

IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

vs.

CASE NO. SC02-804
Lower Tribunal No. 85-2685 CFAES

STATE OF FLORIDA,

Appellee.
_____ /

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The appellate record from Henry's original 1987 trial (Florida Supreme Court Case No. 70,816) will be designated as (TR V#/#). The appellate record from the 1991 retrial (Florida Supreme Court Case No. 78,934) will be designated as (OR V#/#). References to the instant record will be designated as (R V#/#).

STATEMENT OF THE CASE

The Grand Jury for the Sixth Judicial Circuit indicted appellant, John Ruthell Henry, for Murder in the First Degree. (OR V7/867-868) Appellant was convicted and sentenced to death. This Court overturned his conviction and remanded the case for a new trial. See Henry v. State, 574 So. 2d 73 (Fla. 1991).

On October 7, 1991, a new trial was held before the Honorable Maynard Swanson, Circuit Judge. The jury again found appellant guilty as charged. (OR V7/953) After penalty phase proceedings on October 10, 1991, the jury returned a 12 to 0 recommendation of death. (OR V7/954)

On October 18, 1991, sentencing was held before Judge Swanson. He imposed the death penalty, (OR V7/958-968) finding in aggravation that:

1. Defendant had previously been convicted of a felony involving the use or threat of violence to another person.
2. The defendant's commission of this murder was especially heinous, atrocious and cruel.

The court found no mitigating factors applied.

Appellant then sought review in this Court asserting the following claims:

ISSUE I. WHETHER THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING THE CONTEMPORANEOUS HOMICIDE OF APPELLANT'S STEPSON.

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

ISSUE III. WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF DURING THE COMMISSION OF A FELONY.

ISSUE IV. WHETHER THE TRIAL JUDGE FAILED TO CONSIDER ALL NONSTATUTORY MITIGATING FACTORS URGED BY DEFENSE COUNSEL WHEN HE IMPOSED SENTENCE.

ISSUE V. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

ISSUE VI. WHETHER THE APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATE ON THE FACTS OF THIS CASE.

This Court denied relief holding that: (1) testimony concerning Eugene Christian's murder was admissible; (2) transcript of former trial testimony was admissible; (3) testimony concerning autopsy report of defendant's murder of his first wife was harmless; (4) consideration of aggravating factor that murder was committed during course of felony was harmless; (5) trial court properly considered mitigating evidence presented by defense; (6) finding of aggravating circumstance that murder was especially heinous, atrocious or cruel was supported by testimony; and (7) the sentence of death was proportionate. Henry v. State, 649 So. 2d 1366 (Fla. 1994). After rehearing was denied, a Petition for Writ of Certiorari

was taken to the United States Supreme Court asserting the following claims:

I.

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

II.

WHETHER THE SUPREME COURT OF FLORIDA ERRED BY AFFIRMING THE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE AGGRAVATING FACTOR OF HOMICIDE DURING THE COMMISSION OF A FELONY, BECAUSE THE EVIDENCE TO SUPPORT THE FACTOR WAS TOTALLY INSUFFICIENT.

The petition was denied on June 19, 1995. Henry v. Florida, 515 U.S. 1148 (1995).

Post-conviction Proceedings:

The Office of the Capital Collateral Regional Counsel-Middle filed a shell Motion to Vacate Judgment of Conviction and Sentence on March 31, 1997. (R V1/55-83) An amended motion was filed on June 11, 1999 and the State filed a response on December 22, 1999. (R V3/334-4440, 448-534, 566-603) After CCRC-Middle filed a motion to withdraw alleging conflict, registry counsel, Baya Harrison was appointed to represent Henry. (R V4/605-610, 615, 626, 956-969)

After conducting a Huff hearing on December 18, 2000, Judge Swanson agreed that new counsel could file an amended motion to vacate. (R V6/968-981) This motion was filed on March 21, 2001. (R V4/644-735) The State's response followed on April 19, 2001. (R V5/822-831)

An evidentiary hearing on the motion commenced on November 19, 2001. (R V6/986-1112) After obtaining written closing arguments from all parties, Judge Swanson issued a written order denying all relief. (R V5/844-46) This appeal follows.

