Suzanne learned of the relationship, she was angry. (T. 592-94)

In December of 1985, Henry was addicted to cocaine. He had

been using crack cocaine every day for months. (T. 562) It acted as an "upper," making him nervous and paranoid. Fifteen or twenty minutes after smoking crack cocaine, he would crave more. (T. 564)

On the weekend of the homicides, Henry went to Grants Pool Hall, a local hangout, and borrowed a car from Steve Mathis. While at Grants, he used cocaine. (T. 561) He went to Suzanne's house to discuss buying Christmas presents for Eugene. (T. 565) They argued about Rosa Thomas, with whom Henry was living, and Suzanne got a knife from the kitchen. She threatened him with it. He panicked and stabbed her. (T. 565)

Henry found Eugene in his bed in the next room. Henry asked him if he wanted to go with him because he did not want to leave the child alone in the house. He carried Eugene through the living room, turning his head so he would not see his mother. (T. 566-68) He intended to take Eugene to his Aunt Bonnie Cangro's house, but Eugene was hungry and wanted to eat "Church's Chicken." The nearest place they could get it was Plant City.

While in Plant City, Henry purchased more cocaine. (T. 568-69) He started using it right away, smoking it through a copper pipe. (T. 570) He started back toward Zephyrhills, still intending to take Eugene to his aunt's house. He continued smoking cocaine. (T. 571) By this time, it was dark outside. On the outskirts of Plant City, he saw what appeared to be flashing lights and turned off onto another road because he was in possession of cocaine. (T. 572) He turned a couple times and ended up at a chicken farm. When the car got stuck, he took Eugene and "went a'walking." They crossed a couple fences and ended up in a wooded area. (T. 573)

He sat down with Eugene in his lap and continued to smoke crack cocaine. He smoked so much that he "freaked out."[2] He did not remember the stabbing clearly. Afterward, he told Eugene that he loved him. (T. 574) Henry could not give "a clear picture" of why he stabbed Eugene because "it shouldn't have happened." He loved the child. (T. 575) When he left Suzanne's house with Eugene, he never even thought of hurting him. It did not even occur to him that Eugene might tell the police what he had done. (T. 575) After he stabbed Eugene, he sat awhile and held him and cried. He thought about killing himself but was unable to do it. He dropped the knife somewhere. (T. 576-77)

John Henry walked back to Zephyrhills, a distance of about twenty miles. During the walk, he ingested the remainder of the cocaine. When he arrived at Rosa's house, he felt numb. (T. 578) He remembered telling Rosa he was leaving and she said she wanted to go with him. They went to a motel. (T. 579)

He had "semi-dozed off" when the police came. (T. 579) When he went to the door, Detective Wilber had his gun drawn. He asked where the boy was. Wilber told him that if he did not tell him where the boy was, he would personally kill him. (T. 580)

He was then taken to the police station and questioned. He told the officers he knew nothing because he was afraid of what they might do to him. (T. 580-81) Eventually, however, he told Detective Wilber that Eugene was in Plant City and that they should

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[2] At this point, John Henry was crying on the witness stand. He continued to cry as he recounted the events surrounding Eugene's death. (T. 574-75)

go get him. Henry accompanied them to find the body. (T. 581) He was not sure which road he had turned on but eventually found the location and showed the detectives where to find the body. He was afraid to get out of the car because a child was involved and he did not know what the officers' reactions would be. (T. 582)

Henry was taken back to the police station where he told Detective Wilber everything he could remember. (T. 583) Henry described his feelings throughout the arrest and the trip to find Eugene as "hurt" because of what happened. He was not thinking clearly so could not say exactly how high he was at the time. (T. 583-84) He testified that he had intended to eventually turn himself in but had not yet done so when arrested. (T. 619)

John Henry said that he had been convicted of several felonies and had been in prison twice. He received no psychological treatment while in prison. (T. 584-85) After his release from prison, he was convicted of cocaine offenses. At the time of the instant offense, he had pled guilty to cocaine charges and was awaiting sentencing. (T. 586) Henry said he had been convicted and sentenced to death for the murder of Suzanne Henry. (T. 587)

Henry admitted stabbing Patricia Roddy to death in 1975 for which he was convicted of second-degree murder. (T. 588-89) He had two daughters by Patricia Roddy, to whom he was formerly married, who are now nineteen and twenty. (T. 599) He was 24 years old and under the influence of alcohol when he stabbed Roddy. (T. 591)

Psychiatrist Daniel Sprehe was appointed by the Hillsborough and Pasco County courts to examine John Henry. He interviewed him for over an hour on February 12, 1987, and reviewed other reports.

(T. 646-47, 685) Dr. Sprehe was aware that John Henry had at one time been "Baker Acted." (T. 654) John Henry told Dr. Sprehe virtually the same story he told Detective Wilber and to which he testified. Sprehe recalled that Henry thought he saw a man in medieval armor in the woods that night.[3] He said Henry knew he was killing Eugene but did not know why he did it. He loved Eugene very much. He cried and regretted it. (T. 650-53)

Dr. Sprehe did not diagnose any psychotic state, but testified that John Henry was in a state of cocaine intoxication at the time of the crime. He concluded that Henry's ability to form specific intent was impaired from cocaine use. (T. 659-60) Within a reasonable probability, Henry was unable to form the specific intent to commit first-degree murder on the night in question. (T. 686, 690)

Dr. Walter Afield, a specialist in neurology and psychiatry, first examined John Henry in December of 1986. (T. 691) At that time, Henry was quite paranoid and disturbed. (T. 696-97) He believed people were plotting against him and everyone was out to get him. He was somewhat vague, did not seem very intelligent, and wanted to unite with his dead wife and child. He had a long-standing history of mental illness and drug abuse and had been hospitalized for attempted suicide. (T. 697-98)

Dr. Afield testified that Henry had a very serious and severe drug and alcohol addiction, and was deteriorated. His diagnosis was "chronic paranoia and drug and alcohol abuse, severe." He

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[3] Dr. Sprehe considered this an hallucination but admitted that Henry could have seen a deputy or some one and have had a visual distortion. (T. 666)

noted that psychotic persons often use drugs such as cocaine to medicate themselves -- to control the voices and hallucinations. Eventually, the drugs make it worse. (T. 699-702)

Dr. Afield opined that Henry's ability to form the specific intent to commit first-degree murder at the time of the homicide was "seriously compromised, if he even had the ability at all." He thought Henry was burned out on drugs, craziness and alcohol and could not form the intent at all. (T. 705)

Dr. Robert Berland, a psychologist, first evaluated John Henry in October of 1986, at the request of the public defender. (T. 784) He spent at least ten hours talking with John Henry, in addition to which he reviewed reports of other experts, talked with witnesses, and administered psychological tests. (T. 789-90) He administered the Minnesota Multiphasic Personality Inventory ("MMPI") on two occasions; the Wechsler Adult Intelligence Scale ("WAIS"); the Bender-Gestalt, and the Rorschach or "ink blot" test.[4] (T. 791)

John Henry's December, 1991, MMPI test showed that he had a chronic mental illness. "Chronic" meant that he was mentally ill so long that he was used to hallucinations and delusions and was no longer feeling a great deal of discomfort from his symptoms. He was still considerably disturbed even when the inflammatory effect of drugs was gone. Henry scored high for schizophrenia, paranoia and depression. (T. 802-05)

Dr. Berland administered an earlier MMPI to John Henry in

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[4] The Rorschach test showed that Henry was not capable of much conventional thinking. His scoring showed a disturbed thinking process, symptomatic of psychosis. (T. 844-45)

October of 1986, about ten months after his arrest for the instant homicide. (T. 806) At that time, he was quite severely disturbed. He scored more like someone in a state hospital than someone out on the street. (T. 807) The prosecutor applied Dr. John R. Graham's interpretations to Henry's scores on the 1986 MMPI, using Graham's authoritative book on the MMPI, and argued that Henry was faking. Dr. Berland disagreed. (T. 884-99) Berland noted that Henry's 1991 MMPI profile, on which his decreased "F" score showed no attempt to fake, confirmed his diagnosis of chronic mental illness. (T. 808)

The WAIS test, administered to John Henry in October, 1986, showed that Henry's IQ was 78, indicating borderline intellectual functioning. Henry could not read the MMPI which requires a sixth grade reading level. Dr. Berland had to read it to him. (T. 810-12) Henry's highly variable scores (two full standard deviations) on the WAIS indicated brain damage. (T. 814-15)

Henry's brain damage was corroborated by interviews with others. Henry's sisters told Dr. Berland that his father physically abused their mother before, during and after her pregnancy with Henry, necessitating medical attention in some cases. (T. 824) His mother suffered from serious sickle cell anemia. (T. 825) Henry had severe asthma from infancy which caused him to have trouble sleeping prior to the age or four or five, raising the possibility of prolonged oxygen deprivation. He sniffed gasoline for weeks at a time from age five or six, particularly between the ages of nine and thirteen. Gasoline causes oxygen deprivation and is extremely damaging to brain tissue. Henry fell off a trailer and hit his head at age ten. He experienced blurred vision for

weeks after that, a symptom of brain injury. At age sixteen, he was in an automobile crash. (T. 824-25)

During clinical interviews in 1986 and 1991, Henry reluctantly admitted to auditory, visual and tactile (things felt on the skin) hallucinations. (T. 811-12) In 1986, Henry said he had believed, since he was nineteen years old, that unknown people were talking about him as they walked past him. Also since age nineteen, he had experienced "impending doom," unrelated to anything going on around him. This is an early symptom of psychosis. He reluctantly admitted to hearing voices, which increased with his drug use, since his late teens. He had visions, mostly when on drugs, since age 25. He thought his wife was plotting behind his back. (T. 820-21)

Henry was not so disorganized that he would show his symptoms by babbling incoherently. He was guarded about what was going on inside his head. Henry's long-standing psychotic disturbance appeared to be a combination of brain damage and inherited mental illness. (T. 826) His condition would cause disturbances in judgment and distortions in his perception of what was happening to him and what others intended when they did things. (T. 829)

Dr. Berland summarized Henry's 1986 description of the events leading up to and the stabbings of Suzanne and Eugene. Henry reported feeling frightened when looking at Suzanne that day. He felt that he was in grave danger when he knocked on her door and sensed the presence of an unknown person in the house. He lost control while stabbing her. He reported that she had threatened him with a knife before. (T. 822, 831-33)

Henry found Eugene sitting on his bed watching TV in the next

room. He asked Eugene if he wanted to go with him. He kept Eugene from seeing his mother so he would not ask questions. He intended to take him to his sister-in-law's house because he could not leave him there alone. He took Eugene to Plant City because the boy wanted Church's Fried Chicken. He bought beer on the way. In Plant City, they got chicken and Henry purchased cocaine, drove around smoking cocaine, and bought more three or more times. (T. 834)

When Henry left Plant City at nearly midnight after spending the last of his money, Eugene went to sleep in the car. On the way to Zephyrhills, Henry saw flashing lights, and was afraid it was the police. He tried to take the back way to Zephyrhills. He was smoking cocaine as he drove. Although he thought the lights were following him, he later realized he was hallucinating. (T. 834-35)

Henry ended up near a chicken farm where the car got stuck in the mud. He hid in a wooded area, lying on the ground, holding Eugene. He thought he heard voices and saw shadows moving. He repeatedly told a shadow to stay away from him. He thought he saw a man in shining armor. (T. 835) Things got silent and he felt like things were closing in on him; people were crowding around him. He smoked more cocaine. Everything started up again and seemed to get worse the more he smoked; yet, he could not stop because he was addicted. He continued to smoke until he smoked everything he had. He felt people closing in on him. (T. 835)

It occurred to Henry that, with Suzanne dead, he wanted Eugene to stay with her. He thought about killing himself and Eugene so they could both go with her. He did not want to live without them. He did not want to leave Eugene alive if he went to prison and

could not be with him. He had never even spanked Eugene and did not want to hurt him. He felt possessed by something.

Henry told Eugene over and over that he loved him. Eugene said, "Daddy, I know you love me." Henry wanted to take his own life before being caught. He stabbed the child without thinking. Although he knew it was wrong, it "just happened." He felt that rather than be separated from Eugene, he would rather be with him in heaven. He tried to kill himself but felt some force stopping him. He sat there and held Eugene in his arms. He felt he had made a mistake and asked himself how he could have done something like that. (T. 837)

Dr. Berland thought that Henry, an unsophisticated person, gave a very accurate description of what people go though in an acute psychotic state, including the inflammatory effects of drugs. It was his opinion that Henry's state of mind was so contaminated by mental illness that he could not rationally and deliberately form the specific intent to commit first-degree murder. (T. 838-39)

In rebuttal, Paul Fillingim, a truck driver, testified that, on December 22, 1985, he worked for Winn-Dixie Egg Processing Plant. (T. 970) That night, he went to the chicken farm where Henry's car was abandoned to pick up eggs. He drove an eighteen-wheel tractor trailer with headlights, lights over the cab and on the top, bottom, both sides and back of the trailer. (T. 970-71) He noticed a car stuck in the mud. He drove to a convenience store and took a deputy back to where the car was stuck. He stayed with the deputy fifteen or twenty minutes and saw no one. (T. 978)

Deputy Terry Chauncey, Hillsborough County Sheriff's Office,

testified that, on the evening of December 22, 1985, he responded to a call that a suspicious vehicle had driven through a convenience store parking lot several times. While at the store, a man came in to report a car stuck in the mud. He went with the man to a nearby chicken farm where a car had run into the edge of a pond. It was about 11:40 or 11:45 p.m. (T. 930-33)

He called in the license number, got out and looked in the car. He used the spotlight on his squad car to illuminate the area. He wore a white shirt and green trousers, and had a holster and radio on his hip. He had his police radio on. He saw no one and heard nothing. He left about midnight. (T. 935-38)

Dr. Mark Montgomery, a biochemical toxicologist, testified that cocaine builds up in the body to an extremely small degree. (T. 952-53) Half of the cocaine is gone in 45 minutes to one hour. Although cocaine remains in the system for four to six hours, the user is under the direct influence of cocaine only for about fifteen to thirty minutes. (T. 957) Dr. Montgomery admitted he knew nothing of the psychologic effects of long-term use of cocaine and that its effect on brain tissue is not yet known. (T. 959-60)

Dr. Fesler, a psychiatrist, testified in rebuttal for the State. (T. 979) He examined John Henry for an hour in October of 1987 pursuant to court orders from Pasco and Hillsborough Counties. He reviewed Detective Wilber's deposition and Drs. Afield and Berland's reports. (T. 982-83) Henry told him about his unhappy and abusive childhood. At age seventeen, Henry had an accident while driving and his brother was killed. His father was shot and killed. (T. 983) He began to drink at age nine or ten and soon was

drinking a fifth of liquor a day. He continued that during much of his life. He was once hospitalized for three days for drug abuse but was released when he told them he had no drug problem. (T. 985)

Dr. Fesler diagnosed long-term extensive substance abuse and, possibly, a low grade or "smoldering" schizophrenic illness for which he had never been treated. (T. 994, 1003) He said it was nearly impossible to tell whether Henry was psychotic when not on drugs because of the long term substance abuse. Henry described occasional hallucinations or delusions while in prison. Cocaine would certainly aggravate an existing psychosis. (T. 1004-05)

