IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY, :

Appellant, :

vs. : Case No. 80,941

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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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.

Appellee characterizes Detective Wilber's change of testimony as an "insignificant addition to the evidence,"[1] arguing that it did not constitute a material change in the evidence warranting a second look at this aspect of Henry's suppression issue. Although, as Appellee argues, evidence of Wilber's alleged threat to kill Henry was presented at the first trial, Wilber repeatedly denied having said anything of the sort. (Def. Exh. 1 to June 1, 1992, hearing, Vol. XV, pp. 102-04; Def. Exh. 2 to June 1, 1992, hearing, Vol. XV, pp. 18-20) In this case, Detective Wilber for the first time admitted that he said, "if [Henry] has done something to that child, he needs to die." (T. 1449) This was plainly a material change in the evidence.

The case of Thompson v. State, 595 So. 2d 16 (Fla. 1992), provides a perfect example of a case in which new evidence at the second trial caused this Court to reverse its ruling in the first appeal. In Thompson's first appeal, Thompson v. State, 548 So. 2d 198 (Fla. 1989), this Court reversed, in part, because a portion of Thompson's confession was made after an equivocal request for counsel was not clarified. The Court upheld the earlier portion of

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[1] Brief of Appellee, page 12.

the confession, finding that Thompson understood his Miranda[2] rights. In the second trial, defense counsel for the first time presented, as evidence, the "Consent to be Interviewed" form from which Detective Childers read Thompson's Miranda rights. 595 So. 2d at 17. Detective Childers, who had testified at the first trial that he advised Thompson of his right to have a lawyer at no cost, then admitted that his previous testimony was in error and that he did not tell Thompson he had a right to a lawyer at no cost. 595 So. 2d at 18 n.4. This Court concluded that, "Clearly, this omission constitutes a material change in the evidence not previously addressed by this Court." Id.

The instant case is the same. In the first trial, Wilber testified that he made no statement which could be construed as a threat to kill Henry if they did not find the child. At the second trial, he changed his testimony, admitting that he said (out loud to himself) that, if Henry did something to the child, he needed to die. Like Thompson, Henry did not argue Wilber's admission in the first appeal, because it was not in evidence in the first trial.

This case is distinguishable from cases such as Santos v. State, 19 Fla. L. Weekly S25 (Fla. Jan. 6, 1994), in which no new evidence was adduced on remand. The trial judge in Santos was ordered to reweigh the aggravating and mitigating circumstances presented at the original penalty proceedings. He heard no new evidence. Thus, this Court's holding in Santos' first appeal, that the "cold, calculated and premeditated" factor could not be

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

considered, was "law of the case." Id.

Unlike Santos, in this case the Court ordered a whole new trial on all issues. "At a new trial the parties may present new evidence or use different theories than were presented in the first trial. United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957) (quoted by this Court in Huff v. State, 495 So. 2d 145, 152 (Fla. 1986). It would make no sense to allow the parties to present new evidence, to allow the trial judge to make new rulings on the evidence, to allow a new jury to reach a different verdict, and to then say that the appellate is bound by its prior decision based on evidence at an earlier trial which was declared null and void. Cf. Hall v. State, 614 So. 2d 473, 477 (Fla. 1993); Preston v. State, 607 So. 2d 404 (Fla. 1992) (because a resentencing is a totally new proceeding, the resentencing court is not bound by the original court's findings).

At this trial, Wilber admitted that, obviously, Rosa Thomas (Henry's girlfriend) overheard him when he made the comment. (T. 1449) McNulty testified that he heard Wilber's threat, that Henry was sitting in the patrol car ten to fifteen feet away at the time, at that the door may have been open. (Def. Exh. 4 to June 1, 1992, hearing, Vol. XV, pages 20-23) At this trial, John Henry testified for the first time that he heard the threat. Although his facts were somewhat different from Wilber's and McNulty's, it had been seven years since the event transpired, which would could affect anyone's memory as to the details.