STATEMENT OF FACTS

Trial:

At Henry's re-trial the following testimony was presented:

Curtis Clark testified that appellant, John Henry, was married to his sister-in-law, Suzanne for approximately three years. (OR V3/292)

Ray McAddams testified that at approximately 11:30 a.m. on December 22, 1985, he saw a car pull up in the yard of Suzanne Henry's house, a black male got out and knocked on the door. The door opened and the man was admitted. (OR V3/299)

Marion Crooker stated that he had previously witnessed an argument wherein Suzanne Henry told appellant to take his clothes and get out of the house, but could not say how long before the 22nd of December this had occurred. (OR V3/307-308)

Bonnie Cangrow, Suzanne Henry's sister, testified she had driven Suzanne to work on December 21st at the Presto Convenience Store. (OR V3/309) Suzanne had a ride to work the next evening, December 22nd, however, Bonnie called the store that night to check on her. When she was told Suzanne had never come to work, she went to her house on Collins Avenue. The house was locked, however, the bedroom light was on and the television was playing. Suzanne wasn't in bed, so she left. (OR V3/311) Bonnie returned the next day. Everything was still

the same. Bonnie went to the house of her other sister, Dorothy, to ask if she had seen Suzanne. Bonnie was also concerned that Eugene was nowhere to be found. (OR V3/312) When Dorothy reported she had not seen Suzanne either, Bonnie returned to Suzanne's house with the key. (OR V3/312)

She unlocked the door and pushed it open. A chair was lying on its side in front of the door. She saw blood on the wall and her sister was lying on the floor covered up. She shut the door and went and advised Dorothy she had found Suzanne dead. (OR V3/313)

Ms. Cangrow characterized Suzanne's and appellant's relationship as very rocky. She recalled one incident where she had found appellant sitting on top of Suzanne holding her down and slapping her on the face. (OR V3/316) Bonnie described Suzanne as a "big girl" about 5'5" and 165 pounds who wouldn't lay down for anyone and would hit back. (OR V3/318) On cross-examination, Ms. Cangrow recounted an incident where Suzanne had threatened a girl with a knife. Appellant had stopped her from going after the girl. (OR V3/319-20)

Deputy Dale Neuner testified he was dispatched to Suzanne Henry's apartment on Collins Avenue around 3:45 p.m. on December 23rd. Upon entering the house, Deputy Neuner saw the body of a white woman lying prone in the southeast corner of the living

room. There were no other persons in the apartment. (OR V3/329)

John Mathis testified he had seen appellant smoke crack cocaine on occasion, however, he could not specifically recall seeing him smoke it on the 22nd of December. (OR V3/390)

Dr. Joan Wood, Chief Medical Examiner, testified that the victim had been dead twenty-four to thirty-six hours. (OR V4/405) She had thirteen stab wounds to the neck and left shoulder and bruises on her face, neck, shoulder, arm and knee. (OR V4/407) There were no wounds that could be characterized as defensive wounds associated with a knife. (OR V4/412)

Rosa Mae Thomas testified on December 21st appellant was living with her. (OR V4/429) She saw appellant at 8:00 or 9:00 p.m. on December 23rd. (OR V4/431) At that time, she fixed him something to eat, and he asked her to get him some extra clothes. She and appellant ended up taking a room at the Twilight Motel. (OR V4/432) Around 10:00 p.m., Detective Wilbur came to the door. He called for appellant to come out, then handcuffed him and put him into the police car. (OR V4/435)

Ms. Thomas stated that Suzanne Henry was aware she was the other woman in appellant's life and had approximately five confrontations with her about that fact. (OR V4/435-436)

Suzanne would call and tell Ms. Thomas she was not going to let her [Ms. Thomas] have him [John Henry]. (OR V4/430) On one occasion Suzanne was arrested in Ms. Thomas's front yard. Suzanne told Ms. Thomas she would rather see appellant rot in jail before she [Suzanne] would let her have him. (OR V4/437)

Detective William Ferguson testified he was dispatched to the Twilight Motel where he found appellant in the custody of Detective Wilbur. (OR V4/443) Detective Ferguson examined the motel room, particularly the bathroom. There was wet clothing hanging over the shower rod. (OR V4/446) There were shoes on the floor, also soaking wet. (OR V4/447) In addition, there were two towels which had appeared to have blood on them. (OR V4/449)

Mary Cortege, a serologist, testified she analyzed several of the items for blood stains. She found human blood present on the shirt and towel found in the motel room bathroom, but was unable to establish a blood type. (OR V4/454-456)

Detective Fay Wilbur testified that Suzanne Henry's apartment was quite neat and nothing else had been moved or was in disarray, other than a knife missing from the knife rack in the kitchen. (OR V4/360, 471-474) Dr. Wood had previously testified that a knife fitting the empty space in the knife rack would be consistent in size with the one used to stab Ms. Henry.