Dr. Fesler found it "most probable" that Henry was capable of forming specific intent when he killed Eugene, although he had some impairment. (T. 996) He based this finding on his "common sense" inability to believe some of the things Henry told him, especially as to his lack of reasoning or intent. He suspected Henry killed Eugene to eliminate a witness, but only because that was a logical motive. (T. 998-99) He admitted that it was possible that Henry was not capable of forming specific intent at that time. (T. 1009)

PENALTY PHASE

Dr. Joan Wood, Pinellas County medical examiner, testified concerning the autopsy of Patricia Roddy, Henry's first wife, done in 1975 by Dr. Schinner who had since died. She also identified autopsy photographs showing Roddy's injuries. Roddy's death was caused by a combination of many stab wounds. (T. 1211-25) Dr. Wood described the autopsy she performed on Suzanne Henry in 1985 and photographs showing Suzanne Henry's body, the scene of the crime, and Suzanne Henry's stab wounds. (T. 1226-40)

Gloria Nix, a friend of Patricia Roddy, described Roddy's death in 1975. She saw Henry stabbing Roddy in her car. When she opened the car door, Henry walked away. She stayed with Roddy until the police came but did not know if she was conscious. (T. 1246-50)

Detective Fay Wilber testified for the defense. (T. 1259) He arrested Henry for the 1975 murder of Patricia Roddy in a predominately black area of Zephyrhills where Henry had relatives. Henry walked out of the woods and said that he was the one Wilber was looking for. When he was cuffing Henry, a number of people began coming out of a nearby house. Henry told Wilber to get out of there before he got hurt. (T. 1260-63)

Dr. Berland diagnosed John Henry as psychotic but said that it is sometimes difficult to differentiate between various psychoses because the symptoms are similar. He found evidence of organic personality syndrome, a psychosis that results from brain damage. (T. 1270) He also found evidence of paranoid schizophrenia, an inherited mental illness. Symptoms of paranoid schizophrenia are hallucinations, delusions, unrealistic beliefs, and certain mood disturbances. Schizophrenia can be controlled with antipsychotic medications, but cannot be cured. (T. 1271-72)

John Henry's WAIS IQ of 78 placed him in the borderline retarded range. The testis indicated that his functional IQ might be lower. (T. 1276) Henry had a substantial history of alcohol abuse which began at age nine or ten. (T. 1278) Two older sisters corroborated a pattern of sniffing gasoline, which may cause oxygen deprivation resulting in brain damage. (T. 1279)

James McKay, John Henry's best friend when he was about

fourteen or fifteen years old, testified that when Henry's brother died in a car accident, Henry blamed himself because he turned in front of another car. After that, Henry changed; he clammed up. (T. 1292-93) When he was a teenager, Henry smoked marijuana and was "strong on alcohol," then drugs and pills. (T. 1297)

Ruby Henry was ten years older than her brother, John Henry. When John was born, the family lived in Dothan, Georgia. (T. 1303) There were five boys and three girls in the family. When John was five, his mother left the family and moved to Florida to be with her oldest daughter who was having her first baby. She was gone for six weeks. (T. 1304) About six months later, she returned to Florida where she stayed most of the time until her death in 1971. Ruby was primarily responsible for taking care of John. (T. 1305)

When John was about fourteen, he and his brother Lonnie ran away to Zephyrhills where she lived. (T. 1308) John did some seasonal work in the fields. He sniffed diesel fuel. (T. 1310) After John married Suzanne, Ruby often babysat for Eugene, sometimes for weekends or weeks at a time. John often took Eugene and other children on outings. He and Eugene got along well. (T. 1311)

The judge instructed the jurors that they could consider that (1) Henry was previously convicted of another capital offense or violent felony; and (2) that the offense was committed during a kidnapping. (R. 418-19) In mitigation, the jury was instructed to consider whether (1) Henry was extremely emotionally or mentally disturbed at the time of the offense; (2) Henry's capacity to appreciate the criminality of his actions was substantially impaired; and (3) any other aspect of the offense. (R. 419)

PRELIMINARY STATEMENT

The documents in the Record on Appeal are numbered separately from the trial transcript. References to the court documents and materials in the Record on Appeal (Volumes I-III) will be preceded by the letter "R." The pretrial hearings and sentencing hearing follow the trial transcript and are numbered consecutively to the trial transcript, except for the two hearings in the supplemental record. Accordingly, references to the trial transcript and consecutively numbered hearings (Volumes IV-X1V) will be preceded by the letter "T." The two hearings in the supplemental record are numbered consecutively to the court documents rather than the trial transcript and other hearings. References to the hearings in the Supplemental Record on Appeal, therefore, will be preceded by the letters "SR."

Volume XV contains various unnumbered defense exhibits. The first "Defense Exhibit 1" and "Defense Exhibit 2" are police reports which are exhibits to the January 27, 1992, suppression hearing. The second "Defense Exhibit 1" and "Defense Exhibit 2," plus "Defense Exhibits 3 and 4," are exhibits to the June 1, 1992, suppression hearing. These exhibits will be referred to by exhibit number, hearing date, volume number, and any other identifying information necessary to locate them.

Undersigned counsel has attempted to arrange the issues in this case in approximate chronological order for a better understanding of the issues. Thus, the order of the issues is not intended to suggest that some issues have more merit than others.

ISSUE 1

THE TRIAL COURT ERRED BY DENYING THE 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.

The assistant public defender who originally handled this case (Raybun Stone) filed a motion requesting that the State Attorney's Office for the Thirteenth Judicial Circuit be disqualified and a special prosecutor appointed. The basis for the conflict was that Gene Leonard, formerly an investigator with the public defender's office assigned to John Henry's case, engaged in confidential communication with him while employed there. Subsequently, Leonard left the public defender's office and went to work at the state attorney's office, also as an investigator. (R. 57-58, 109)

At a hearing July 15, 1991, Leonard testified that he had not discussed the case with anyone at the state attorney's office and would not do so in the future. (T. 1703-06) The prosecutor pointed out that Leonard was the training director at the state attorney's office and was not involved in investigative work. Leonard agreed that he would screen himself from association with Henry's case. (T. 1705-07) The trial judge instructed Leonard to build a wall around himself as to this case and not to talk to anyone about any confidential information he learned while working for the public defender's office. She noted that, of course, he would be subject to contempt if he disobeyed her order. (T. 1709)

Defense counsel argued that this case was distinguishable from

cases such as Preston v. State, 528 So. 2d 896 (Fla. 1988),[5] in which the Court found no conflict as to the entire office because, here, Leonard worked on the first trial in the same case -- not another case. The trial court revisited the motion the following day, after reading various cases submitted by counsel, and denied it. She said she was satisfied that the investigator had not discussed the matter with any other member of the state attorney's office and she had instructed him not to do so.[6] (SR. 480)

In Young v. State, 177 So. 2d 345 (Fla. 2d DCA 1965), the court recognized that when a public defender representing a defendant subsequently becomes a prosecutor in the same case, the defendant has been denied due process of law and any conviction obtained must be reversed. In State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), this Court held that the entire office need not be disqualified so long as the former defender neither personally assisted in the prosecution or provided prejudicial information regarding the case. Justices Ehrlich and Shaw dissented:

> To the public at large, the potential for betrayal in itself creates the appearance of evil, which in turn calls into question the integrity of the entire judicial system.

464 So. 2d at 1188.

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[5] In Preston, the Court found no conflict of interest sufficient to warrant disqualification where an attorney who defended Preston on a misdemeanor several years earlier later joined the state attorney's office, because Preston's former attorney played no substantive role in the prosecution.

[6] Court-appointed counsel, William Fuente, resubmitted this motion after he became counsel for Henry. At the hearing, however, defense counsel noted that the public defender had previously filed the motion and the court had denied it on July 16, 1991. The judge said she would "stand on that ruling, obviously." (T. 1642)

In this case, Leonard admittedly received confidential information from John Henry concerning the exact same case. (T. 1703-06) Although he told the judge that he had not and would not impart this information to anyone in the state attorney's office, the possibility that he might inadvertently reveal information he had learned from John Henry cannot be eliminated. The entire case revolved around Henry's intent, which would have been a primary subject of Leonard's initial interview with John Henry.

In Reaves v. State, 574 So. 2d 105 (Fla. 1991), this Court held that the entire state attorney's office may be disqualified only if the individual prosecutor was not properly screened from direct or indirect participation in, or discussion of the case. Id. at 107. As training director, Leonard would, presumably, be working with all of the investigators, including those working on Henry's case. It seems unlikely that he could properly screen himself from other state-attorney personnel as required by Reaves. Thus, his conflict should be imputed to all of the attorneys.

In Castro v. State, 597 So. 2d 259 (Fla. 1992), this Court reversed for a new trial because the public defender who represented Castro in his first trial was employed by the prosecutor's office at the time of the second trial. The prosecutor called Castro's former defense attorney to discuss legal authorities to use in reply to motions filed in the case. The former defense lawyer testified that he supplied the prosecutor with case citations that he found while researching another case at the state attorney's office. 597 So. 2d at 260. The Castro Court found that, because the former defense lawyer participated in some capacity in

the case, the whole state attorney's office must be disqualified from prosecuting, even absent a showing that confidential information was disclosed. 597 So. 2d at 261.

In Popejoy v. State, 597 So. 2d 335 (Fla. 3d DCA 1992), the court, relying on Castro, disqualified the entire state attorney's office from prosecuting the defendant because his former defense lawyer was employed by the state attorney's office. Although the State contended that he was shielded from the case, the record contained evidence that he sat at the prosecution table during a hearing concerning the defendant. The state attorney's office was small and the two lawyers worked in the same courtroom.

Leonard received confidential information directly from the defendant. He did not testify as to whether or how much he worked on the case in addition to the interview with Henry. (T. 1703-06) As training director, he must have been in contact with numerous employees of the state attorney's office including investigators in Henry's case. The potential for prejudice is especially great in a capital case because character evidence which might be inadmissible in the guilt phase of a trial becomes the focus of the penalty trial. In the instant case, the only issues in both guilt and penalty phase were Henry's mental state, and his intent or lack thereof when he killed his stepson. These are exactly the type of confidential communications the investigator would have been privy to when he interviewed Henry prior to his first trial. Accordingly, the risk that this confidential information might "leak out" within the state attorney's office was too great to risk. The trial judge should have disqualified the entire office. Reversal is required.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT'S MOTION TO SUPPRESS STATEMENTS AND ADMISSIONS MADE DURING CUSTODIAL INTERROGATION BECAUSE DETECTIVE WILBER THREATENED HIM.

At a motion hearing on May 27, defense counsel filed a motion for rehearing on his motion to suppress Henry's confession or admissions. (T. 1407) He explained that Detective Wilber's testimony at the January 27, 1992, suppression hearing was different from all of his prior testimony. He requested that the court revisit an issue which had been raised in Henry's prior trial, and ruled on by this Court, because the new evidence excepted the issue from the "law of the case" doctrine. The trial judge agreed to read the prior testimony submitted by defense counsel and to hear the motion on June 1, 1992. (T. 1420-22)

As defense counsel explained at the June 1, 1992, hearing, Detective McNulty had previously testified in this case that Detective Wilber came to him after first speaking to John Henry upon his arrest, 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." (T. 1549) At the January 27, 1992, suppression hearing, however, Wilber admitted for the first time that he made a comment that might have been interpreted in that manner. He said that, "if [Henry] has done something to that child, he needs to die." (T. 1449) This was plainly a material change in the evidence. The judge agreed to read the transcripts and rule on the motion. (T. 1649, 1551-52, 1566) The motion was denied. (R. 105)

Although this issue was raised in Henry's previous appeal,[7] this Court's prior decision is not "law of the case," and does not control the outcome of the present appeal. As recognized in Steele v. Pendarvis Chevrolet, 220 So. 2d 372 (Fla. 1969), "[w]hen a subsequent hearing or trial develops different facts and different issues, the 'law of the case' doctrine will not preclude a conclusion at variance with the initially adjudicated result." Id. at 376 (citing Furlong v. Leybourne, 171 So. 2d 1 (Fla. 1964); see also Ball v. Yates, 29 So. 2d 729, 738 (Fla. 1946) (if facts are different, so that principles of law announced on first appeal are not applicable, as where there are material changes in evidence, prior decision is not conclusive upon questions presented in subsequent appeal); Saudi Arabian Airlines Corp. v. Dunn., 438 So. 2d 116, 123 n.8 (Fla. 1st DCA 1983).[8]

In the present case, Detective Wilber for the first time admitted that he said something that might have been construed as a threat. (T. 1426-85) Wilber testified that he said, "if [Henry] has done something to that child, he needs to die." Although he maintained that he made the comment to himself, he admitted that,

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[7] In this Court's opinion remanding this case for a new trial, the majority "found no reason to reverse the trial judge's finding that the confession was voluntary and not coerced." Henry v. State, 574 So. 2d 66, 69 n.2 (Fla. 1991). The Court did not specifically discuss this aspect of the suppression issue.

[8] Also see analysis and case law in Issue III, infra, concerning the Court's power to correct erroneous decisions, and the effect of the "plurality" opinion in this case.

obviously, Rosa Thomas overheard him.[9] (T. 1449) This was plainly a material change in the evidence which substantially changed the question of law this Court must decide. Thus, this Court's previous decision on this matter does not constitute the law of the case.

Prior to the first trial in this case,[10] 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 Wilber 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." Wilber was visibly upset. Although Rosa Thomas must have heard the remark, McNulty did not think Thomas talked to Henry after that. (Def. Exh. 3, Volume XV, pp. 14-16, 23)

Prior to Henry's first Pasco County trial, McNulty testified on deposition that Wilber told him that, if they did not find Eugene Christian, he would kill John Henry. He said they were about ten to fifteen yards from the police cruiser where Henry sat and the door may have been open. Detective Wilber was emotional and almost had tears in his eyes. McNulty too was on the verge of tears. (Def. Exh. 4 to June 1, 1992, hearing, Vol. XV, pages 20-23)

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[9] Detective Wilber's reference to Rosa Thomas having heard him, evidently refers to Detective McNulty's testimony at Henry's first trial that Rosa Thomas was standing on the sidewalk when Wilber made the alleged threat and was close enough that she must have heard the remark. (Def. Exh. 3, Volume XV, pp. 14-16, 23)

[10] Defense counsel submitted transcripts from prior hearings relevant to this issue at the suppression hearing on June 1, 1992. (T. 1544-49) They were admitted into evidence and included in the record on appeal. (Volume XV) Thus, this evidence was considered by the trial court as evidence in this case, and should also be considered by this Court in deciding the issue.

At the first trial in this case, Detective Wilber said, on deposition, that he did not recall making any such statement. On cross-examination, Henry's counsel tried to get Wilber to say whether he meant that he did not make the statement or just did not remember whether he made such a statement. Wilber repeatedly responded verbatim that he "did not recall" making a statement like that. He refused to make a more specific response. (Def. Exh. 1 to June 1, 1992, hearing, Vol. XV, pp. 102-04)

In the Pasco County proceeding, when asked on deposition if he ever voiced a conditional threat to kill Mr. Henry, Wilber said, "no, none whatsoever." When asked more specifically, he said, "to the best of my knowledge, I made no statements to [sic] that." (Def. Exh. 2 to June 1, 1992, hearing, Vol. XV, pp. 18-20)

Thus, when Wilber finally admitted prior to this trial that he did, in fact, make a statement that might have been what McNulty heard, the evidence changed drastically. Wilber's testimony that he made a statement that might have been considered a threat lends much credence to the testimony of the others who allegedly heard the threat. That Wilber finally professed to remember his exact words belies his previous testimony, on several occasions, that he did not remember making any statement at all.