Henry testified that, when he went to the motel room door at

Wilber's request, Detective Wilber told him that if he did not tell him where the boy was, he would personally kill him. (T. 580) Henry told the officers he knew nothing because he was afraid of what they might do to him. (T. 580-81) When he finally accompanied the officers to find the boy, he was afraid to get out of the car because he did not know how the officers would react when they found the child. (T. 581-812) Henry's fear of the officers is supported by Wilber's testimony that, only after he assured Henry that the officers would not hurt him, did Henry direct them to the body. (T. 444, 449)

Thus, it is not hard to believe that Henry (who was paranoid and borderline retarded) heard Wilber's comment and interpreted it as a serious threat. Henry may well have confessed because he was intimidated by Wilber's threat, and attributed Wilber's attitude to the other officers too. Henry's confession should be suppressed and the case reversed and remanded for a new trial.[3]

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[3] If this issue alone is insufficient to require that Henry's confession be suppressed, when considered together with the next issue concerning Henry's at least equivocal request to end the interrogation, suppression is clearly in order.

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."

Since Henry's initial brief was filed, this Court rendered an opinion in Santos v. State, 19 Fla. L. Weekly S25 (Jan. 6, 1994), further elucidating the "law of the case" issue when a plurality opinion is rendered. The Santos plurality noted that, "[u]nder the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision." Id. (citing Art. V, § 3(a), Fla. Const.) This does not totally clarify the matter in the case at hand, however, because Henry is distinguishable from Santos.

In Santos, all of the justices agreed that the case should be reversed for resentencing. As in Henry, they did not all agree as to the reason. Justices Grimes and McDonald concurred with the result but not with the plurality's finding that the CCP aggravating factor was inapplicable. However, two other justices-- Kogan and Barkett, concurring in part and dissenting in part, agreed with the plurality's ruling that CCP was inapplicable, making a total of five, for a majority decision as to that issue. Santos, 591 So. 2d at 164. Accordingly, the trial judge was not free to disregard the Court's opinion on resentencing. Santos, 19 Fla. L. Weekly S25.

In Henry, the entire court agreed that the case should be

reversed for a new trial, but a majority agreed upon no other error. Because four justices believed that Henry's suppression was voluntary, this would seem to be a "binding decision" under the Santos court's reasoning. 19 Fla. L. Weekly S25. Because four justices (not all the same ones) agreed that the trial court's failure to allow Henry to use the insanity was not error, this would also seem to be binding under Santos. Nevertheless, the court reversed because four justices found reversible error, although not the same error. The result, therefore, was that Henry got a new trial even though the plurality found no error. Four justices dissented, at least in part, from the plurality decision.[4] Thus, the major difference between Santos and Henry is that Santos had a majority that agreed on the result reached by the plurality, wherein Henry had only a plurality that found no error.

Even if this Court's previous ruling on the suppression issue is binding precedent, it should not be considered "law of the case" in a new trial. When the case was reversed and remanded, the trial judge was presented with the anomaly of having the case back for retrial even though no error was found by a majority of the court. If the trial court were not permitted to reconsider the insanity and suppression issues at retrial, it would be likely that the second appeal would present the same issues as the first -- issues

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[4] In Greene v. Massey, 384 So. 2d 24 (Fla. 1980), this Court stated that, 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. The aggregation of separate judicial opinions in a case does not produce a precedent.

that were already ruled upon. (Indeed, the second trial was very similar to the first and a number of the issues are similar.) It seems, therefore, that the new trial in this case should be treated as just that -- a new trial with a clean slate, where the parties were free to present different evidence and use different trial strategies, the judge was free to make new rulings, and this Court was free to consider the all of the issues based on the evidence introduced at the new trial. See United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957); Huff v. State, 495 So. 2d 145, 152 (Fla. 1986) ("At a new trial the parties may present new evidence or use different theories than were presented in the first trial.) It makes no sense to allow the parties to present new evidence but to require the trial court to make the same rulings made by this Court ruled based on evidence introduced at an earlier trial, and to then say that this Court is bound by its prior decision based on evidence at a trial they declared null and void. Instead, this Court's reversal should wipe the slate clean. See Huff, 495 So. 2d at 152 (prosecution proceeded on different theory at new trial; evidence from first trial could not be considered).