No usable prints were found in the house. (OR V3/368) There were blood spatters on the wall and the drapes and a great deal of blood in the immediate area of the body. (OR V4/475)

Detective Wilbur's initial investigation led him to appellant at the Twilight Motel. At the motel, appellant did not appear to be under the influence of either alcohol or drugs. (OR V4/487) After advising appellant of his rights, he first asked if appellant knew Eugene's location. Appellant said he did not. (OR V4/487-491) Appellant denied having seen either Suzanne or Eugene since the previous Sunday. (OR V4/497) Detective Wilbur then told appellant if he would not help him find Eugene, he [Detective Wilbur] would find him himself. At that point, appellant led him to Knight's Station area of Plant City where the body of Eugene was found nearby in an area with large trees and thick undergrowth. (OR V4/502)

Afterwards, John Henry, told Detective Wilbur he had gone to Suzanne's house to give a Christmas present to Eugene. While he was there, Suzanne had become very angry with him and told him to leave. (OR V4/503) She had gotten a knife and cut him, whereupon, he became enraged, overpowered, and stabbed her. Appellant could not recall how many times he had stabbed Suzanne. Detective Wilbur asked appellant to show him where Suzanne had cut him. Appellant showed him several scratches on

his lower arm just above his hand. (OR V4/508) In Detective Wilbur's opinion, the scratches looked like those one would get from shrubbery or thorns, not cuts by a knife. (OR V4/509) Detective Wilbur conceded that he had no photos of appellant's arm, explaining that in the photos he tried to take, the flash had burned out the image. (OR V4/518)

Appellant had covered up Suzanne's body, gotten Eugene from the bedroom, and left in the car. Appellant admitted to subsequently killing Eugene and throwing the knife away in the area where his body was found. (OR V4/505)

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

Debbie Fuller testified concerning the murder of Henry's first wife Patty Roddy. (OR V6/681) On a day in August of 1975, appellant had come to her grandmother, Irene Wilson's, house and brought Patty some clothing she had requested. Patty Roddy accompanied him out the door. (OR V6/682)

Ms. Wilson went to the door and saw Henry pulling Patty to his car. (OR V6/683) Ms. Wilson yelled at appellant to let Patty go or she would call the police. Appellant replied, "Call the damn police." Debbie meanwhile called for assistance. After calling the police, Debbie ran back to the door.

Appellant had Patty in his car and they were struggling. Patty screamed. Her children got into the car and screamed that appellant was cutting their mother. (OR V6/684) Debbie ran to the back door, but by then Patty's screaming had stopped. She went outside where she could hear appellant hitting Patty on the chest. Debbie arrived at the passenger door of the car at the same time as a neighbor, Gloria Nix did. Appellant got out on the driver's side and walked away into the darkness. (OR V6/685) Only after Debbie reached in and touched Patty, did she realize Patty had been stabbed. (OR V6/686)

Gloria Nix testified she had lived across the street from Irene Wilson, Patty Roddy, and Debbie Fuller. She had heard an argument going on between appellant and Patty Roddy. She went outside and across the street to the car where they were arguing. Initially she thought appellant was hitting Patty. Gloria opened the car door and Patty's hand fell out. Appellant got out of the car and walked down the road. (OR V6/689)

Detective Wilbur testified he had been a patrol deputy back in August of 1975. He had arrested appellant after the murder of Patty Roddy. Appellant had ultimately pleaded guilty and been convicted of second degree murder. (OR V6/695)

Dr. Joan Wood testified she had reviewed the autopsy report prepared by the late Dr. Shinner, the former chief medical

examiner. (OR V6/706) In his report, Dr. Shinner described thirty separate knife wounds that caused the death of Patricia Roddy. (OR V6/708)

Dr. Wood was also asked about the effect of crack cocaine on an individual. She explained that the maximum effect of the drug was attained in a few minutes and the significant effects would wear off within an hour. (OR V6/713-714)