Additionally, at this trial, John Henry testified that he heard the threat. Henry testified that, when he went to the motel room door, Detective Wilber had his gun drawn. Wilber told him that if he did not tell him where the boy was, he would personally kill him. (T. 580) When he said he did not know where the boy was, he was taken to the police station and questioned further. He told

the officers he knew nothing because he was afraid of what they might do to him. (T. 580-81) When later accompanied the officers to find the boy, he was afraid to get out of the car because a child was involved and he did not know what the officers' reactions would be. (T. 581-812) Wilber substantiated Henry's testimony that he was afraid the officers would hurt him. He testified that, only after he assured Henry that the officers would not hurt him, would Henry direct them to where the body was found. (T. 444, 449)

Because of his chronic paranoia, Henry would be more easily intimidated by threats. Even though Detective Wilber did not seriously intend to kill Henry, Henry may have taken the threat seriously. Henry is borderline retarded, with an IQ of 71 to 78 (T. 810-12), and was under substantial stress in addition to having had almost no sleep for two days, little food, a lot of cocaine, and some alcohol. (T. 525, 529, 568-71) He had just walked ten to twenty miles from Plant City to Zephyrhills. (T. 578)

If Wilber actually threatened to kill John Henry if he did not tell him where Eugene was, as Henry testified, Henry had good reason to be afraid to admit that he had killed the boy. If, as McNulty testified, Wilber made the threat to him and either Rosa Thomas or John Henry (or both) heard it, Henry would have been equally frightened. If, as Wilber testified, he said that if Henry hurt the child he should die, and Rosa Thomas heard it, she may have interpreted it to mean that Wilber would personally kill Henry and would certainly have reworded the threat while relating it to John Henry. Even if she repeated it verbatim, or Henry overheard it, Henry may have interpreted the statement as a serious threat.

It makes perfect sense, therefore, that when Wilber later gave up on questioning John Henry, told him that he was going to go find the boy himself and started to leave the room, Henry stopped him and admitted that Eugene was near Plant City and was not alive. Wilber testified that Henry seemed upset and wanted to go find the boy. (T. 439-50) Certainly, if he believed that Wilber would kill him if he did not tell him where to find Eugene, he would not want Wilber to leave to go look for the boy. He would have been afraid to admit that he killed the child, but equally fearful of not telling Wilber where to find him, considering Wilber's earlier threat. Perhaps Henry decided he was safer telling Wilber where the child was, even if he was dead, than continuing to deny knowledge of the child's whereabouts after Wilber's earlier threat, and risking having Wilber find the dead child himself. Wilber made it seem as though locating the child -- dead or alive -- was the primary goal. Thus, Henry's confession was not voluntary.

To be admissible, a confession must be free and voluntary. It "must not be extracted by any sort of threat or violence . . . for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner. Bram v. United States, 168 U.S. 532, 542-43 (1897); see also Colorado v. Connelly, 479 U.S. 157 (1986) (due process forbids not only physical coercion but psychological persuasion); Moran v. Burbine, 475 U.S. 412 (1986); Brewer v. State, 386 So. 2d 232 (Fla. 1980) (quoting from Bram). This means that the police may not obtain a confession by coercion and may not utilize techniques calculated to exert improper influence. Brewer, 386 So. 2d 232 (defendant threatened

with electric chair). The burden of proof is on the State to show the voluntariness of a confession. Lego v. Twomey, 404 U.S. 477 (1972). If Henry's confession was based, in any way, on his fear of Wilber's threat, it was not voluntary.

In Brewer v. Williams, 430 U.S. 387 (1977), the officers persuaded the defendant to tell them where the victim's body was located so that he could have a "Christian burial," thus taking advantage of the defendant's religious beliefs. Here, Wilber used a lot stronger coercion -- he threatened to kill Henry if he did not tell where the child was. The trial court erred by not granting Henry's motion to suppress the confession after the court learned of this new evidence. A new trial is required.

ISSUE III

THE TRIAL COURT ERRED BY 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 "NO MORE."

In its earlier opinion in this case, this Court, by a four to three margin, determined that Henry's comment to Detective McNulty, during custodial interrogation, that he "was not saying nothing" to him did not indicate that Henry wanted to cut off all questioning. Henry v. State, 574 So. 2d 66, 69 (Fla. 1991) Although the State may argue that the law of the case doctrine prevents Henry from rearguing this issue, an exception to this doctrine exists when the facts are different in the second appeal.

The decisions agree that as a general rule, when an appel-

> late court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal, provided the same facts and issues which were determined in the previous appeal are involved in the second appeal. But if the facts are different, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in the evidence, pleadings or findings, a prior decision is not conclusive upon questions presented in the subsequent appeal.

Ball v. Yates, 29 So. 2d 729, 738 (Fla. 1946) (citation omitted). Accord Dupont v. State, 561 So. 2d 460 (Fla. 2d DCA 1990); Barry Hinnant, Inc. v. Spottswood, 481 So. 2d 80 (Fla. 1st DCA 1986); State v. Rollins, 386 So. 2d 619, 620 n.2 (Fla. 3d DCA 1980).

In this new trial, the evidence was different than the evidence in the first trial, as will be explained in detail, infra. To the extent that some of the evidence is the same, however, an appellate court has the power to reconsider and correct erroneous rulings notwithstanding that the rulings have become law of the case. Love v. State, 559 So. 2d 198, 200 (Fla. 1990); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984); Strazzula v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965). Reconsideration is warranted in exceptional circumstances where reliance on the previous decision would result in manifest injustice. Preston, 444 So. 2d at 942. This is such a case because evidence at Henry's new trial which was not presented at his first trial painted a different picture of the true facts. Thus, this Court did not consider all of the evidence when making its prior decision.

It must also be noted that, in the prior decision, three justices filed separate opinions, or concurred with separate opinions asserting that Henry's confession should have been sup-

pressed because the police failed to clarify his equivocal statement. Henry, 574 So. 2d at 71-73 (Shaw, C.J., concurring in part and dissenting in part; Barkett, J., dissenting; Kogan, J., concurring with dissent by Barkett, J.). A fourth justice agreed with the majority that the suppression was voluntary but disagreed concerning the trial court's striking of the insanity defense. 574 So. 2d at 71 (McDonald, J., concurring in part and dissenting in part). Justice Barkett also agreed with Justice McDonald concerning the insanity defense. 574 So. 2d at 72. Thus, the "majority" opinion was in actuality a plurality opinion because, although a majority of the court agreed with each part of the opinion, only three justices concurred with all of it.

In Greene v. Massey, 384 So. 2d 24 (Fla. 1980), this Court stated that "[a]n opinion joined in by a majority of the members of the Court constitutes the law of the case." Id. at 27. When a reversal and remand for new trial is entered with each of the justices concurring for reasons stated in their separate opinions, then none of the justices are bound by any opinion except that in which he or she joined. Id.

Although this Court purported to write a majority opinion,[11] it was the opinion of only three justices -- not a majority. The final per curiam opinion following the four separate opinions, which reverses and remands the case for retrial because the majority of the Court believed that reversible error was committed,

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[11] In the final portion of the opinion reversing and remanding the case, concurred with by the entire Court, the first part of the opinion is referred to as the "majority" opinion, even though only three justices concurred with it. 574 So. 2d at 72-73.

albeit for different reasons, is the only part of the opinion concurred with by a majority -- every member, in fact -- of the Court. 574 So. 2d at 72-73. The Greene v. Massey Court declined to discuss the precedential effect of a holding in which only a plurality of the justices joined because, in the case it was considering, a majority joined in the opinion. 384 So. 2d at 27-28. Nevertheless, in Witt v. State, 387 So. 2d 922, 930 n.31 (Fla.), cert. denied, 449 U.S. 1067 (1980), this Court cited Greene v. Massey for the conclusion that, "[t]he aggregation of separate judicial opinions in a case does not produce a law-changing precedent."

Although this may be a technicality, it is an additional reason for the Court to revisit the issue. The unusual opinion in this case made it difficult for the trial judge to rule on the defense motions.[12] The conviction was reversed and the case remanded for a new trial, but at least a bare majority of this Court decided each issue adversely to the defendant. When the defense again moved to suppress Henry's confession, the State argued that it was law of the case and the trial court seemed to agree. Thus, she did not really consider the merits of the motions. Under Greene v. Massey, 384 So. 2d 24, this Court's

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[12] In State v. Leveson, 147 So. 2d 524 (Fla. 1962), and Solomon v. Sanitarian's Registration Board, 147 So. 2d 132 (Fla. 1962), this Court remanded the cases to the district court for "majority opinions" because the judges' separate opinions indicated that they reversed for different reasons. This made it impossible to determine whether a jurisdictional conflict existed. In Leveson, this Court noted that "[o]n remand, the trial judge could not with assurance follow either opinion. In the future other trial courts would be lacking in any conclusive precedent to guide them." 147 So. 2d at 526. This case presented similar problems.

opinion may not technically constitute the law of the case.

Defense counsel filed a pretrial motion to suppress Henry's statements and admissions because the statements were induced and/or coerced after Henry had advised that he wished to exercise his right to remain silent. (R. 104-05) Detective McNulty, who had moved to Texas, came to testify in a hearing on January 27, 1992, but did not testify because the parties and the court ran out of time, McNulty had to return to Texas, and both counsel decided to forego his testimony. (T. 1669-70, 1679-80, 1682) Defense counsel submitted his police report (and that of Detective Wilber) as exhibits to the hearing. (See Def. Exh. 1 & 2 to Jan. 27, 1992, hearing, Vol. XV) The judge denied Appellant's motions to suppress, without prejudice to revisit them. (T. 1649)

On June 1, 1992, defense counsel reopened the issue. The State again argued that "law of the case" prevented the judge from granting the motion.[13] Defense counsel submitted prior testimony by Wilber and McNulty which was admitted into evidence. (T. 1644-49) (See Def. Exh. 1-4 to June 1, 1992, hearing, Vol. XV)

This Court's previous ruling made no reference to the statement Henry made as reported by McNulty in his police report, which he admitted was probably the more accurate than his testimony. His report indicated that Henry said, "I don't want to talk no more, besides you haven't read me anything." This is far different from the statement this Court considered in the first appeal, which was

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[13] Defense counsel submitted Preston v. State, 444 So. 2d 939 (Fla. 1984), and Greene v. Massey, 384 So. 2d 24 (Fla. 1980), which support Appellant's position that the issue was precluded as law of the case. (See discussion supra.)

"I am not saying nothing to you. Besides, you ain't read me nothing yet." Henry, 574 So. 2d at 68. "I don't want to talk no more" is a plain and clear request to terminate the interrogation.

The facts, as reported by this Court in its earlier opinion in this case were as follows: After the detectives and Henry arrived at the sheriff's department on the night of Henry's arrest, Detective Wilber left the interrogation room to make coffee. McNulty tried to start a conversation with Henry "to establish a rapport." He told Henry that he understood that he had "done some time before." Henry responded, "I am not saying nothing to you. Besides, you ain't read me nothing yet." McNulty reminded him that Detective Wilber read him his Miranda rights at the Twilight Motel; then asked him where Eugene Christian was. Wilber returned shortly hereafter and McNulty left. He reentered the room several times to observe and participate in the questioning but never told Wilber what Henry had said because he took the statement to mean that Henry did not want to talk to McNulty. Henry, 574 So. 2d at 68.

When Wilber returned with coffee, he read Henry his Miranda rights and Henry talked with him for several hours, still not confessing to the crime. When Wilber finally said he was going to leave and find Eugene without Henry's help, Henry admitted that Eugene was in Plant City and was not alive. He agreed to take the officers to find the body and did so. Id.

The 4-3 majority found that the comment, "I'm not saying nothing to you. Besides, you ain't read me nothing yet," did not indicate that Henry wanted to cut off all questioning but, instead, indicated that he did not want to speak to McNulty because he knew

Wilber better. Secondly, the majority noted that the comment was in response to McNulty's comments about Henry being in prison rather than the homicides. Third, the majority suggested that Henry may have only been interested in having his Miranda rights read to him. Fourth, McNulty asked only a few questions about Eugene and the automobile Henry was driving, and Henry did not incriminate himself as a result thereof. 574 So. 2d at 69-70.

The Court found that Wilber's inadvertent reading of the Miranda rights clarified Henry's request and, furthermore, Henry did not confess until after the trip to Hillsborough County six hours later. The Court noted that the purpose of Miranda was to prevent "repeated rounds of questioning to undermine the will of the person being questioned," 574 So. 2d at 70 (citing Michigan v. Mosley, 423 U.S. 96, 102 (1975)), and Henry showed no reluctance to talk to Wilber except an initial unwillingness to tell the truth.

Very little of this Court's analysis is applicable to Henry's comment as reported by McNulty in his police report. The report, written shortly after the actual event, and admitted into evidence at the suppression hearing, stated that, when McNulty tried to make conversation with Henry, Henry said "I don't want to talk no more." (Def. Exh. 1 to Jan. 28, 1992, hearing, p. 4, Vol. XV) Detective Wilber's report (Def. Exh. 2 to Jan. 28, 1992, hearing, pp. 5-6, Vol XV), contains no reference to the comment, indicating that McNulty did not tell him about it.

McNulty testified on deposition in the first trial of this case, that he said something like, "I understand you have done time in Raiford before." Henry said, "I don't want to talk about it."

Henry's counsel read to McNulty from his police report where he had written that Henry said, "I don't want to talk no more. Besides, you haven't read me anything." McNulty agreed that was basically what Henry said. He also agreed that his memory was probably better then than at the time of the testimony. (Def. Exh. 3 to June 1, 1992, hearing, pp. 25-27, Vol. XV)

On deposition in the first Pasco County trial, McNulty said that Henry said, "I ain't saying nothing. Nothing has been read to me." McNulty told him he was mistaken; that Wilber read him his rights. Then Wilber walked in with coffee and McNulty left. (Def. Exh. 4 to June 1, 1992, hearing, Vol. XV, pp. 27-28) "I'm not saying nothing" is closer to "I don't want to talk no more" than to the comment this Court considered, "I don't want to talk to you."

This Court previously found, inter alia, that Henry meant he did not want to talk to McNulty. This conclusion is no longer valid based on McNulty's report that Henry said he did not want to talk "no more," nor is the contention that Henry wanted McNulty to read his Miranda rights or was only responding to McNulty's comment about his previous imprisonment. Moreover, we are not complaining about Henry's responses to the few questions McNulty asked before Wilber returned. We are instead arguing that Henry's eventual admission to Wilber that the child was dead, and his confession which followed, should be suppressed because the officers did not terminate the interrogation or clarify Henry's request.[14]

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[14] That the officers did not terminate questioning immediately or seek to clarify Henry's request was not cured by Wilber's later re-reading of the Miranda rights. See Smith v. Illinois, 469 U.S. 91, 99 (1984) (police may not continue questioning in hope that

This Court also noted that the final confession came after the trip to Hillsborough County six hours later. Nevertheless, it was merely a follow-up to Henry's earlier confession that the child's body was in Plant City and his admissions to Wilber in the patrol car while en route to and at the scene of the crime. As this Court noted in Henry, 574 So. 2d at 70, the purpose of Miranda is to prevent repeated rounds of questioning to undermine the will of the person being questioned." That is exactly what happened in this case. Henry was questioned repeatedly throughout the night while extremely tired (and after Wilber's alleged threat to kill him, see Issue II, supra) until he was so exhausted that he confessed.