Appellee's citation to Johnson v. Dugger, 523 So. 2d 161 Fla. 1988)[5] is inappropriate. Johnson was a postconviction petition for writ of habeas corpus. This Court refused to reconsider issues already raised and decided on direct appeal. 523 So. 2d at 162. As was the case in Santos, no new evidence was introduced; thus, this Court had nothing new to consider. In the case at hand, Henry had

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[5] See brief of Appellee, page 15.

a whole new trial with new evidence. Thus, this Court's prior rulings do not constitute law of the case.

Because of the newly presented evidence -- that McNulty originally recalled, and reported in his police report, that Henry said he did not want to talk "no more,"[6] this Court should reverse for a new trial in which Henry's confession must be suppressed.

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[6] See this issue in Appellant's initial brief.

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.

Appellant first wishes to clarify that this argument is dependant upon this Court's decision in Henry's Pasco County case. We are not arguing the merits of the admissibility of collateral crime evidence in that case, but only that if the evidence is again found inadmissible, and the conviction vacated, the conviction in this case must also be vacated. The suggestion that the Pasco County judge again admitted collateral crime evidence that this Court found inadmissible is based only on argument of trial counsel in his motion to exclude evidence of the conviction. (R. 97-98)

Secondly, this Court's decision in Henry's earlier appeal, that collateral crime evidence concerning the killing of Suzanne Henry was admissible, does not make this error harmless. See Henry v. State, 574 So. 2d 66, 70 (1991). The Court did not find that evidence of Henry's Pasco County conviction and death sentence were admissible. Such evidence is in no way relevant to this case and would be untrue and extremely prejudicial in the event the Pasco County conviction is reversed.

Trial counsel apparently conceded that he opened the door to the prosecutor's questioning and remarks about Henry's Pasco conviction and sentence. This was, however, only after the trial

judge denied defense counsel's motion to exclude the conviction.[7] Once the court found the evidence was admissible, defense counsel evidently decided to be "up front" about the conviction and sentence, rather than to allow the State to present it later, so as to minimize the adverse effect. This is the reason for pretrial motions -- to allow the judge to rule on the admissibility of evidence before it is presented so that the parties can plan and present their cases accordingly. Since the judge denied the defense motion to exclude evidence of Suzanne's death, defense counsel should not be penalized for "opening the door." The door was already open.

Additionally, at the time of the trial, the evidence was correct. Henry had indeed been convicted and sentenced in Pasco County. If that conviction is vacated, the evidence will be incorrect and the jury will have been misled. The conviction in this case cannot be allowed to stand if the jury based its verdict and advisory recommendation, in part, on erroneous information.

The error cannot be harmless. Knowing that Henry was already facing death surely made it easier for the jury to also convict him of first-degree murder and recommend death. The jurors could please the community by finding Henry guilty and recommending death, without feeling responsible for the consequences, because was already facing death. This evidence certainly must have affected the verdicts in both the guilt and the penalty phases.

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[7] The judge admitted, however, that if the Pasco case were reversed, they would have to "redo" the penalty phase of this trial. (T. 1652-53)

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. Thus, the State cannot meet its burden of showing beyond a reasonable doubt that the error had no direct or indirect effect on the jury's guilty verdict. See Chapman v. California, 386 U.S. 18 (1967); DiGuilio, 491 So. 2d at 1138-39.

As to the penalty phase, any error which may have affected the sentencer's weighing process requires reversal for resentencing. 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, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (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).

Thus, as to the penalty phase of the trial, the harmless error exception can only be invoked if the state can show beyond a reasonable doubt that the error did not contribute to the jury's penalty verdict. Even if the reviewing court cannot tell what part

the error played in the jury's consideration of its recommended sentence, the error is reversible. Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

Accordingly, if the Pasco County conviction is reversed, or the death penalty vacated, this case must be reversed for a new trial.

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.