Dr. James Kessler, a psychiatrist, testified for the State that he had evaluated appellant, John Henry in 1987. Appellant had told him that he had bought some crack cocaine and smoked it before going to Suzanne Henry's on the day in question. (OR V6/720) At Suzanne's, they had argued about his involvement with another woman, she became angry and told him to leave. When he didn't, Suzanne got a knife and tried to stab him. Appellant received two or three small cuts on his arm. Appellant got the knife away from her, lost control and stabbed her in a rage an unspecified number times. (OR V6/720-721) Dr. Kessler also agreed that the effects of crack cocaine hit people within the first few minutes and then tapered off very rapidly. (OR V6/722) From speaking to appellant about the incident, Dr. Kessler concluded that although appellant had some lingering effects of the cocaine, he was generally in contact with reality and was not thinking bizarrely when he went to Suzanne Henry's

house. (OR V6/723) Dr. Kessler did not believe appellant was under the influence of any extreme mental or emotional disturbance at the time and was able to appreciate the criminality of his conduct. (OR V6/726)

Dr. Kessler stated that appellant's history included his recollection that he began drinking at age ten and was soon drinking a fifth a day. (OR V6/727-728) Appellant had also experienced auditory hallucinations, even when he hadn't been drinking or taking drugs. (OR V6/728)

Dr. Daniel Sprehe, a psychiatrist, testified he, too, saw appellant in February 1987. Appellant told him he had been smoking crack cocaine, had borrowed a car and gone to see Suzanne, his estranged wife, about a Christmas present for a child. Suzanne let him in and they started talking. She brought up the subject of the girl he had been living with and an argument ensued. She asked him to leave, but he wanted to continue the argument. She got a knife and threatened appellant. He became angry, got the knife away from her and stabbed her several times, but he was not sure how many. (OR V6/737) Appellant also told him that his first wife, Patricia Roddy, had threatened him with a knife during an argument, he had grabbed it and killed her. (OR V6/738)

Dr. Sprehe stated that although appellant was angry and

overwrought, he was not unable to control himself when he stabbed Suzanne. (OR V6/739) He was not suffering from any specific mental disorder. (OR V6/740) In his opinion, appellant's ingesting cocaine beforehand would have had a relatively negligible effect. (OR V6/739)

Stephanie Thomas, Rosa Mae Thomas's daughter, testified for the defense. Appellant, John Henry, had lived with her and her mother for five or six months in 1985. Appellant was pleasant to live with and she never witnessed any arguments between her mother and appellant. (OR V6/751) Appellant went out of his way to be nice to her and her brother, and she still felt affection for him. (OR V6/752)

Suzanne Henry, on the other hand, would come to their house and start altercations. On one occasion it appeared Suzanne had been drinking. She started fighting with appellant, although he just told her to leave. Even after her mother had called the police and they had arrived, Suzanne continued. The police told Suzanne they would forget everything if she would just get in her car and leave, however, she continued telling Rosa Mae she would never have him [appellant] and telling appellant she would get him for this. (OR V6/753) Stephanie explained that Suzanne would always come to their house late at night and ask to speak to appellant, they would go outside and she would start an

argument with him. (OR V6/754)

Rosa Mae Thomas testified she had known appellant since high school. (OR V6/758) When he moved in with her on a permanent basis, Suzanne Henry would come over to the house and argue with appellant. She said she would not let appellant stay, he was her husband and she was going to do what she wanted to. Suzanne wasn't even dissuaded when Rosa Mae advised her she was going to call the police. (OR V6/760) When the police tried to persuade Suzanne to leave, she accosted them. Rosa Mae estimated that Suzanne and appellant were almost equal in size. (OR V6/761) Appellant told Suzanne he didn't want to be with her any more, but she still insisted she wouldn't give him up. When appellant threatened to call the police, she replied she did not care. Rosa Mae stated Suzanne Henry offered appellant money, knowing he would use it to buy cocaine, to keep control over him or to get him to come back to her. (OR V6/772)

Rosa Mae described appellant, John Henry, as real nice, a good provider and handy around the house. (OR V6/762) He loved her and her two children, also. He never physically assaulted her or her children. Rosa Mae admitted appellant had a problem with crack cocaine which made him act paranoid. (OR V6/763) Appellant also had an alcohol problem, and he would mix it with taking drugs, however, he would not drink or take drugs around

her children. (OR V6/764)

Post Conviction Evidentiary Hearing:

At the outset of the hearing, collateral counsel Harrison and Assistant State Attorney Van Allen noted that, in addition to evidence presented at the hearing, the court should consider trial testimony, reports and depositions that would be submitted as exhibits in lieu of live testimony. (R V6/990-91)