Detectives Wilber and McNulty did not scrupulously honor or clarify what was at least an equivocal and, arguably, an unequivocal request to terminate the questioning. Although Henry indicated that he wanted to end the interrogation, the detectives failed to honor his request.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) (emphasis added); see also Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) ("if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop") (emphasis added).

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later answer will cast doubt on earlier request to stop).

Michigan v. Mosley, 423 U.S. 96 (1975), explained in more depth the nature of a suspect's right to cut off questioning.

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored. . . ." 384 U.S. at 479. . . . The critical safeguard identified in the passage at issue is a person's right to cut off questioning. Id. at 474. . . . Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether "his right to cut off questioning" was "scrupulously honored."

Id. at 103-04 (footnote omitted, emphasis added).

Whether a suspect has asserted a right to cut off questioning is determined not by fragmented statements taken out of context but rather by the totality of the circumstances. State v. Rowell, 476 So. 2d 149 (Fla. 1985). This totality may be measured, however, only by the circumstances occurring prior to the assertion of the right. Smith v. Illinois, 469 U.S. 91, 99 (1984). The police may not continue to question suspects in the hope that a later answer will cast doubt on an earlier request to end the interrogation.

Sometimes, even under the totality of the prior circumstances, a request to remain silent is not clear but equivocal. In such cases, the police and the courts must apply the same standard applied to equivocal requests for the assistance of counsel. Unless the police immediately limit their next questions to clarifying the equivocal request and obtaining the suspect's permission to

proceed, any resulting statements are inadmissible at trial.

> "[W]henever even an equivocal request for an attorney is made by a suspect during a custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one subject only. Further questioning thereafter must be limited to clarifying that request until it is clarified. . . . And no statement taken after that request is made and before it is clarified . . . can clear the Miranda bar." . . . We see no reason to apply a different rule to equivocal invocations of the right to cut off questioning.

Martin v. Wainwright, 770 F.2d 918, 924 (11th Cir. 1985), quoting Thompson v. Wainwright, 601 F.2d 768, 771-72 (5th Cir. 1979). Like the eleventh circuit, this Court also adheres to "the well-established rule that a suspect's equivocal assertion of a Miranda right [to cut off questioning] terminates any further questioning except that which is designed to clarify the suspect's wishes." Owen v. State, 560 So. 2d 207, 211 (Fla. 1990).

The same is true if the defendant expresses an equivocal desire for counsel. The investigating official may "continue questioning for the sole purpose of clarifying the equivocal request." Long v. State, 517 So. 2d 664, 667 (Fla. 1987). In Long, the defendant said to the detective, "The complexion of things have sure changed since you came back into the room. I think I might need an attorney." The officers ignored the comment and continued the interrogation. 517 So. 2d at 666. This Court reversed because the statement was equivocal and put the officers on notice that the only permissible further inquiry would be to clarify Long's request. 517 So. 2d at 667.

In this case, Henry said that he did not want to talk any more. Detective McNulty may have believed that Henry meant only

that he did not want to talk to McNulty. If so, he was required to clarify this desire, because Henry had ostensibly invoked his right to silence, and any statements he made thereafter were inadmissible. Instead, he continued to question Henry and did not even tell Detective Wilber of Henry's request.

Henry may have believed, based on McNulty's response, that he was entitled only to Miranda warnings and, once they were given, had to talk to the officers. Although this does not seem entirely rational, John Henry was borderline retarded, extremely tired, and had smoked a large quantity of cocaine. (T. 810-12) Two of the four psychiatric experts at the penalty phase trial found that he was seriously psychotic. (T. 696-97, 802-07) He was certainly not thinking in a totally rational fashion during the questioning.

Henry may also have assumed that McNulty left and Wilber returned and again read him his rights because the officers had no intention of ending the interrogation. If, as Henry testified, Wilber threatened to kill him if he did not find the child (see Issue II, supra), Henry may have tried to stop the interrogation by telling McNulty he did not want to talk rather than risk asking Wilber who might kill him. Perhaps he was less afraid of McNulty.

Wilber made coffee, indicating that he anticipated a long night of interrogation. Perhaps, when he returned with the coffee and reMirandized Henry, Henry decided not to further pursue his request to stop talking because asking Wilber to stop the interrogation would be futile. The officers were admittedly upset about the missing child and Wilber had made it clear that he would do whatever was necessary to find the child.

This Court in Owen v. State, 560 So. 2d 207 (Fla. 1990), agreed that the police must clarify equivocal requests of this sort before proceeding.

> [W]hen police inquired about a relatively insignificant detail, [Owen] responded with "I'd rather not talk about it." Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear matters up. He was soon responding with inculpatory answers and asking questions of his own. After further exchanges and a question on another relatively insignificant detail, Owen responded with "I don't want to talk about it." Again, instead of exploring the meaning of the response, the police pressed him to talk. . . . [These] responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement.

Id. at 210-11 (emphasis added). "I'd rather not talk about it" is almost identical to Henry's, "I don't want to talk no more."

Under the totality of the prior circumstances, Henry's unequivocal statement could have one and only one possible meaning -- that Henry wanted to end the interrogation. Indeed, McNulty apparently interpreted this statement as a request to end the interrogation. Otherwise, he would have told Henry that Wilber would be right back to continue questioning him. Understandably, when the officers ignored Henry's request, he did not want to antagonize them, or provoke Wilber to violence, by bringing it up again, especially when they were so upset about the child. Consequently, he chose to keep quiet and continue to deny any knowledge of the child's whereabouts.

In State v. Wininger, 427 So. 2d 1114 (Fla. 3d DCA 1983), the defendant was willing to talk to the police about a homicide until they told him he was a suspect. He said, "I don't believe it. I

want to go home. Can I?" The officer said he could go home, but that he wanted to talk to him about this serious matter. Wininger correctly characterized the issue as whether the defendant's words "indicated in any manner that the defendant wished to invoke his right to remain silent." Wininger found that the

> request, made on the heels of being informed for the first time that he was a suspect, was, at the least, an indication in some manner that the defendant did not want to answer further questions. . . . But if, however, the police were in doubt as to the meaning of the defendant's request to go home, then further inquiry should have been limited to clarifying the defendant's wishes.

Id. at 1115-16.

Wininger further rejected the State's claim that the defendant's continuing to answer questions showed that his request was not really a request to cut off questioning.

> [T]he very protection which this aspect of Miranda v. Arizona is designed to afford is to preclude the State from using the defendant's answers to questions asked after the defendant has invoked his right to remain silent. It is sophistry to suggest that the act of answering questions after the invocation of the right to remain silent, an act deemed by Miranda to be the "product of compulsion subtle or otherwise," 384 U.S. at 474, . . . can be used to show that the defendant really did not mean it when he earlier indicated his desire to remain silent.

Id. See also Smith v. Illinois, 469 U.S. 91, 99 (1984) ("under the clear logical force of settled precedent, an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself"). Similarly, in this case, the defendant's continued response to the further police questions did not alter the necessity for the officers to honor "scrupulously" his request to end the interrogation.

In other cases, even more equivocal statements were found to

require clarification before the interrogation could continue. In Stokes v. State, 541 So. 2d 642, 645 (Fla. 1st DCA 1989), the juvenile's statement to her father, "Daddy, I can't handle no more of this," required the officers "to limit inquiry at that point to a clarification of any doubt presented by the request." In State v. Chavis, 546 So. 2d 1094, 1096 (Fla. 5th DCA 1989), the defendant's statement that he did not want to talk "right now" while he was eating his sandwich was an equivocal request to remain silent which the officers scrupulously honored by immediately stopping the questioning. In Bain v. State, 440 So. 2d 454 (Fla. 4th DCA 1983), the defendant's statement that "he was unsure of himself" invoked his right to remain silent. In Holiday v. State, 369 S.E.2d 241 (Ga. 1988), when the defendant said he was tired, the officers honored this request by allowing him to rest before talking to him further. In State v. Zimmerman, 802 P.2d 1024 (Ariz. App. 1990), the defendant's statement, "That is all I want to say, I am tired," was an ambiguous invocation of the right which the officer clarified by asking him if he wanted to continue. In Phillips v. State, 701 S.W.2d 875, 891-92 (Tex. Cr. App. 1985), the suspect's statement that he "wanted a little time" to think about it invoked his right to remain silent. In People v. Williams, 155 Cal. Rptr. 414, 426 (Cal. App. 1979), the defendant's ambiguous answers -- "Man, really, I'm confused," "I don't know what to do, to say or what" -- invoked hi right to cut off questioning. If being confused and not knowing what to do or say invokes the right to remain silent, then certainly, "I don't want to talk no more" invokes the right.

In Belcher v. State, 520 So. 2d 303 (Fla. 3d DCA 1988), the

officers did not communicate the defendant's request. Defendant Belcher, after denying the murders for nearly four hours, said to the officer, "I don't want to talk to you any more," a statement identical to Henry's. The officer stopped the questioning and left the room. He called another officer, however, and informed him that Belcher no longer wanted to talk to him. The other officer arrived about an hour later and told Belcher he wanted to hear his side of the story. After five minutes, Belcher confessed.

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

The fact that Wilber again read Henry his rights before continuing questioning does not cure the problem. Because the police made no effort to clarify Henry's desires, they did not scrupulously honor his Miranda right to cut off questioning, and the trial judge should have suppressed the resulting statements.

The error was obviously harmful. The only direct evidence concerning the details of the stabbing was provided by Henry's admissions. The case must be reversed and remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO EXCLUDE MENTION OF HENRY'S 1991 PASCO COUNTY CONVICTION FOR KILLING SUZANNE HENRY BECAUSE THE PASCO COUNTY TRIAL COURT FAILED TO FOLLOW THE MANDATE OF THIS COURT.

Defense counsel filed a motion requesting that the trial court exclude any mention of Henry's 1991 conviction for killing his wife, Suzanne Henry, because the Pasco County trial judge had not followed this Court's mandate excluding, on retrial, the collateral crime evidence concerning the murder of Eugene Christian. (R. 97-98) Defense counsel told the judge that he talked to trial counsel in Pasco County who advised that the court admitted evidence of Eugene Christian's murder despite the fact that this Court specifically found it inadmissible. (T. 1651-52) The trial judge denied the motion but noted that, if the Pasco case were reversed on appeal, they would have to "redo" the penalty phase in the instant case. (T. 1652-53) As it turned out, the error affected both phases of the instant trial.

John Henry testified that he had been convicted of several felonies and had been in prison twice. He served over seven years of a fifteen-year sentence for the second-degree murder of a woman by stabbing. He received no psychological treatment while in prison. (T. 584-85) At the time of the instant offense, he had pled guilty to cocaine charges and was awaiting sentencing. (T. 586) Henry said that he had been convicted and sentenced to death for the murder of Suzanne Henry. (T. 587)

The prosecutor asked the court if defense counsel had opened

the door so that he could cross-examine Henry on all three murders. Defense counsel and the court agreed that he could do so, except that he could not get into the appellate reversal. (T. 587-88) On cross-examination, the prosecutor asked and John Henry reiterated that he is currently under sentence of death in Pasco County case. (T. 642) During his penalty phase closing argument, the prosecutor argued to the jury that Henry had been convicted and sentenced to death in Pasco County. (T. 1321)

In the event that defense counsel was correct and this Court reverses Henry's 1991 Pasco County conviction, this case must be reversed and remanded for a new trial, not merely a new penalty phase hearing, because the jury learned during the guilty phase of this trial that Henry was convicted and sentenced to death for the murder of his wife. If the conviction is overturned, the jury will have based its verdict in part on erroneous information. Had the jury not been told that Henry was convicted and sentenced to death already, they might have believed that Suzanne's death was second degree murder or even justifiable homicide. This surely would have affected the verdict.

In Long v. State, 529 So. 2d 286 (Fla. 1988), this Court reversed and remanded for a new penalty trial in Hillsborough County because it vacated Long's conviction and death sentence in Pasco County. Long had entered a guilty plea in Hillsborough County so there had been no guilt phase. In the case at hand, the guilt phase was also contaminated. Thus, if the Pasco conviction is vacated, the conviction in this case must be reversed and the case remanded for retrial.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING THE MURDER OF SUZANNE HENRY TO BECOME A FEATURE OF THE TRIAL, IN VIOLATION OF THE "WILLIAMS RULE" AND SECTIONS 90.403 AND 90.404(2)(a) OF THE FLORIDA EVIDENCE CODE.

When evidence of collateral crimes or bad acts is so disproportionate that it becomes a feature rather than an incident of the trial, the State has gone too far. The evidence must be excluded even if relevant. Long v. State, 610 So. 2d 1276, 1280-81 (Fla. 1992); State v. Lee, 531 So. 2d 133, 137-38 (Fla. 1988); Williams v. State, 117 So. 2d 473, 475-76 (Fla. 1960). Otherwise, the defendant is deprived of his Fifth and Fourteenth Amendment rights to due process and a fair trial.

A main feature of John Henry's trial for the stabbing of his stepson, Eugene Christian, was the myriad of testimony -- much of it cumulative -- detailing the stabbing of his wife some nine hours earlier. Although some of the evidence was relevant, its volume and prominent position at trial created reversible error.

In its opinion reversing this case for a new trial, this Court held that evidence concerning the murder of Suzanne Henry was admissible to show that Henry premeditated the murder of Eugene Christian, and that Henry kidnapped the child instead of taking him lawfully. Additionally, this Court found the two homicides too intertwined to separate. Henry, 574 So. 2d at 70.

Accordingly, prior to the retrial, the trial court denied defense counsel's motion to exclude evidence concerning the death of Suzanne Henry because this Court upheld its admission in the

first trial. (T. 1562) The prosecutor took advantage of the ruling to introduce numerous cumulative versions of the killing, argue with John Henry during cross-examination concerning the details of the killing, and to make it a primary feature of the trial.

To demonstrate Henry's guilt in Suzanne's murder, the prosecutor (1) repeatedly questioned Henry and various other witnesses as to whether Suzanne Henry asked him to leave before he stabbed her, (2) asked Dr. Sprehe whether Henry was impaired when he killed Suzanne, eliciting the response that he was not impaired at that time, and (3) spent his entire penalty phase closing telling the jury to consider the murders and look at the gory photographs of Suzanne Henry and Patricia Roddy and to condemn Henry to death.

Much of the "Williams rule"[15] evidence should have been excluded because it was cumulative and argumentative. Detective Wilber described in great detail all of the events of the murder of Suzanne Henry. (T. 425-32, 450-52) The prosecutor brought out all the minute details of the stabbing of Suzanne Henry, and attempted to prove that John Henry was morally at fault in the murder of his wife. During his cross-examination, the prosecutor tried repeatedly to get Henry to admit Suzanne asked him to leave.

Defense counsel objected at one point to the prosecutor's questioning Henry about Suzanne asking him to leave because he was

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[15] The "Williams Rule," codified in the Florida Evidence Code at § 90.404(2)(a), takes its name from the case of Williams v. State, 110 So. 2d 654 (Fla. 1959), in which this Court held that similar fact evidence of a prior criminal act is admissible if relevant except to prove bad character or criminal propensity. In a second "Williams" case, the Court added the prohibition against collateral crime evidence become a feature of the trial. Williams v. State, 117 So. 2d 473 (Fla. 1960).

asking Henry to "pass of the credibility" of Detective Wilber. Although the objection was sustained, the prosecutor continued to try to get Henry to change his testimony. (T. 604-612)

Q. [by prosecutor] Now, Mrs. Henry, in the course of this argument with you, was insisting that you leave, wasn't she?

A. No, sir.

Q. Didn't you tell Sergeant Wilber that is what she wanted you to do, was to get out of the house?

A. Ah, I noticed Detective Wilber repeatedly stated yesterday that Suzanne, that I said that Suzanne told me several times to leave. No, sir, I don't remember telling him that, that she told me several times.