Appellee argues that, except for his pretrial motion to exclude evidence concerning the death of Suzanne Henry, defense counsel did not object to this evidence until shortly before the State rested. We wish to reiterate that we are not objecting to the admission of any evidence that Henry killed his wife but, rather, to the admission of so much evidence concerning that incident that it became a primary feature of the case. Defense counsel could not object to the collateral crime evidence becoming a feature of the case until enough evidence was admitted that it became a feature. If he had objected previously, the State would have argued that this Court, and the trial judge, had already found it admissible. Defense counsel did object earlier when the prosecutor repeatedly attempted to get Henry to admit that Suzanne asked him to leave and that he had told Detective Wilber she had asked him to leave, or else that Detective Wilber was wrong when he so testified. (T. 604-06)

When this Court determined, in Henry's prior appeal, that evidence of the killing of Suzanne Henry was admissible in this case, it was for three specific reasons: (1) To show that Henry premeditated the murder of Eugene Christian, (2) that Henry kidnapped the child instead of taking him lawfully, and (3) because the two homicides were too intertwined to separate. Henry v. State,

574 So. 2d at 66, 70 (1991). Much of the testimony brought out by the prosecutor was in no way relevant to any of these purposes.

Certainly, whether Suzanne asked Henry to leave before he killed her did not show premeditation as to the killing of Eugene Christian.[8] Nor did it show that he kidnapped Eugene. It was not at all intertwined with the kidnapping or killing of Eugene. In fact, we cannot imagine why the prosecutor was so insistent upon trying to prove it, unless to show that Henry could have left rather than killing Suzanne, thus making him guilty of first-degree murder. Surely, this Court's ruling was not intended to permit the State to retry Henry for the murder of his wife during this trial.

Similarly, whether Suzanne Henry's stab wounds were similar to Eugene Christian's shows nothing relevant. Although the prosecutor argued that Henry's ability to form the requisite intent to kill Suzanne (according to Dr. Sprehe) showed that he could form the requisite intent to kill Eugene, such a conclusion was nothing more than rank speculation. Nine hours and, according to Henry, a large quantity of cocaine intervened between the two killings. This evidence only tended to inflame the emotions of the jurors by subjecting them to more gruesome photographs irrelevant to the issues in this case.

Appellee disagrees with Appellant's characterization of the subject of the prosecutor's cross-examination of John Henry, which accounts for the disparate tallies of the amount of testimony about

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[8] See prosecutor's cross-examination of John Henry, quoted in Appellant's Initial Brief, at pages 51-54.

the two murders.[9] The discrepancy between Appellant's count of seventeen pages of testimony concerning the murder of Suzanne Henry, and Appellee's tally of only six pages, results from Appellant's inclusion of the events leading up to the actual murder of Suzanne Henry, such as the disagreements between Henry and his wife and Henry's trip to Suzanne's house. (T. 592-603)

Appellee has combined the kidnapping and killing of Eugene Christian and subtracted incorrectly. The pages Appellee cited (T. 609-634) add up to twenty-five rather than thirty-five. As we noted in our initial brief, nine of these pages were spent on the killing and the other fifteen on the kidnapping.[10] Moreover, Appellee included the events leading up to the death of Eugene Christian, while excluding the events leading up to the death of Suzanne Henry.

Appellee correctly points out that evidence concerning the deaths of Suzanne Henry and Patricia Roddy was admissible in the penalty phase. We are not arguing that all of the evidence should have been excluded, but only that the evidence was too extensive and comprised the State's entire penalty case and closing argument, thus adding to the prejudice caused by its featuring the collateral crime evidence. The autopsy reports and photographs of Henry's decease wives were unnecessary and tended only to inflame the jury.

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[9] See brief of Appellee, pages 24-25.

[10] Page 609 is primarily about the killing of Suzanne Henry but mentions Henry going into Eugene's room at the bottom of the page, which accounts for the one-page discrepancy between Appellee's total of twenty-five pages and Appellant's total of twenty-four (four plus fifteen).

As Appellee noted, defense counsel did not request a limiting instruction as to the Williams rule evidence, and we are not arguing that the judge should have given one. Instead, we are arguing that, because the jurors had no such instruction, they would have assumed that the evidence of Suzanne's murder was to be used by them as showing Henry's propensity to murder Eugene, and his generally violent character. Because the collateral crime evidence became the main feature of the case, it was not harmless.