Henry also presented the live testimony of Dr. Bill E. Mosman. Dr. Mosman testified that he is a licensed psychologist. (R V6/992) He reviewed Henry's files and records for mental health issues, any substance abuse, character history, record and criminal history which may have been appropriate for presentation at trial. (R V6/1001) He also interviewed Dr. Berland and John Henry. (R V6/1003) Dr. Mosman identified his October 2, 2001 report which was given to Judge Swanson. (R V6/1004) The purpose of the report was to determine whether he thought Henry was effectively represented by counsel in this case. (R V6/1005) Dr. Mosman noted that in the guilt phase of the second trial defense counsel did not present any mental health expert testimony. (R V6/1006)

Dr. Mosman testified that Henry's father was an alcoholic and that his father and mother frequently attacked each other

with knives and guns. He stated that the children were frequently abused and witnessed the violence. (R V6/1007) Accordingly, he opined that the children learned to use violence as a scripted response. He believes that one of Henry's sisters is mentally ill and killed her own husband. (R V6/1008) In terms of Henry, Dr. Mosman noted that Henry killed his first wife, then Suzanne and Eugene and that knives appear to be the weapon of choice. (R V6/1009) Henry's mother had at least a minimum of 11 children of which 9 lived. After she abandoned them and moved to Florida, Henry became very attached to his younger brother and sister Ruby. (R V6/1010) Ruby left home and Lonnie died from an automobile accident. (R V6/1011) The experts who evaluated Henry prior to trial, including Drs. Afield, Kessler, Berland, and Sprehe, reported that Henry had a long history of alcohol and drug abuse. There was some discussion that he had used crack cocaine within hours of the murder. (R V6/1012) Although crack cocaine wears off fairly quickly and may not establish insanity at the time of the crime, Dr. Mosman opined that it was still valid mitigation in the context of capacity. (R V6/1014-16)

Dr. Mosman also rejected Dr. Sprehe's diagnosis of smoldering schizophrenia as it does not exist; it is not contained in the DSM-3. (R V6/1018) He noted that the experts

all testified that there was no indicator of major mental illness, hallucinations or delusions. He noted that they were hired to do competency and sanity evaluations, not mitigation evaluations. He stated that there are "entire hosts of diagnoses that could have been presented." (R V6/1019) He stated that even though he only interviewed Henry for a few moments, he could say factually he knows some exist. He again criticized the experts for focusing on the issue of sanity. (R V6/1019)

Dr. Mosman next asserted that trial counsel should have presented the issue of Henry's age as a mitigator. He noted that physical age is not the only issue, that you must also consider the developmental age of the defendant. He found that although Henry was 42 years old his judgment process was equal to a 13-14 year old child because he has an IQ of 78. (R V6/1026)

He also opined that there was possibly an organic personality disorder because of a long history of head injuries. (R V6/1026) Dr. Mosman concluded that even though this testimony was presented at the first trial and the jury, nevertheless, found him guilty and recommended death, counsel should have presented it at the second trial as it was a totally different jury. (R V6/1030) Moreover, he felt that three statutory

mitigators should have been presented to the jury. (R V6/1034) He agreed, however, that there is no argument with the issue of insanity. (R V6/1048) He also agreed that in the Hillsborough trial for Eugene's murder the court found the two statutory mental mitigators. (R V6/1049) He noted that they may have existed for Eugene's murder but not Suzanne's because of Henry's use of cocaine immediately prior to murdering Eugene. (R V6/1050)

The next day, former trial counsel, Richard A. Howard, Circuit Judge in and for the Fifth Judicial Circuit, testified that he represented John Henry for the second Pasco County trial. He explained that he had 13 years in private practice preceded by 7 years as an Assistant State Attorney. (R V6/1061) He explained that in private practice he became capital qualified and handled a number of capital cases. (R V6/1062) He also testified that he was assisted in this case by co-counsel Howard Umsted. (R V6/1074) At the time he undertook representation of Henry he had available to him all of the files and records from Henry's first trials. (R V6/1064) He was aware that Henry had been examined by a number of mental-health professionals, both psychiatric and psychological. He had their reports, depositions and trial testimony. He also had conversations on the phone with some of them. (R V6/1065) He

was aware that this evidence had been presented in both the Hillsborough and prior Pasco trials and that the jury recommended death in both cases. (R V6/1066) He was also aware of Henry's childhood and developmental years. (R V6/1066) Judge Howard testified that he argued the mental health mitigation without expert witnesses. (R V6/1067) He chose not to present them because after reviewing all of the reports, he felt they were devastating to Henry. He thought the comments made by his own expert witnesses were very bad for him in front of the jury. For example, one of the doctors testified that Henry was a very, very dangerous man. His theory was to establish the mental mitigators from family members, try to argue cocaine intoxication, self-defense and to do it without having to put on the experts who were like a two edged sword. (R V6/1068) He felt he had a better shot by putting on witnesses who could testify that Henry was non-violent when he was not under the influence. In addition they presented evidence concerning the victim as "she was not the type of victim a jury could warm up to." (R V6/1069)