Q. He would be wrong about that?

A. He could be.

Q. He could be or he is?

A. He could be, sir.

Q. She was not insistent on you leaving?

A. She was arguing with me over my moving back in with Rosa Thomas.

Q. My question, Mr. Henry, was, was Mrs. Henry insisting that you leave the house?

A. If you are saying that Suzanne gets the knife and threatens, demanded me to leave the house, no, sir.

Q. Let me see if I can ask this question so it's very simple. Did Mrs. Henry insist that you leave the house?

A. No, sir.

Q. Now did she go into the kitchen and get the knife?

A. Yes, sir.

Q. Did she come back out and threaten you with the knife?

A. Yes, sir.

Q. So, Detective Wilber got that part right. Is the part about her going into the kitchen and getting the knife and coming out and threatening you with the knife, he got that part right?

A. Yes, sir.

Q. But he is mistaken when he relates that you told him --

MR. FUENTE [defense counsel]: Judge, object to the form of the question, asking the question, passing on the credibility of another witness.

THE COURT: Sustain the objection.

BY MR. CASTILLO [prosecutor]:

Q. Mr. Henry, even after, by your testimony, that Mrs. Henry had gone in the kitchen and gotten the knife and threatened you with it, she was threatening you with it in an effort to get you to get out of the house, wasn't she?

A. No, sir. She was threatening me because of my moving back in with Rosa Thomas, because the last time I had talked with her, she was under the impression that I were going to move back in with my, I were going to move in with one of my sisters, not Rosa. So she was upset once she discovered I had moved back in with Rosa.

Q. Did Mrs. Henry threaten you or threaten to hurt you with the knife unless you left the house that morning?

A. Did she threaten to hurt me if I --

Q. With the knife unless you left her house that morning?

A. No, sir.

(T. 604-06)[16] The prosecutor then asked Henry if his wife cut him with the knife. When Henry said she cut him a couple times on the arm with the knife, the prosecutor asked him if he remembered how Detective Wilber characterized them and he said he remembered, but

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[16] The prosecutor later asked Dr. Fesler if Henry told him Suzanne asked him to leave. Dr. Fesler said that he had. (T. 986)

continued to insist that Suzanne cut him with the knife.[17] (T. 607) In response to further questioning, Henry testified that, when Suzanne approached him with the knife, he "freaked out" and "the result was she was overpowered, the knife was taken from her. As a result she was stabbed." (T. 608)

The prosecutor would not stop there; he wanted more details:

Q. It's a little more detail than that, Mr. Henry. Let's go a little slower than that.

A. Yes, sir.

Q. You took the knife away from her, didn't you?

A. Evidently, I had to.

Q. You don't remember taking the knife from her?

A. Evidently I had to have taken the knife away from her.

THE COURT: Mr. Henry, if you will, answer the questions asked, please, sir.

BY MR. CASTILLO:

Q. Do you remember taking the knife away from Mrs. Henry?

A. No sir.

Q. Do you remember her falling to the ground?

A. We both fell.

Q. Do you remember getting on top of her?

A. No sir.

Q. Do you remember putting your knees on her chest?

A. No, sir.

Q. Do you remember how many times you stabbed Mrs.

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[17] Detective Wilber said they looked more like scratches from running through bushes in the woods. (T. 452-53)

Henry in the neck?

A. No, sir.

Q. Could it have been as many as eleven?

A. I don't know, sir.

(T. 608-09)

During closing arguments, the prosecutor argued that Henry told Wilber and the psychiatrists that Suzanne wanted him to leave but on the witness stand Henry denied that she asked him to leave. The prosecutor continued to argue that she asked him to leave and threatened him with a knife because he wouldn't leave. (T. 1064) The only possible relevance of this detail was to place the blame for the domestic argument on John Henry.

The prosecutor's cross-examination of John Henry concerning the murder of his first wife, Patricia Roddy, consumed four pages. (T. 588-92) His cross-examination concerning the murder of Suzanne Henry consumed seventeen pages. (T. 592-609) He then took fifteen pages to cross-examine Henry about the alleged kidnapping of Eugene Christian. He spent nine pages on the killing of Eugene Christian. (T. 609-634) He then cross-examined Henry for several pages about his arrest. (T. 635-39) He spent two pages asking John Henry about his conviction and death sentence in Pasco County for the murder of Suzanne Henry. (T. 640-41) He 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. Additionally, Detective Wilber had already described Henry's confession to the killing in detail, and Henry had testified about on direct. (See Statement of Facts, supra.)

Defense counsel objected to Suzanne Henry's murder becoming a feature of the trial when the prosecutor asked Detective Wilber if he noticed any similarities between Eugene's stab wounds and Suzanne's. (T. 457-58) The prosecutor argued that the similarities showed intent to kill because Dr. Sprehe would testify that Henry was able to form the requisite intent when he killed Suzanne.[18] (T. 456-57) The judge overruled the objection. (T. 458)

Defense counsel could not have objected much sooner because it takes awhile for collateral crime evidence to accumulate to the point that it becomes a feature of the trial. This Court determined that the State could introduce evidence of Suzanne's death. Thus, it was only after the evidence became so extensive and intrusive that defense counsel needed to object.

In addition to the testimony about Suzanne Henry's murder, a number of large photographs of Suzanne's house, and a large photograph of her front door, showing her leg inside, were introduced into evidence during the testimony of Suzanne's sister, Bonnie Cangro, who found the body. (T. 406, 609) Other photographs of Suzanne Henry's body (and some of Patricia Roddy's body) were introduced into evidence during the penalty phase, ostensibly to show the location of the stab marks. (T. 1213-39) The jury had already heard testimony that Suzanne was stabbed numerous times in the side of the neck. The photos showed nothing more. They were unnecessary and tended merely to inflame the jury.

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[18] Dr. Sprehe later testified that he thought John Henry knew what he was doing when he killed Suzanne Henry. (T. 686)

In closing, defense counsel said that the other two murders and the drug matters were for other courts -- not for us today. (T. 1102) On rebuttal, the prosecutor argued that this was not true. He said that the murders of the other two women were part of this case. "They are a part of this case because it is the motive, it is the reason, that Eugene Christian is dead. Because John Henry had the taste of prison as a result of killing Patricia Roddy. And he served his time for that and got out. And, then killed Suzanne Henry . . . the two circumstances together, the two murders, produced the motive for the killing of Eugene Christian." (T. 1125)

Suzanne's murder was also a feature of the penalty phase -- at least the State's case. Joan Wood, the medical examiner, identified pictures and testified about the autopsy of Henry's first wife, Patricia Roddy, and described the autopsy she performed on Suzanne Henry in 1985. She identified and described photographs presented to the jury showing Suzanne Henry's body and the general area at the scene of the crime. (T. 1211-30) She identified and described photographs showing Suzanne Henry's bruises and the stab wounds to the neck, which caused her death. (T. 1232-40) The State then introduced copies of the judgments and sentences against John Henry for the murders of Patricia Roddy and Suzanne Henry. (T. 1254-55) All of the State's evidence pertained to the murder of Henry's two wives, and none to the death of Eugene Christian.

During his penalty closing, the prosecutor argued mostly how gruesome the murders of Henry's wives were; that Henry did fine in prison and did not need medication; and that his only problem was with women. (T. 1319-20, 1326) He described the stab wounds and

told the jury that John Henry became more proficient at killing between the murders of his two wives -- the first murder was sloppy but the second one (Suzanne Henry) took only eleven stab wounds to the neck area. He urged the jury to look at the photographs and count the stab wounds to Suzanne Henry's dead body. (T. 1320) He argued that John Henry put his knee on Suzanne's head and shoulder while stabbing her, although there was no evidence to support it. He argued that Henry stabbed her on both sides of the neck; that the only thing in his mind while inflicting that pain was to kill her; and that Henry was convicted for the murder and sentenced to death in Pasco County. (T. 1321) He mentioned the killing of Eugene Christian only three times and, each time, it was in connection with the murder of Suzanne Henry. (T. 1322-23, 1326-27)

The State will undoubtedly argue that the defense opened the door to this myriad of evidence. Once this Court approved the admissibility of the evidence concerning Suzanne Henry's death, defense counsel apparently concluded that it was best to admit it from the outset. John Henry admitted he had been convicted and sentenced to death for Suzanne Henry's murder. (T. 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. Defense counsel and the court agreed that he could do so, except that he could not get into the appellate reversal. (T. 587-88) This did not mean, however, that any and all evidence concerning Suzanne's death was admissible.

When collateral crime evidence is relevant, one must consider whether it became a feature of the trial and whether its probative

value was outweighed by unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Bryan v. State, 533 So. 2d 744 (Fla. 1988). This Court already determined that evidence that Henry killed Suzanne Henry was relevant in this case. Henry, 574 So. 2d at 70. The opinion did not say, however, that any and all evidence was admissible, no matter how great or how cumulative, or that the prosecutor could make it the main feature of the trial.

Appellant contends that the large quantity of evidence concerning the murder of Suzanne Henry so permeated the trial that it became a main feature rather than merely a "sideshow," confusing the jurors as to their proper role. The jury must certainly have believed that their verdict encompassed the entire episode, including the stabbings of both Suzanne and Eugene. Because the prosecutor continually attempted to show that Henry was at fault in the encounter that led to Suzanne's death, the jurors must have believed that, even if Henry did not have the specific intent necessary to be guilty of the first-degree murder of Eugene, he had the necessary intent when he killed Suzanne; thus, he was guilty.

Rule 403 also prohibits relevant evidence if its probative value is substantially outweighed by confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Because the jury received no Williams rule cautionary instruction, the jurors were probably confused as to its purpose, and why they heard so much detail about it. The plethora of evidence concerning the stabbing of Henry's sometimes violent wife with the knife she used to threatened him was particularly prejudicial. It suggested

to the jurors that Henry was violent and "no good" and that he had a propensity for murder. {90.404(2)(a), Fla. Stat. (1985). Any probative value was undoubtedly outweighed by prejudice.

The admission of improper collateral crime evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged. Straight v. State, 397 So. 2d 903 (Fla. 1981). Without a doubt, the prosecution believed that the evidence that John Henry stabbed his wife would so permeate the trial that the jury of would consider both stabbings in deciding Henry's guilt. Undoubtedly, the jury did so. Thus, the error was not harmless. See Jackson v. State, 451 So. 2d 458 (Fla. 1984).

In State v. Diguilio, 491 So. 2d 1129 (Fla. 1986), the Court stated that application of the harmless error test requires

> not only a close examination of permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict... The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. . . . The focus is on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

491 So. 2d at 1138-39. In the case at hand, the evidence of intent was not that compelling. With so much extraneous collateral crime evidence admitted, including photographs of Suzanne Henry's dead body, one could not say with any certainty that myriad of evidence did not affect the verdict. The jury could not have deliberated Henry's guilt without also considering his stabbing of Suzanne. A new trial is required.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO IMPEACH THE TESTIMONY OF DRS. AFIELD AND BERLAND BY ACCUSING DR. BERLAND OF BEING A "HIRED GUN," AND MAKING DEROGATORY ACCUSATIONS AGAINST DR. AFIELD."

In the first trial of this case, the State elicited testimony from defense expert, Dr. Robert Berland, that ninety-eight percent of his clientele consisted of criminal defendants and that forty percent of his practice consisted of first-degree murder defendants represented by the Hillsborough County Public Defender's Office. This Court found the testimony relevant to show bias. Henry v. State, 574 So. 2d 66, 71 (Fla. 1991). Apparently for that reason, defense counsel did not object much this second time around to the outrageous conduct of the prosecutor in cross-examining Dr. Berland and Dr. Afield, two of the defense psychiatric experts.[19]

In this trial, the prosecutor went much further. He harassed both Dr. Afield and Dr. Berland, attempting to discredit their expertise. Probably the worst of the prosecutor's misconduct was directed at Dr. Berland whom he argued to the jury was a "hired gun" for the defense. He first elicited testimony that, at the time Dr. Berland was first hired to examine John Henry, his office was in Tallahassee. He later opened a Tampa office. (T. 860-61) He brought out that Dr. Berland was not board certified until six months after his 1986 interview with Henry. (T. 870-71) He

[19] Defense counsel did renew all motions filed in the first trial which would include a defense motion to preclude the prosecutor from eliciting from Dr. Berland his relationship with the Hillsborough County public defender's office. (T. 1564-65) See Henry v. State, 574 So. 2d 66 (Fla. 1991).

questioned Dr. Berland as to the associations he belonged to at that time, and whether he had published, insinuating that he was not well established. (T. 871) During closing argument, the prosecutor argued that Dr. Berland was not certified and was barely known when he first saw Henry. (T. 1079)

The prosecutor argued that the public defender's office sent Dr. Berland a letter telling him that the defense was cocaine intoxication and, thus, he was "primed." He called it an "implied message." (T. 1079-80) During cross-examination, the prosecutor could not find his copy of the letter. Dr. Berland testified that he had faxed a copy of the letter to the prosecutor shortly before the trial, at his request, but did not reread it at that time. Although he did not remember what it said, he did not dispute what the prosecutor said was in the letter. Dr. Berland said his diagnosis would not be affected by a suggested defense. (T. 862-64)

The prosecutor's closing argument became even bolder. He argued to the jury that the public defenders picked Dr. Berland whose office was in Tallahassee and used him in twenty-one other cases because he was a "hired gun." He described Dr. Berland as "[s]omeone who is slick and can manipulate the psychological mumbo-jumbo to persuade a jury." He argued that Dr. Berland does charts and things jurors are not familiar with. (T. 1076-77)

It may well be that the public defender's office used Dr. Berland routinely because he administered tests and used graphs and charts to explain his findings to the jury. No evidence in the case suggested that Dr. Berland manipulated any "psychological mumbo-jumbo" or used "charts and things jurors are not familiar

with." (T. 1076-77) To the contrary, charts and graphs are general helpful to the jury in understanding the expert's findings. (See charts in Defense Exhibit 1, end of Volume XV)

In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), this Court ruled that the personal view of a nontestifying expert, that expert witnesses such as the defense expert were "hired guns," was totally irrelevant, improper, and misleading. The prosecutor's personal view that Dr. Berland was a "hired gun" was even more irrelevant, improper and misleading.

As noted in Nowitzke, this form of impeachment is improper. "One impeaches an expert's opinion by the introduction of a contrary opinion based on the same facts." 572 So. 2d at 1352 (citation omitted). In this case, the prosecutor correctly attempted to impeach Dr. Berland's testimony by comparing his analysis of Henry's MMPI scores with the analysis of Dr. Graham in his authoritative book. (T. 884-93) The prosecutor did not stop there, however. He resorted to name-calling.

The prosecutor made much of the fact that both Dr. Berland and Dr. Afield had originally opined that John Henry was insane at the time of the offense. Defense counsel at Henry's first trial intended to use the insanity defense. The trial court prohibited them from doing so because John Henry refused to see a state psychiatrist (although he saw two court-appointed psychiatrists). This Court affirmed that decision. Henry, 574 So. 2d at 70. For reasons unknown to undersigned counsel, defense counsel did not pursue the insanity defense in the second trial, but continued the original defense that Henry was sane but lacked specific intent to

kill because of cocaine intoxication. Dr. Afield and Dr. Berland, who originally found Henry insane, testified at this trial that he was sane but unable to form specific intent.