ISSUE VIII

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

Appellee argues that this Court has "repeatedly held" that the trial court must answer only questions of law, and not of fact, and has wide discretion as to whether testimony to have testimony read back.[11] In one of the cases cited by Appellee, Coleman v. State, 610 So. 2d 1283 (Fla. 1992), the jury asked if the vaginal swabs taken from the sexual battery victim matched the defendant's DNA. The trial court refused defense counsel's request to answer "no" and instead told the jurors they must rely on their recollection of the evidence. 610 So. 2d at 1286. This Court found no error, and noted that the answer to the jury's question was not as clear as defense counsel alleged. Id. at n.4. Defense counsel did not request that the judge have the relevant testimony read back. Thus, Coleman is nothing like the case at hand.

In Kelley v. State, 486 So. 2d 578 (Fla.), cert. denied, 479 U.S. 871 (1986), also cited by Appellee, the jury question was whether one of the witnesses was given immunity for his testimony and whether he had anything to gain by testifying against the defendant. Like Coleman, this question required the trial judge to interpret the testimony which he correctly refused to do. In Kelley, however, the judge offered to have the witness's testimony read back in portions designated by the jury. This Court approved the procedure, noting that the trial court's insistence upon having

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[11] See brief of Appellee, page 32.

the jury select the portions to be read back was proper because of judge's legitimate hesitancy to comment on the evidence. 486 So. 2d at 583. In Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991), the third case cited by Appellee, the trial court also read back the exact testimony requested by the jury although the State requested that additional testimony be read back. This Court found no error in that procedure. This is exactly what defense counsel requested in the case at hand. If the judge wanted to avoid having all of Dr. Berland's testimony read back, she could have offered to have the court reporter read the part concerning Henry's narrative of events on the day of the homicide, as the jury requested.

Appellee argues that the judge made an analysis of the pros and cons of having the testimony read back to the jury. If so, it was certainly a superficial analysis. Although she noted that several doctors talked about Henry's account of the day of the homicide, she did not say that this was a reason for sidestepping the jury's request for Dr. Berland's testimony. She said only that she would prefer to just tell the jury that the testimony was not transcribed. (T. 1156-58) In other words, she preferred to side-step the issue rather than go to the effort of having Dr. Berland's testimony read back.

If the fact that more than one doctor talked about Henry's description of the day of the homicide was a reason for refusing to tell the jury that the testimony could be read back, the judge's reasoning was illogical. First, the jury did not ask for the

testimony of the other doctors. See Kelley, 486 So. 2d at 583. Second, Dr. Berland's testimony concerning the day of the homicide was much more detailed, and described Henry's feelings at the time he killed Eugene Christian. Henry talked to Dr. Berland before the other doctors, so the events were clearer in his mind.

Appellee stated that the trial judge also mentioned that Dr. Berland's testimony was very lengthy. Although we can find no mention of lengthiness by the judge, defense counsel brought it up. (T. 1156-57) No matter how long the testimony lasted, however, in the retrial of a capital case, a few more hours would certainly not have been a good reason to deny the jury an opportunity to hear Dr. Berland's testimony again. "Haste has no place in a proceeding in which a person may be sentenced to death." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990).

Appellee argues that the trial judge's focus on the jury's request for Berland's testimony, which she interpreted as a request for a transcript, was only one of the issues considered by the trial judge. Certainly, the judge considered that the testimony was not transcribed and could not be quickly handed to the jury; however, the record does not indicate that she denied the request because she really believed that the jurors only wanted the testimony if it was typewritten. If this was her real reason for denying the jury's request, she would have, as defense counsel requested, told the jury that Dr. Berland's testimony could be read back if they wanted to hear it. Instead, she sidestepped the issue by treating the request as a request for a transcript rather than

clarifying the request. As in Roper v. State, 17 Fla. L. Weekly D2554 (Fla. Nov. 13, 1992), the judge did not even clarify the jury's request. Instead, she used the wording of the jury question to mislead the jury into thinking its request was impossible, to save the trouble of having Dr. Berland's testimony read back or even making a reasoned decision as to whether to have the testimony read back. The portion of the Roper court's opinion quoted by Appellee[12] could be repeated by this Court almost verbatim as to this case. The judge did exactly the same thing that caused the court to reverse in Roper.

Appellee argues that defense counsel did not preserve this issue and that the trial judge thought her response resolved the issues. This argument is clearly refuted by the record. Defense counsel twice repeated his request that the judge tell the jury that Dr. Berland's testimony could be read back. When the trial judge misunderstood his request, he clarified it for her.[13] When she finally understood his request, she clearly denied it and cut off any further discussion.