Judge Howard testified that the theory of defense was self defense; that Suzanne came at him with a knife. (R V6/1070) He noted that Dr. Berland recommended against using a mental health defense as it was subject to serious attack on the specific

intent issue in Pasco County. (R V6/1071)

He also testified that he discussed his penalty phase strategy with Henry prior to trial. He explained to Henry that the mental health experts were not helping him and Henry agreed. (R V6/1073) On cross Judge Howard agreed that since he got a not guilty verdict on his previous first degree murder case, Henry's penalty phase was the first penalty phase he had done as a defense counsel. He noted, however, that he had done a number of them as a prosecutor. (R V6/1077)

In addition to self defense he had an indirect back up theory which was second degree murder - depraved mind based on the sheer ferocity of the attack. (R V6/1086) Judge Howard disagreed with collateral counsel that he would have been in a better posture to put on an insanity defense the second time around because of the limitation of evidence concerning Eugene and the striking of the cold, calculated and premeditated factor. He stated that in his review of the doctors' prior testimony, Assistant State Attorney Van Allen was able to discount in cross-examination all of the mental health issues raised at the first trial. (R V6/1094)

He also disagreed with Dr. Mosman's assessment that Henry functioned at the level of a 13-14 year old. He was able to discuss adult concepts with Henry. (R V6/1097) He further

noted that even if it was reasonable to argue it, he did not think it was in Henry's best interest because of how badly the witness had hurt him on cross-examination. He could not take that chance. (R V6/1096) Moreover, despite the fact the State put on two experts who said neither mental mitigator existed, Judge Howard testified that he could not in good conscience put on a witness who he felt was going to hurt far more than he was going to help. (R V6/1103)

STANDARD OF REVIEW

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001), citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). "So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses

and in making findings of fact." Porter at 923. Accord Bruno v. State, 807 So. 2d 55 (Fla. 2001) (Standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: the appellate court must defer to the trial court's findings on factual issues, but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.)

SUMMARY OF THE ARGUMENT

ISSUE I: Appellant's first claim is that trial counsel was ineffective in the guilt phase of Henry's retrial for the murder of Suzanne Henry in Pasco County. He contends that counsel's decision to argue self defense with an alternative argument of second degree murder constitutes ineffective assistance because neither position was supported by the law or the facts. Trial counsel clearly considered the alternative defenses and rejected same based on his review of the prior trial and the harmful results of the State's cross-examination of the mental health witnesses. Counsel is not deemed ineffective solely because current counsel disagrees with trial counsel's strategic decisions. Even if another defense may have been more effective, Henry has not shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

ISSUE II: Appellant next urges that trial counsel should have argued that Henry lacked the ability to form the requisite intent to commit first degree murder due to the ingestion of cocaine prior to killing Suzanne that exacerbated his chronic psychotic condition. Neither the evidence nor the law support the intoxication defense and as the defenses presented were based on counsel's tactical decisions, counsel cannot be deemed

ineffective for failing to present the intoxication defense or for failing to assert the alleged Gurganus defense.

ISSUE III & ISSUE IV: Appellant claims in his Points 3 and 4 that counsel was ineffective for failing to present expert testimony in mitigation at Henry's penalty phase. As counsel in the instant case was aware of the now urged evidence and chose to not present it based on a reasoned determination that it was potentially more harmful to the defendant, counsel cannot be deemed ineffective. While current counsel may not agree with the strategy taken by Judge Howard during his representation of Henry, that does not support a finding that his tactical decision constitutes deficient performance or prejudice. Finally, even if counsel's strategic decision could constitute deficient performance, Henry has failed to show that he was prejudiced.

ISSUE V: Appellant's claim based on Ring, *infra.* is procedurally barred and not properly before this Court. Further, aggravating factors in Florida are not elements of the offense, but are constitutionally mandated capital sentencing guidelines. Given that a defendant faces the statutory maximum sentence of death upon conviction of first degree murder, the employment of further proceedings to examine the assorted "sentencing selection factors," does not violate due process.