When the prosecutor asked Dr. Afield if he had originally found John Henry insane, the doctor insisted that insanity was a legal question to be determined by the jury. The prosecutor finally read his report to him to prove he originally diagnosed insanity. (T. 727-29) The prosecutor also impeached Dr. Berland by pointing out that he had first opined that John Henry was insane. Berland said that he had reviewed his information and had changed his mind. (T. 883) This supported the prosecutor's argument that Dr. Berland was a novice when originally hired by defense counsel.

Defense counsel was caught in a "Catch 22." After the trial judge struck the insanity defense prior to Henry's first trial, Dr. Afield and Dr. Berland presumably testified instead that Henry lacked specific intent -- a conclusion consistent with insanity -- but not that he was insane. Had defense counsel used the insanity defense at the second trial, the prosecutor would have impeached the two doctors with their testimony at the first trial that Henry suffered from cocaine intoxication and lacked specific intent. Because defense counsel opted to continue with the cocaine intoxication defense, the prosecutor was able to impeach the two defense experts with their original diagnoses of insanity.

In his closing argument, the prosecutor pointed out that both Dr. Afield and Dr. Berland originally said Henry was insane but later changed their minds. (T. 1077) He argued that, "[t]hat is how outrageous Doctor Berland and Doctor Afield were back in 1987."

He said the doctors then realized that no one would believe them -- they were caught in the trap of their own statements because Henry admitted he knew he was killing the child. (T. 1076)

Further compounding the error, the prosecutor argued that insanity was a "part of this case" because

> it gives you an insight as to how far Doctor Afield and Doctor Berland are willing to go and how far they went in their opinion. How biased their opinion was in '86 and '87 and '88 and '89 and '90 and '91. It is a bone that is being tossed at the body of Eugene Christian to say that this is a second-degree murder.

(T. 1124) In Garron v. State, 528 So. 2d 353, 357 (Fla. 1988), this Court found that the prosecutor's cross-examination of the psychiatrists and comments to the witnesses and the jury, intended to discredit the insanity defense, caused reversible error. Even though the prosecutor in this case was not so blatant, he too attempted to discredit Henry's insanity-related defense.

The trial judge aided the prosecution in making Dr. Afield appear to be incompetent. Several times, with no objection from either side, the judge asked Dr. Afield not to read from his notes. It was not apparent from the transcript that he was doing so. (T. 731-732) The prosecutor asked him a number of specific details about the offenses. It was apparent that Dr. Afield did not recall the details without looking at his notes. After the trial judge repeatedly told him not to read from his notes, he was forced to say that he didn't know, or didn't remember. (T. 734)

The prosecutor continuously tried to belittle Dr. Afield because he did not remember details. At one point, Dr. Afield said, "I am doing the best I can, Mr. Castillo." The prosecutor

replied, "I believe we have some measure of agreement on that." After the testimony was over, the judge admonished the prosecutor for his comment to Dr. Afield. She told him the comment was inappropriate. Mr. Castillo apologized to the judge. (T. 738)

As this Court has reiterated in several cases, "particularly where the death penalty is involved,"

> [W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also "to regulate . . . the discipline of persons admitted" to the practice of law. This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office.

Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (citations omitted). See also Garcia v. State, 18 Fla. L. Weekly S382 (Fla. June 24, 1993) (prosecutor argued to jury that alleged codefendant "Joe Perez" was a nonexistent person created by Garcia during questioning when he knew Perez was an alias for codefendant Urbano Ribas); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Garron, 528 So. 2d 353, 360-61 (Fla. 1988).

In Ake v. Oklahoma, 470 U.S. 68 (1985), the United States Supreme Court recognized the importance of psychiatric testimony and held that the State must assure a defendant access to a competent psychiatrist when the defendant's sanity at the time of the offense is to be a significant factor at trial. The Court cited a long line of cases in which it held that an indigent defendant must be provided with the basic tools for an adequate defense.

The prosecutor deprived Henry of his defense -- that he was incapable of forming premeditated intent to kill when he stabbed Eugene Christian -- when he cross-examined Drs. Afield and Berland in an insulting and disrespectful manner. The testimony of Drs. Afield and Berland were the core of Henry's defense. Accordingly, defense counsel was rendered less effective and Henry was deprived of affective assistance of counsel as required by the Sixth Amendment to the United States Constitution and article I, section 16, of the Florida Constitution.

Defense counsel did not object to the prosecutor's insulting comments and cross-examination, perhaps because this Court upheld cross-examination of Dr. Berland's relationship with the public defender's office in Henry's first appeal. Henry v. State, 574 So. 2d 66, 71 (Fla. 1991) (relevant to show bias). Nevertheless, the prosecutor went much further in this case. Although counsel made no objection, the prosecutor's accusations were so harmful that the error was fundamental and a new trial is required. See Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984); Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978) (errors destroying essential fairness of criminal trial cannot be countenanced regardless of lack of objection).

As the Second DCA noted some years ago, when dealing with a similar problem,

> Firmly entrenched in the law in this state is the rule that the trial judge must halt improper remarks of counsel in their argument to the jury, whether objection is made or not. . . .
>
> An exception to [the rule requiring an objection] is where the improper remarks are of such character that

> neither rebuke or retraction may entirely destroy their sinister influence. In such event a new trial should be granted regardless of the lack of objection or exception.

Ailer v. State, 114 So. 2d 348, 351 (Fla. 2d DCA 1959).

In the instant case, the prosecutor's arguments constituted fundamental error without objection because Henry was denied due process and a fair trial. Denial of due process is never harmless.

In this capital case, heightened standards of due process apply. "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976). Otherwise, the death sentence is arbitrarily imposed and violates the Eighth and Fourteenth Amendments to the Constitution.

Accordingly, the case must be reversed and remanded for a new trial.

ISSUE VII

THE TRIAL COURT ERRED BY DENYING A DEFENSE OBJECTION AND PROPOSED INSTRUCTION, AND INSTEAD GIVING THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT, THUS UNCONSTITUTIONALLY DILUTING THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Defense counsel filed a pretrial motion and supporting memorandum objecting to the standard jury instruction on reasonable doubt. Attached to the motion was a proposed jury instruction which the defense requested to replace the standard instruction. (R. 208-17) The judge denied the motion. (R. 215) The trial judge gave the standard jury instruction (T. 1135-36), after which, defense counsel renewed his objection to the judge's pretrial denial of his requested instruction on reasonable doubt. (T. 1148)

Florida's standard jury instruction states as follows:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. 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 all 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 wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty.

In In Re Winship, 397 U.S. 358 (1970), the United States Supreme Court held that the Constitution requires proof of the defendant's guilt beyond a reasonable doubt. In Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), the Court unanimously reversed a first-degree murder conviction and death sentence because the reasonable doubt instruction was contrary to the "beyond a reasonable doubt" requirement in Winship. The

unconstitutional instruction in Cage defined a reasonable doubt as

> one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

112 L. Ed. 2d at 342 (emphasis in original). The Court noted that the terms "grave uncertainty" and "actual substantial doubt" suggested a higher degree of doubt than is required for acquittal. Id.

In Cage, the Supreme Court based its ruling on "how reasonable jurors could have understood the charge as a whole." 112 L. Ed. 2d at 342. In Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L.Ed. 2d 385, 399 n.4 (1991), however, the Court noted that, despite the Cage opinion, the correct standard of review for jury instructions is the "reasonable likelihood" standard established in Boyde v. California, 494 U.S. 370 (1990). Thus, the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[20] Id at 380.

In Sullivan v. Louisiana, 508 U.S. ___, 113 S. Ct. ___, 124 L. Ed. 2d 182, 188 n.1 (1993), the Court determined that an unconstitutional reasonable doubt instruction such as that found defective

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[20] The four dissenting justices opined, however, that in the past, the Court had regarded the "reasonable likelihood" language as focusing no less than the standards in Chapman v. California, 386 U.S. 18 (1967), and Sandstrom v. Montana, 442 U.S. 510 (1979) (whether a juror "could" interpret the instruction in an unconstitutional manner), on whether an error could have affected the outcome of the trial. 108 L. Ed. 2d at 338 (Marshall, joined by Brennan, Blackmun and Stevens, J., dissenting).

in Cage is not subject to harmless error analysis.[21] The Court reasoned that, if the instruction prevents the jury from properly determining that the defendant is guilty beyond a reasonable doubt, it violates the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment right to trial by jury. 124 L. Ed. 2d at 188. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is **probably** guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt." Id.

Jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized." Monk v. Zelez, 901 F.2d 885, 889 (10th Cir. 1990). It is improper to define a reasonable doubt as "substantial" rather than "speculative." United States v. Rodriguez, 585 F.2d 1234, 1240-42 (5th Cir. 1978). An instruction stating that a reasonable doubt is a "substantial doubt, a real doubt," has been condemned as confusing by the Supreme Court. Taylor v. Kentucky, 436 U.S. 478, 488 (1978).

Florida's instruction -- a "reasonable doubt is not a **possible** doubt, a **speculative, imaginary** or forced doubt" -- essentially equates the word "reasonable" with such condemned terms as "substantial" and "real." What else can "not a possible doubt" mean? Thus, there is a "reasonable likelihood" that Florida's standard jury instruction could be interpreted by a jury to mean that a doubt must be a "substantial" or "real" doubt to be reasonable.

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[21] The Sullivan Court refused to consider whether the Cage instruction would survive review under the Boyde standard because the issue was not raised below. 124 L. Ed. 2d at 188 n.1

Such an interpretation would clearly dilute the burden of proof to an unconstitutional degree. See United States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986) (condemning instruction equating reasonable doubt with "a real possibility," because jurors might interpreted it as shifting burden of proof to defense).

"Not speculative" is virtually the same as "substantial." See Rodriguez, 585 F.2d at 1240-42 (improper to define a reasonable doubt as "substantial" rather than "speculative"). As the Court pointed out in Winship, 397 U.S. 358, the Constitution requires "a subjective state of certitude" before the defendant can be convicted. The absence of such a degree of certitude necessarily involves a degree of speculation and consideration of possibilities. Thus, even reasonable doubts are necessarily founded on speculation and possibility. The standard instruction forbids a not guilty verdict on the basis of a "possible" or "speculative" doubt, although possibilities and speculation can be reasonable and prevent the "subjective state of certitude" required by Winship.

Furthermore, the sentence, "Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt," might reasonably be taken by jurors to mean that they should convict even where a reasonable doubt is found, so long as they had "an abiding conviction of guilt." The question is not what the court thinks the instruction means, but "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Sullivan; Boyde. An "abiding conviction" bears a certain resemblance to the "moral certainty"

language condemned in Cage. Because of the "reasonable likelihood" that a jury would interpret the "abiding conviction of guilt" standard as eliminating the requirement of proof beyond a reasonable doubt, the standard instruction is improper.

This Court upheld the standard instruction in Brown v. State, 565 So. 2d 304 (Fla. 1990), without analysis, noting only that the Court has previously approved of its use. This Court has not directly addressed the constitutionality of the "reasonable doubt" standard under the standards set out in Cage and Sullivan.

In this capital case, heightened standards of due process apply. Mills v. Maryland, 486 U.S. 367, 373-74 (1988) (greater certainty); Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) (heightened reliability); Elledge v. State, 346 So. 2d 998 (Fla. 1977) (heightened standard of review). The use of the standard jury instruction on reasonable doubt in this case, rather than the one proposed by defense counsel or some other constitutionally sound instruction, violated Henry's rights under the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, and article 1, sections 9, 17 and 22 of the Florida Constitution.

ISSUE VIII

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

The jury had four questions. The parties agreed as to how to answer the first three. The fourth was a request for Dr. Berland's testimony, specifically Henry's account of the day of the

homicides. The judge told them the testimony was not transcribed and they would have to rely on their memories. Although defense counsel asked her to tell the jury that the testimony could be read back to them, she refused to do so. (T. 1156-60) The trial court abused her discretion by refusing to tell the jurors that Dr. Berland's testimony could be read back to them.

In the first trial of this case, the jury asked to hear the testimony of all four psychiatric witnesses. This Court found no error in the court's refusal to read back the testimony, noting that the judge indicated he would allow the testimony to be read back if the jury could not reach a verdict. Henry, 574 So. 2d at 71. In this case, the judge did not make such an offer. Even worse, she misled the jurors by not telling them, as defense counsel requested, that the testimony could be read back. By telling them only that it was not transcribed and they would have to rely on their memories, she led them to believe that it was impossible for them to hear the testimony under any circumstances.

The Florida Rules of Criminal Procedure specifically provide for reading back testimony. Rule 3.410 provides as follows:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Fla. R. Crim. P. 3.410.[22]

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[22] As amended Sept. 24, 1992, effective Jan. 1, 1993. See In re Florida Rules of Criminal Procedure, 606 So. 2d 227 (1992) (only changing "such" to "the" in several places).

Under the rule, it is within the court's discretion whether to have the court reporter read back the testimony of witnesses when requested by the jury. Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990); Lewis v. State, 398 So. 2d 432, 437 (Fla. 1981). Nevertheless, the judge must base his or her discretion on some rational thought process. In the case at hand, the judge did not even consider having the testimony read back, or telling the jury that it could be done. She gave no reason for her decision except for passing comments that she was hesitant to have the testimony read back; that a number of doctors talked about Henry's accounts of the day; and that she "would prefer to tell them that the testimony is not typed up."[23] (T. 1156)

In Lewis v. State, 398 So. 2d 432 (Fla. 1981), the jury asked to have the testimony of various witnesses read back. After hearing part of the testimony of the first witness, the jurors decided they had heard enough. The trial judge explained that, in fairness to both sides, the testimony of a witness must be read back in its entirety so as not to place an undue emphasis on the portions read back. After the court reporter finished with the first witness, the jury foreman said that he thought they could abbreviate their previous request. Defense counsel did not object.

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[23] The prosecutor never asked that the testimony of other experts be read back and never objected to having Dr. Berland's testimony read back. The trial judge did not solicit counsel's opinions as to whether the testimony should be read back, but only asked if they objected to what she intended to tell the jury. Defense counsel specifically asked her twice to tell the jury that the testimony could be read back. The prosecutor did not object to defense counsel's suggestion. (T. 1156-60)

This Court found no error because defense counsel did not object to the way the judge handled the jury requests. "In the absence of any request by the defense to handle it any differently, it is impossible for this Court to say now that the judge abused his discretion." 398 So. 2d at 437. This suggests that the judge must have some basis for exercising discretion.

In Chambers v. State, 504 So. 2d 476 (Fla. 1st DCA 1987), the trial judge allowed the jury to view a videotape of child witnesses during their deliberations, thus allowing them another chance to view the demeanor of the witnesses that they would not have had if the testimony had been read back to them. Citing this Court's holding in Lewis, 398 So. 2d at 437, the Chambers court refused to consider the issue because defense counsel made no objection and offered no alternative suggestions against which the appellate court could compare the trial court's exercise of discretion. Thus, it was impossible for the appellate court to determine whether the trial court abused its discretion. 504 So. 2d at 477.