> MR. FUENTE: No. No. I didn't suggest any problem with that. I do suggest that --
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> THE COURT: I won't do that. I understand what you

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[12] See brief of Appellee, pages 32-33.

[13] He first said: "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." When the judge misunderstood, defense counsel attempted to clarify his request and was interrupted by the judge who still misunderstood his request. When the judge said she would only tell the jury that Dr. Berland's testimony was not transcribed (not mentioning the other doctors), defense counsel clarified his request. (R. 1160)

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. 1158)

Appellee's final argument that the error was harmless because Dr. Berland's testimony was not critical to the case is specious. Appellee notes that Dr. Berland was only one of "numerous" witnesses who testified about Henry's accounts of the day. Appellee obviously believes that Dr. Berland's testimony was not critical because it was the most favorable to the defense. Dr. Berland was the only witness who testified in detail concerning Henry's psychotic feelings of paranoia at the time of the killing.[14] The only issue in the guilt phase was whether Henry could form and did

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[14] Henry told Dr. Berland (among other things) that, while at the chicken farm, 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) He felt possessed by something. He told Eugene over and over that he loved him. He stabbed the child without thinking. 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)

form the specific intent to kill necessary for a first-degree murder conviction. Dr. Berland believed that he could not form specific intent, and that Henry's description of his feelings supported the conclusion. This was the most important defense evidence in the case. The fact that the jurors wanted to hear it again proves that the jurors were struggling with the issue of specific intent, and were considering a verdict other than first-degree murder. It clearly belies Appellee's argument that the error was harmless. Had Dr. Berland's testimony been read back to the jury, Henry might have been found guilty of a lesser-included offense.

The error may also have affected the jury's penalty recommendation. The prosecutor argued that the killing was a witness elimination.[15] Defense counsel argued that Henry killed Eugene out of confusion caused by psychosis and drug intoxication. The jurors were obviously interested in Henry's psychotic and paranoid feelings at the time of the killing. Had they been able to again hear and consider Dr. Berland's description of Henry's feelings, their penalty recommendation might have been life instead of death.

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[15] See Issue X in Appellant's initial brief.

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.

Although, as Appellee contends, this Court's function is not to reweigh the aggravating and mitigating factors, its function is "to consider the circumstances in light of [its] other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982) (quoted in Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)). As argued in Appellant's initial brief, this killing resulted from a domestic situation and was not a cold calculated killing. Henry did not threatened to kill Eugene Christian as in Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990), cited by Appellee. He loved Eugene Christian very much and killed him because of his disturbed thinking, caused by chronic psychosis, borderline retardation, and heavy drug use. He was extremely remorseful when he realized what he had done.

This case is more comparable to Maulden v. State, 617 So. 2d 298 (Fla. 1993); Garron v. State, 528 So. 2d 353 (Fla. 1988); and Santos v. State, 19 Fla. L. Weekly S25 (Jan. 6, 1994), in which this Court found the death penalty unwarranted. As in this case, Santos killed both his daughter and her mother, with whom Santos had lived for a number of years. As in this case, the relationship was stormy. Santos, like Henry, suffered from serious mental problems. He killed as a result of a passionate obsession. Also like Henry, Santos probably killed his daughter only as a result of

the killing of the child's mother. See Santos v. State, 591 So. 2d 160 (Fla. 1992).

In Santos, 19 Fla. L. Weekly S25, this Court found only one aggravating factor and several mitigating factors, including two mental mitigators, and concluded that, clearly, death was not proportionately warranted. Although Henry had two aggravating factors, the kidnapping was questionable because Eugene was Henry's stepson and went with him willingly; the two often spent time together. Without this factor, the aggravating and mitigating factors would be about the same as those in Santos, except for Santos' lack of a prior criminal history. On the other hand, unlike Santos, Henry suffered from borderline retardation in addition to his psychosis.

For these reasons, and those in Appellant's initial brief, if the case is not reversed and remanded for a new trial, Henry's sentence should be reduced to life.[16]

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[16] As to Issues I, VI, VII, IX, and X, Appellant relies on the arguments in Appellant's initial brief.