The plain language of Ring establishes that it comes into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Henry was death eligible upon conviction, Ring does not invalidate his death sentence or render Florida's sentencing scheme unconstitutional. Moreover, based on Henry's prior violent felony conviction, error, if any, is harmless.

ARGUMENT

ISSUE I

**WHETHER THE TRIAL COURT ERRED IN DENYING HENRY'S CLAIM
OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE
GUILT/INNOCENCE PHASE OF THE RETRIAL?**

Appellant's first claim is that trial counsel was ineffective in the guilt phase of Henry's retrial for the murder of Suzanne Henry in Pasco County. He contends that counsel's decision to argue self defense with an alternative argument of second degree murder constitutes ineffective assistance because neither position was supported by the law or the facts. It is the State's position that this claim is unsupported by the law and the facts of this case. Accordingly, the lower court properly found that Henry was afforded reasonably effective assistance of counsel.

At the evidentiary hearing below, trial counsel testified that he thoroughly reviewed the file and, after consultation with his experts, co-counsel and appellant, he decided to argue that Suzanne came at Henry with a knife and that the murder was in self defense. (R V6/1070) Trial counsel testified that his plan was to attack the victim as "she was not the type of victim a jury could warm up to." (R V6/1069) He was able to argue this defense based on evidence presented by the State without having to give up opening and closing. (R V6/1083)

At trial, the State presented Detective Wilbur, who testified that Henry told him he had gone to Suzanne's house to give a Christmas present to Eugene. While he was there, Suzanne had become very angry with him and told him to leave. (OR V4/503) She had gotten a knife and cut him, whereupon, he became enraged, overpowered, and stabbed her. Henry could not recall how many times he had stabbed Suzanne. (OR V4/508) The State also presented Bonnie Cangrow, who described Suzanne as a "big girl" about 5'5" and 165 pounds who wouldn't lay down for anyone and would hit back. (OR V3/318) Ms. Cangrow recounted on cross-examination an incident where Suzanne had threatened a girl with a knife. Appellant had stopped her from going after the girl. (OR V3/319-20)

In addition to self defense, trial counsel's indirect back up theory was second degree murder - depraved mind based on the sheer ferocity of the attack. (R V6/1086) He testified at the evidentiary hearing that, "If you can show to the jury that the killing was either one not covered by felony murder or one not covered by premeditation, if you can bring up the fact that this looks like it was some sort of a mindless, non-premeditated killing, there you go with depraved mind, so you get a second degree." (R V6/1086) He further noted that although at the time of this trial Florida did not recognize a diminished mental

capacity defense, it did not preclude him from arguing depravity because of the number of wounds and going for second degree murder. (R V6/1087) Judge Howard disagreed with collateral counsel that he would have been in a better posture to put on an insanity defense the second time around because of the limitation of evidence concerning Eugene and the striking of the cold, calculated and premeditated factor. He noted that Dr. Berland recommended against using a mental health defense as it was subject to serious attack on the specific intent issue in Pasco County. (R V6/1071) He also noted that in his review of the doctors' prior testimony, Assistant State Attorney Van Allen was able to discount in cross-examination all of the mental health issues raised at the first trial. (R V6/1094)

Thus, contrary to collateral counsel's assertion that neither defense was legally viable, the record shows that counsel was, nevertheless, successful in being able to argue them to the jury and obtain jury instructions on same. The trial record shows that counsel argued to the jury that Suzanne was violent, that she attacked Henry with a knife and that the murder was in self defense. (OR V5/560, 563-67, 570-72) Trial counsel also rebutted the State's argument with regard to self defense, noting that Henry had no legal obligation to retreat and that a number of other weapons were available to Suzanne

once he disarmed her. (OR V5/602-604) He also noted that the State had addressed the second degree murder instruction and that the jury could find second degree - depraved mind, not requiring premeditation. (OR V5/601) Based on the evidence and the defenses presented, trial counsel obtained a jury instruction on both theories of defense. (OR V7/903-07, 909-10) The jury was specifically told that if it found Suzanne Henry attempted to murder him or attempted to commit either an aggravated assault or aggravated battery, then he could use such force as necessary to prevent imminent death or great bodily harm.¹ (OR V7/903)

In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional

¹ Curiously, collateral counsel chastises trial counsel for presenting a diminished capacity defense while asserting that he was ineffective for not presenting this drug ingestion/psychosis which is essentially a diminished capacity defense that is inadmissible. [See Issue II, *infra*.] Trial counsel actually presented a second degree - depraved mind argument based on rage induced by Suzanne's attack. Judge Howard testified at the evidentiary hearing that although at the time of this trial Florida did not recognize a diminished mental capacity defense, it did not preclude him from arguing depravity because of the number of wounds and going for second degree murder. (R V6/1087) Thus, he deftly managed to present this argument without being limited by the diminished capacity case law.