Unlike defense counsel in Lewis and Chambers, in the instant case, defense counsel suggested an alternative which the court refused without giving a reason. Defense counsel requested that the judge tell the jurors that, although the testimony was not transcribed, it could be read back to them. Had she done so, the jurors could have then decided whether they wanted to rehear the testimony. If they wanted to rehear it, the judge should then have proceeded to confer with counsel before making a decision.

It would not have been too difficult to have had the testimony of Dr. Berland read back to the jury. It would have taken consi-

derably less time than in the first trial when the jury wanted to hear the testimony all of the expert witnesses. It would have taken even less time to read only Henry's description of the day of the homicides, as recounted to Dr. Berland, although, if the prosecutor requested it, the court might have been required to read all of the testimony in fairness to the state. In any event, after a lengthy capital retrial, it would seem foolhardy for the court to refuse to allow a portion of the testimony reread merely to save time, at the expense of a fair trial.

In Rodriguez v. State, 559 So. 2d 678 (Fla. 3d DCA 1990), as in this case, defense counsel made a request which the judge ignored. The jurors asked if they could have portions of statements read back to them. The defense asked that the jury be directed to specify exactly what they wanted to hear. The court denied the request and told the jury that no statements would be read back to them. Several hours later, a juror again asked if they could have the court reporter replay some of what they heard. The judge said he had already ruled on that. Fifteen minutes later the jury found the defendant guilty. 559 So. 2d at 679.

The appellate court found that the trial judge should have granted the defense request to determine what the jurors wanted to have read back. It noted that, although the trial court has great discretion in ruling on such requests, "the discretion cannot be properly exercised without knowing the nature of the request." Id.

In several other cases, courts found reversible error because the judges instructed the jury beforehand that they would not be permitted to have any of the testimony read back to them, or led

the jury to believe testimony could not be read back to them under any circumstances. In Hendrickson v. State, 556 So. 2d 440 (Fla. 4th DCA 1990); George v. State, 548 So. 2d 867 (Fla. 4th DCA 1989), and Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987), the trial judges instructed the juries during preliminary instructions that they could not have testimony read back to them during deliberations. Reversing all three cases, the Fourth DCA found this to be a denial of due process, constituting fundamental error even absent an objection. Hendrickson, 556 So. 2d at 441 & n.1. It reasoned that "[h]armful error occurs when a trial judge or anyone else interferes with the jury deliberation process." The court further held that, "[g]iven the sanctity of a jury room, the State cannot establish that such error was harmless beyond a reasonable doubt. 556 So. 2d at 441 (citing DiGuilio, 491 So. 2d 1129).

The judge's decision in this case was similar. Although she did not tell the jurors in advance that they could not have testimony read back, she intentionally failed to tell them that Dr. Berland's testimony could be read back when they asked for the testimony. Moreover, when the jurors asked for his testimony, they probably meant that they wanted to hear it again, not that they specifically wanted a transcript to read. Even if they knew that testimony was sometimes read back to juries, the jurors would hesitate to ask the judge to rehear the testimony since she did not suggest that this could be done when they asked for the testimony.

Roper v. State, 17 Fla. L. Weekly D2554 (Fla. 5th DCA Nov. 13, 1992), is almost identical to this case. In that case, the jurors asked to "see" the cross-examination testimony of a crucial trial

witness. When the judge told counsel that he intended to explain to the jury that the testimony was not transcribed and there was no way they could see it, defense counsel told the judge that the defendant would like for him to suggest to the jurors that the testimony be read back if that was what they were really seeking. The judge said that if they sent out another request to have it read back to them, then they would address that issue (as did the judge in this case), but that he interpreted "wanting to see his cross-examination" as meaning the jurors thought there was something to see, meaning "to read." Thus, he instructed the jury that the testimony was not transcribed and that it must be transcribed before it could be read by someone other than a court reporter; thus, they would have to rely on their memories. Afterwards, the judge told defense counsel that he believed the jury would be put on notice that the testimony could be read back if that was what they really wanted, because he told them a court reporter was speaking into something. 17 Fla. L. Weekly at D2555.

The appellate court disagreed. It opined that the trial judge's response to the jury may well have led the jury to conclude that their only recourse was to rely upon their memories.

> Rather than weighing the pros and cons of having the cross-examination read back to the jury . . . the trial judge here narrowly focused upon the word 'see' (as distinguished from 'hear') in the jury's request and deftly side-stepped the problem. . . . [H]e 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.

17 Fla. L. Weekly at D2555.

The court noted that there were discrepancies between the testimony of that witness and other witnesses and, thus, it could not say that the error was harmless under the Diguilio standard. The same is true in this case. Certainly, there were numerous discrepancies between Dr. Berland's testimony and that of the other expert witnesses. Instead of telling the jury that Dr. Berland's testimony could be read back to them, the trial judge employed a "semantic shell game," to mislead the jury:

> THE COURT (reading jury question): Could we get Doctor Berland's testimony, narrative from his accounts of the day, specifically?"
>
> I don't understand 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 (prosecutor): What Mr. Henry told.
>
> MR. WELLS (defense counsel): Told Doctor Berland; right.
>
> THE COURT: Well, I am hesitant to do that. We had a number of doctors to talk about his accounts. And I would prefer to tell them that the 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 (defense counsel): 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 could 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.

(T. 1156-58).

When the jury returned, the trial judge told them, as to their request for Dr. Berland's testimony:

BY THE COURT: 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, again, that you will need to rely on your recollection of Doctor Berland's testimony as to this, as to the narrative of his account of the day.

(T. 1160) Thus, the judge did exactly the same thing as did the judge in Roper. She semantically evaded the issue. As in Roper, defense counsel specifically asked her (twice in this case) to tell the jury the testimony could be read back to them, but she refused.

There is no requirement that, if the judge allows testimony to be read back, the court reporter must also read back testimony of other witnesses that the jury did not ask to hear. In fact, this Court specifically approved reading back only the testimony asked for. In Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990), this Court found no abuse of discretion where the judge read only the testimony specifically requested by the jury, and the testimony was

not misleading. Although the prosecutor might have preferred for the jury to rehear the State's expert instead, or in addition to, Dr. Berland, the jury did not ask to hear any other testimony. Dr. Berland's testimony was not misleading.

Dr. Berland's summary of Henry's detailed description of the events leading up to the stabbings, given to him in 1986 when Henry's memory was best, was probably the most favorable evidence supporting the defense theory that Henry lacked the specific intent to kill the child. It went to the heart of Henry's defense.

Berland testified that Henry reported feeling frightened when looking at Suzanne that day, sensing the presence of an unknown person in the house, and losing control while stabbing her. (T. 831-33) He found Eugene watching TV in the next room. and asked Eugene if he wanted to go with him. He kept Eugene from seeing his mother's body. He intended to take him to his sister-in-law's because he could not leave him alone.

Henry bought some beer and drove to Plant City to buy Eugene Church's Fried Chicken. He drove around smoking cocaine and bought some more. He bought it three or more times. (T. 834) On the way back to Zephyrhills, Henry saw flashing lights, and was afraid it was the police. Although he believed the lights were following him at the time, he later realized he had been hallucinating. (T. 835)

He ended up near a chicken farm where the car got stuck in the mud. Henry ran with Eugene in his arms, and hid in a wooded area, lying on the ground holding Eugene. He heard voices and saw moving shadows. He thought he saw a man in shining armor. He repeatedly told a shadow to stay away from him. Then it got silent and he

felt like things were closing in on him. He smoked more cocaine. Everything started up again and seemed to get worse the more he smoked, yet he could not stop smoking because he was addicted. He continued to smoke until he had smoked everything in his possession. He felt people were closing in on him. (T. 835)

It occurred to Henry that, with Suzanne dead, he wanted Eugene to stay with her. He thought about killing himself and Eugene so they could both go with her. He did not want to live without them. He told Eugene over and over again that he loved him. Eugene said, "Daddy, I know you love me." He stabbed Eugene without thinking. Although he knew it was wrong, it "just happened." At that moment he felt that, rather than be separated from Eugene, he would rather be with him in heaven. He tried to kill himself but felt like some force was stopping him. He just sat there and held Eugene in his arms. He felt he had made a mistake and asked himself how he could have done something like that. (T. 837)

Dr. Berland thought that Henry, an unsophisticated person, gave a very accurate description of what people go though in an acute psychotic state, including the inflammatory effects of drugs. He believed Henry's state of mind was so contaminated by mental illness that he could not rationally and deliberately form the specific intent to commit first-degree murder. (T. 838-39)

Had the jury been able to again hear this compelling testimony, the verdict might have been different. In any event, the above case law clearly shows that the trial court committed reversible error by misleading the jury into believing that Dr. Berland's testimony could not be read back to them.

ISSUE IX

FLORIDA'S "FELONY MURDER" AGGRAVATING FACTOR VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT MERELY REPEATS AN ELEMENT OF FIRST DEGREE MURDER AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Defense counsel filed a pretrial motion to declare the "felony murder" aggravating circumstance, set out in section 921.141(5)(d), Florida Statutes, unconstitutional because it does not narrow the class of persons eligible for the death penalty and, in fact, has the opposite effect by creating a presumption that death is the appropriate sentence in cases of felony murder. (R. 141) The trial court denied the motion. (R. 146) The judge instructed the jurors that they could consider as an aggravating factor that the crime was committed while Henry was engaged in the commission of a kidnapping. (R. 418-19, T. 1343-44) The jury recommended the death penalty by a vote of 11 - 1. (R. 423) The trial judge, in her order sentencing Henry to death, found as an aggravating circumstance that the capital felony occurred during the commission of a kidnapping. (R. 441-47)[24]

By considering, and allowing the jury to consider, as an aggravating circumstance weighing in favor of a death sentence a factor which merely repeats an element of first degree murder, and which in no way narrows the class of persons eligible for the death

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[24] While the jurors may have found that the killing was premeditated, it is at least as likely that they rejected the theory of premeditation, because of Henry's lack of specific intent defense, and instead based their verdict on the finding that the killing occurred during the commission of a kidnapping.

penalty, the trial judge impermissibly skewed her own -- and the jury's -- weighing process, and in effect put a thumb on death's side of the scale. See Stringer v. Black, 503 U.S. ___, 112 S. Ct. ___, 117 L. Ed. 2d 367, 379 (1992). That thumb may well have determined the outcome.

While this Court has previously rejected constitutional challenges to the felony murder aggravating circumstance,[25] several more recent decisions of the U.S. Supreme Court and this Court compel reexamination of the issue, and strongly suggest the opposite result. These decisions include Stringer v. Black, 117 L. Ed. 2d 367 (distinguishing Lowenfield v. Phelps, 484 U.S. 231 (1988)); Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ____, 120 L. Ed. 2d 854 (1992); Arave v. Creech, 507 U.S. ___, 123 L.Ed. 2d 188 (1993); and Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Moreover, the Supreme Court has granted certiorari in Tennessee v. Middlebrooks, 123 L. Ed. 2d 466 (1993), which concerns the constitutionality of Tennessee's felony murder aggravating circumstance. That decision may resolve the question of whether the holding in Lowenfield v. Phelps, that Louisiana's use of a felony murder aggravator in the penalty phase does not violate the Eighth Amendment, because the narrowing function under that state's capital sentencing scheme is performed in the guilt phase, has any applicability in a state like Tennessee (or Florida) where the

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[25] See e.g., Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991) (rejecting argument without discussion citing Menendez); Mills v. State, 476 So. 2d 172, 178 (Fla. 1985); Clark v. State, 443 So. 2d 973, 978 (Fla. 1983); Menendez v. State, 419 So. 2d 312, 314-15 (Fla. 1982).

narrowing function is performed in the penalty phase.

Lowenfield v. Phelps, 484 U.S. 231 (1988), does not save the felony murder aggravator in the context of Florida's capital sentencing scheme. Lowenfield held only that, under the very different capital punishment scheme employed in Louisiana, the state's use in the penalty phase of a felony murder aggravating factor did not violate the Eighth Amendment. As the Court made very clear in Stringer v. Black, however, the Lowenfield rationale was inapplicable to the Mississippi scheme and, by extension, to the Florida scheme because Mississippi's system operates in the same manner as Florida's. 117 L. Ed. 2d at 380-81.

Louisiana is a "non-weighing" state where the constitutionally required narrowing occurs primarily in the guilt phase of the trial. Lowenfield, 484 U.S. at 241-46. In that state, intentional murder and felony murder are defined as second-degree murder, which is punishable by life imprisonment. Lowenfield, 484 U.S. 241.

> In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. . . . A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. . . . After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. . . . Unlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.

Stringer, 117 L. Ed. 2d at 380 (citations omitted).

Florida, like Mississippi, is a weighing state. The Florida co-sentencers -- jury and judge -- must consider and weigh all aggravating and mitigating circumstances to arrive at a reasoned

judgment as to which factual situations require the imposition of death and which can be satisfied by life imprisonment. State v. Dixon, 283 So. 2d 1, 10 (Fla 1973). Moreover, under Florida law, both premeditated murder and felony murder are defined as first degree murder, punishable by death or life imprisonment. There is no separate crime of capital murder; thus, no statutory criteria determining death eligibility are addressed in the guilt phase. The list of aggravating factors set forth in section 921.141(5) are intended both to define those capital felonies which the legislature finds deserving of the death penalty and to channel the co-sentencers' discretion via the weighing process. The narrowing process in Florida occurs solely in the penalty phase.

The Lowenfield decision turned on this distinction:

> It seems clear to us . . . that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase . . .
>
> Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

484 U.S. at 246.

Since, in Florida, no narrowing occurs in the guilt phase of the trial and since -- unlike Louisiana -- the Florida jury and judge are required to weigh the aggravating factors against the mitigating factors, the rationale of Lowenfield is by its own terms inapplicable. See Stringer v. Black, 117 L. Ed. 2d 367. Under Florida's capital punishment scheme, allowing the co-sentencers to consider and weigh an aggravating factor which merely repeats an element of the crime itself, and which does not genuinely narrow the class of persons eligible for the death penalty, violates the Eighth Amendment and renders Henry's death sentence constitutionally infirm. See Arave v. Creech, 123 L.Ed. 2d 188; Zant v. Stephens, 462 U.S. 862, 867 (1983); Porter v. State, 564 So. 2d 1060.

When a weighing state places capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh an invalid aggravating factor. Espinosa, 120 U.S. 845. See Stringer, 117 L. Ed. 2d 367 (when sentencing body told to weigh invalid factor, reviewing court may not assume it would have made no difference if "thumb had been removed from death's side of the scale"). Because the jury was instructed on an aggravating factor flawed by law, it must be presumed that this factor was weighed by the jury in reaching its death recommendation. Sochor v. Florida, 119 L. Ed. 2d 326, 340 (1992); Espinosa, 120 L. Ed. 2d 845.

Three state supreme courts (North Carolina prior to Lowenfield; Wyoming, and Tennessee post-Lowenfield) have found similar "felony murder" aggravating circumstances unconstitutional. State v. Cherry, 257 S.E. 2d 551 (N.C. 1979); cert. denied, 446 U.S. 941

(1980); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991); State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992), cert. granted, 123 L.Ed. 2d 466 (1993). This Court should do the same.

To avoid arbitrary and capricious punishment, an aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Lewis v. Jeffers, 497 U.S. 764, 776 (1990); Porter v. State, 564 So. 2d at 1063-64 (Fla. 1990). This Court recognized this principle in adopting its narrowing construction of the "cold, calculated, and premeditated" aggravating factor. In Herring v. State, 446 So. 2d 1049, 1057 (Fla. 1984), this Court upheld a finding of CCP based solely on the fact that a second gunshot was fired after the store clerk had fallen to the floor. Justice Ehrlich, dissenting in part, observed that the "very significant distinction" between the simple premeditation needed for a conviction and the heightened premeditation necessary to establish the aggravating circumstance was being gradually eroded. He warned that "[l]oss of that distinction would bring into question the constitutionality of that aggravating factor, and, perhaps, the constitutionality, as applied, of Florida's death penalty statute." 446 So. 2d at 1058.

Subsequently, in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1982), this Court receded from its holding in Herring, and defined "calculation" as "a careful plan or prearranged design." The Court has specifically recognized that the phrase "heightened premeditation" was adopted "to distinguish [the CCP] aggravating circum-

stance from the premeditation element of first-degree murder." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); Thompson v. State, 565 So. 2d 1311, 1317 (Fla. 1990). As further explained:

> Since premeditation already is present in an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder. Therefore, section 921.141(5)(i) must apply to murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder.

Porter, 564 So. 2d at 1063-64 (footnotes omitted).

The same logic demonstrates the constitutional invalidity of the "felony murder" aggravating circumstance. The factor applies to every Florida defendant found guilty of murder during the commission attempt to commit, or flight after any robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy, or bombing.[26] No additional evidence -- and no "heightened" level of culpability beyond that which is necessary to sustain the underlying conviction -- is required to establish the aggravating factor. Thus, the aggravator neither narrows the class of persons eligible for the death penalty, nor reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of first degree murder.

Because, under Florida law, aggravating factors serve to

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[26] Three offenses (none of which was enumerated in the first-degree felony murder statute at the time the current death penalty statute was originally adopted) are included as felonies upon which a first-degree felony murder conviction can be based, Fla. Stat. 782,04(1)(a)(2), but are not included in the definition of the aggravating factor in section 921.141(5)(d). These are escape (which is covered by the (5)(e) aggravating factor), drug trafficking (addressed in a separate death penalty statute, section 921.142) and aggravated child abuse.

"define those capital felonies which the legislature finds deserving of the death penalty," Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982), and because aggravating factors play a crucial role in the weighing process by guiding the sentencer's[17] discretion, see e.g., State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), the felony murder aggravating circumstance which merely repeats an element of first degree murder does not provide a principled basis for distinguishing those who deserve capital punishment from those who do not. Arave v. Creech, 123 L.Ed. 2d 188 (1993); see also Stringer v. Black, 117 L. Ed. 2d 367 (as a matter of federal constitutional law, "[i]f a State uses aggravating factors in deciding who shall be eligible for the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion"). Therefore, the jury and judge's consideration of the felony murder aggravating factor in the weighing process accomplishes nothing but to place a heavy thumb on death's side of the scale. See Stringer v. Black, 117 L. Ed. 2d 367.

The instruction on this aggravating circumstance was particularly damaging in this case because the alleged "kidnapping" was

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[17] Under Florida's hybrid capital sentencing scheme, the jury and the judge are co-sentencers. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); see also Espinosa v. Florida, 120 L. Ed. 2d 845 (1992). "If the jury's recommendation, upon which the trial judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 120 L. Ed. 2d 845 (1992).

merely technical in the case at hand and did not actually aggravate the murder. Because the court instructed the jury, however, that it was one of two aggravators which they could consider to impose a death sentence, it must be presumed that at least some of them relied on it. Further, it must be presumed that the judge followed Florida law and gave great weight to the resultant death recommendation, see Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), thereby indirectly weighing the invalid factor. Espinosa, 120 L. Ed. 2d 845. Finally, the judge directly weighed the invalid aggravator in her order sentencing Henry to death after defense counsel urged her not to find the factor. (R. 441-47, T. 1504)

While, normally, a kidnapping causes the victim increased anxiety prior to the murder, in this case, the alleged "kidnapping" produced the opposite effect. Henry was Eugene's stepfather. Eugene went places with him all the time. (T. 745-46, 1311) He left with Henry willingly. Henry loved the child and would not have left him in the house alone with his dead mother. He carried him from the house so that he could not see his mother, intending to take him to his aunt's house. He bought him fried chicken.

The State did not charge John Henry with kidnapping. The prosecutor did not even mention it in his penalty closing. (T. 1318-28) In his guilt phase closing, the prosecutor inadvertently admitted that one of the elements of kidnapping was not established. Kidnapping requires that the taking be with intent to commit a felony. 787.01, Fla. Stat. (1991). The prosecutor said that "John Henry did not want to kill Eugene Christian. . . . And when he took that child from that house, it created an enormous

dilemma. . . . (T. 1067) That Henry took Eugene from the house actually mitigated rather than aggravated the offense.

In view of the fact that the court found the two mental mitigators and gave them some weight, and found several nonstatutory mitigators deserving of some weight, the State cannot meet its "harmless error" burden of showing beyond a reasonable doubt that consideration of the invalid aggravator did not contribute to the jury's recommendation, and had no direct or indirect effect on the sentence imposed by the court. See Sochor, 119 L. Ed. 2d 326; Espinosa, 120 L. Ed. 2d 845; Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Henry's death sentence must be vacated and the case remanded for a new penalty trial before a newly impaneled jury.

ISSUE X

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.

The prosecutor asked for jury instructed only on the "prior violent felony" and "committed during a felony" aggravating factors. (T. 1187) Apparently, he too read case law cited by the trial court and realized that the witness elimination factor would not hold up on appeal. Nevertheless, witness elimination was his theme throughout the trial. Despite the fact that witness elimination was a clearly inappropriate aggravating factor, the prosecutor argued to the jurors that they should find Henry guilty. He argued to the judge that she should impose the death penalty

because Henry killed Eugene to eliminate the only witness to the earlier murder of Suzanne Henry. (T> 1502) This argument was based purely on speculation and was and contrary to any evidence in the case. Defense counsel objected, arguing that it would be improper for the judge to rely on witness elimination as an additional statutory aggravator, or as a non-statutory aggravator. (T. 1510)

The law is clear that the witness elimination aggravating factor was not applicable. When the victim of a homicide is not a police officer, proof of intent to avoid arrest by murdering a possible witness must be very strong to support this aggravating factor. Garron v. State, 528 So. 2d at 360 (Fla. 1988); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978), cert. denied, 459 U.S. 1229 (1983). The evidence must show that the "dominant motive" for the murder was the elimination of a witness. White v. State, 403 So. 2d 331, 338 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983).

The prosecutor commenced his guilt phase closing argument by reminding the jurors that, during voir dire, they said that it would be important to know why the killing took place:

> And when I apply that question of why to this case, the issue then becomes, "What is the reason, what is the reason, what is the why, of a five-year-old little boy, a child, was killed?"
>
> I have urged you that the evidence supports the conclusion that the victim, Eugene Christian, was killed to eliminate a witness to the second person that was killed at the hand of John Henry. That was stabbed to death by John Henry. .

(T. 1059)

The prosecutor also argued that John Henry only stabbed Eugene until he severed a vein. "The minute that vein was severed, he stopped. The minute he knew that that was it, it was over. He was

going to die. He stopped. This was a cold and calculated elimination of a witness. (T. 1069) He said that perhaps the elimination of a witness is the most graphic example of premeditation that we have. (T. 1069) This was mere speculation.

The judge instructed the jury that they could consider any evidence they heard in guilt phase in determining the proper penalty. (T. 1343) The prosecutor also told the jury during his penalty phase closing to consider what they heard in the guilt phase in considering the penalty. (T. 1319) Thus, the jury was urged to use the inapplicable factor to impose a death sentence.[28]

In Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), this Court noted that, "[w]e must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." In Atkins v. State, 452 So. 2d 529, 532 (Fla. 1984), this Court noted that "aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by a judge or jury." In a variety of contexts, it has been held improper for the prosecution to try to persuade the jury with claims it knows to be improper. See e.g., Reed v. State, 496 So. 2d 213 (Fla. 1st DCA 1986) (improper for state to death quality jury where no basis upon which death penalty could be imposed). In this case, the prosecutor distorted the jury recommendation and the judge's sentence by urging an aggravator which he knew did not apply.

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[28] The prosecutor did not make this argument during his penalty phase closing because he spent the entire closing arguing that the jury should sentence Henry to death based upon his prior murders of his two wives. (T. 1318-27)

The prosecutor's argument was mere speculation and was not supported by the evidence. Even if Eugene Christian knew that Henry killed his mother, which is not supported by any evidence, this would not have been a reason for Henry to kill him. Various people knew that Henry went to Suzanne's house, and that Eugene was in his company. The police reports of Wilber and McNulty both reflect that Suzanne's sisters immediately told the officers they suspected John Henry. (Def. Exh. 1 & 2 to Jan. 28, 1992, hearing, Vol. XV) John Henry had stopped at the convenience store to ask Suzanne's sister, Dorothy Clark, about Suzanne's whereabouts right before he went to Suzanne's house that day. Certainly he knew he would be the prime suspect. Killing the child would not -- and did not -- prevent his arrest for the murder of his wife. It merely exposed him to arrest and prosecution for another murder. Moreover, that the victim knew his assailant does not establish a witness elimination killing. Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984).

Henry testified that he did not know why he killed the child because he loved him. He consumed a large amount of crack cocaine and apparently freaked out. This is the only evidence that even suggests a motive. It does not suggest a witness elimination. Henry testified that witness elimination never even entered his mind. Certainly, Henry would not have returned to Zephyrhills where he knew he would be, and was, arrested, if he were trying to evade conviction for Suzanne's murder. If Henry intended to kill the child to eliminate a witness, he could have killed him at the house and left his body with Suzanne's, suggesting a burglary.

This Court has consistently recognized that it is constitutional error for the jury to be prevented from considering nonstatutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because failure to do so skews the analysis in favor of imposition of the death penalty. Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987); see also Cooper v. Dugger, 526 So. 2d 900, 901 (Fla. 1988); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) (if jury recommendation upon which judge must rely results from unconstitutional procedure, entire sentencing process is tainted). The jury's consideration of an improper statutory aggravating factor results in the same taint. If an additional and unwarranted aggravating factor is considered, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the improper factor skews the analysis in favor of death, which renders it unreliable.

There is no doubt but that the jurors applied the witness elimination factor in recommending the death penalty even though they were not instructed on it. The jury would not appreciate that as a matter of law it could not properly weigh the witness elimination aggravating factor into the equation of whether to recommend life or death for Henry. The burden is on the state to show beyond a reasonable doubt that this error did not affect the jury recommendation. See Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) Accordingly, the jury's recommendation is tainted and unreliable under article 1, section 17, of the Florida Constitution and the Eighth and Fourteenth amendments to the United States Constitution.

ISSUE XI

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

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

The sentencing judge found two aggravating circumstances. One of them, that the murder was committed during a kidnapping, is deserving of little if any weight. Although John Henry may have committed a technical kidnapping when he took Eugene from his home, the taking was certainly a lot less traumatic for the child than if Henry had left him in the house alone with his dead mother. Henry was his stepfather and the two went places together all the time.

That Henry had been convicted of two other violent felonies is admittedly deserving of great weight. Nevertheless, it is not deserving of so much weight that no amount of mitigation would overcome it. Notably, the court did not find, or even instruct on, the "cold, calculated and premeditated" aggravating factor or the "heinous, atrocious or cruel" factor.

The court found the two mental mitigators and various nonstatutory mitigators. Two of the four psychiatric experts

testified that Henry was psychotic and the State's expert thought he might have a "smoldering" psychosis. All four opined that he suffered from cocaine intoxication. The death penalty has been upheld in few cases where both mental mitigators were found. See e.g. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Miller v. State, 373 So. 2d 882 (Fla. 1979), on remand, 399 So. 2d 472 (Fla. 2d DCA 1981).

There are many cases in which the defendant's sentence was reduced to life where there was another victim killed or seriously injured in conjunction with the capital felony. See e.g., Holsworth v. State, 522 So. 2d 348 (Fla. 1988) (defendant stabbed a mother and daughter, killing the daughter and, three years earlier, had attacked another woman; conduct was affected by drugs and alcohol and psychological disturbance); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (atrocious double murder of a mother and eleven-year-old daughter raped and stabbed during home burglary). .

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

Also noteworthy is a comparison between the complete lack of mitigation in Wilson and the substantial amount of mitigation in the case at hand. John Henry was borderline retarded, chronically psychotic, and under the influence of crack cocaine and alcohol.

He was under a lot of stress, having recently separated from his wife and stepson. He loved his stepson, Eugene Christian, and showed great remorse over his death. He broke down sobbing when he admitted that Eugene was not alive. He broke down again in court during his testimony in this case.

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

Garron is somewhat like this case because the stepdaughter was killed, at least arguably, to prevent her from calling the police or, "to eliminate a witness." The prosecutor argued that Henry killed his stepson to eliminate a witness although no evidence supported the argument. Even if the prosecutor's unsupported theory were true, the death penalty would not be proportionately warranted based on Garron.

The stabbings of Patricia Roddy, Suzanne Henry, and Eugene Christian were caused by domestic problems. Henry was separated from his first wife, Patricia Roddy, when he stabbed her during a domestic confrontation in 1975. Dr. Berland testified that John Henry had been psychotic since his teen years (T. 820-21); thus, the stabbing of his first wife most likely also resulted from his disturbed thinking. He was recently separated from his second wife, Suzanne Henry, when he stabbed her, also during a domestic

confrontation. It was after this obviously stressful homicide that John Henry, after consuming large quantities of cocaine and some beer, "freaked out" and stabbed his stepson whom he loved. He did not understand why he did it and felt terrible. This is not like murders during robberies, motivated purely by a desire for money, and characterized by a total disregard for human life.

Although Henry consumed more and more cocaine between the two killings and, thus, was still in a state of stress and aroused passions when he killed the child, a domestic dispute need not be in the heat of passion. In Maulden v. State, 617 So. 2d 298 (Fla. 1993), the defendant killed his ex-wife and her lover in their bed. Maulden was paranoid schizophrenic and extremely depressed. He loved his wife and wanted she and the children to come home. This Court reduced the penalty to life, despite a death recommendation by the jury, because the murders were not "cold, calculated and premeditated," and the judge based his death sentence on that factor. Similarly, in White v. State, 616 So. 2d 21 (Fla. 1993), the Court reduced the death penalty to life for killing former his former girlfriend, based on the defendant's drug abuse, although the jury recommended death by a 11-1 vote. White had only one aggravating factor while Henry had two; however, as discussed supra, only one of Henry's aggravators deserves any weight.

Henry was borderline retarded, psychotic, and suffered from a serious drug and alcohol problem. Henry's moral culpability is simply not great enough to deserve a sentence of death. This is not one of the "unmitigated" cases for which death is the proper penalty. Cf. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

CONCLUSION

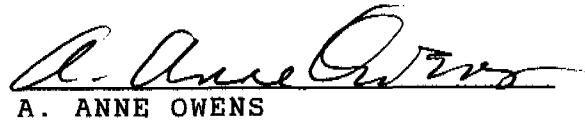
Based on the foregoing argument, reasoning, and citation of authority, Henry respectfully requests that this Court grant the following relief:

> Reverse his conviction and death sentence and remand for a new trial. (Issues I, II, III, IV, V, VI, VII, and VIII)
>
> Reverse his death sentence and remand for imposition of a sentence of life imprisonment (Issue XI).
>
> Reverse his death sentence and remand for a new penalty proceeding before a newly impaneled jury (Issues IX, and XI).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of September, 1993.

Respectfully submitted,



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