norms and that the challenged action was not sound strategy." Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) (quoting Strickland v. Washington, 466 U.S. 668, 688-89 (1984)). This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. See Spencer v. State, 2002 WL 534441 (Fla. April 11, 2002); Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). Moreover, "[t]o establish prejudice [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Williams v. Taylor, 529 U.S. 362 (2000) (quoting Strickland, 466 U.S. at 694); See Valle v. State, 778 So. 2d 960, 965-966 (Fla. 2001); Shere at 220. Trial counsel clearly considered the alternative defenses and rejected same based on his review of the prior trial and the harmful results of the State's cross-examination of the mental health witnesses.

Nevertheless, collateral counsel urges reversal based on a claim that another viable defense was available. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." Stewart v. State, 801 So. 2d 59, 65-66 (Fla. 2001). Even if another

defense may have been more effective, Henry has not shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Lusk v. State, 498 So. 2d 902, 905 (Fla. 1986) (trial counsel's decision to rely on self-defense was a strategic choice which did not fall outside the acceptable range of competent choices.) The lower court properly denied this claim.

ISSUE II

DID THE TRIAL COURT ERR IN FINDING THAT HENRY DID NOT SUFFER PREJUDICE AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT/INNOCENCE PHASE OF THE RETRIAL? (AS STATED BY APPELLANT)

Appellant, relying upon Gurganus v. State, 451 So. 2d 817, 822-23 (Fla. 1984), next urges that trial counsel should have argued that Henry lacked the ability to form the requisite intent to commit first degree murder due to the ingestion of cocaine prior to killing Suzanne that exacerbated his chronic psychotic condition. As previously noted, defense counsel specifically testified that he rejected presenting this defense because he was concerned about the facts that would come out with a mental health defense (R V6/1071) and that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Burger v. Kemp, 483 U.S. 776 (1987), quoting Strickland v. Washington, 466 U.S. 668, 812 (1984). Moreover, even if counsel's strategic decisions were reviewable, this claim is baseless in law and fact and should be denied.

First, contrary to collateral counsel's assertions, a defense that "Henry lacked the ability to form the requisite intent to commit first degree murder due to the ingestion of cocaine prior to killing Suzanne that exacerbated his chronic

psychotic condition," is not admissible under Gurganus v. State, 451 So. 2d 817 (Fla. 1984). This Court in Gurganus held that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. Subsequently, in Bunney v. State, 603 So. 2d 1270, 1273 (Fla. 1992), this Court further noted that evidence of certain commonly understood conditions that are beyond one's control, such as epilepsy, infancy, or senility are also admissible. Subsequently in State v. Bias, 653 So. 2d 380, 382-383 (Fla. 1995), this Court synthesized its decisions in Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994), Bunney, Chestnut v. State, 538 So. 2d 820 (Fla. 1989), and Gurganus and set forth limitations regarding the admissibility of evidence of mental disease or defect within the defense of voluntary intoxication to ensure that the defense of voluntary intoxication is not utilized as a label for what in reality is a defense based upon the doctrine of diminished capacity.

More recently, in Spencer, this Court reaffirmed the holding in Bias, stating:

While not specifically addressed by the lower court, we conclude that the evidence of Spencer's "dissociative state" would not have been admissible during the guilt phase of the trial. "[E]vidence of most mental conditions is simply too misleading to be allowed in the guilt phase." Dillbeck v. State, 643 So.2d 1027, 1029 (Fla.1994). While evidence of voluntary intoxication and of other commonly

understood conditions that are beyond one's control, such as epilepsy, are admissible in cases involving specific intent, see *id.*; see also *Bunney v. State*, 603 So.2d 1270 (Fla.1992); *Gurganus v. State*, 451 So.2d 817, 822-23 (Fla.1984) ("When specific intent is an element of the crime charged, evidence of voluntary intoxication ... is relevant."), there are limitations regarding the admissibility of evidence of mental disease or defect within the defense of voluntary intoxication. See *State v. Bias*, 653 So.2d 380, 382-83 (Fla.1995). As this Court explained in *Bias*, such limitations are required "to ensure that the defense of voluntary intoxication is not utilized as a label for what in reality is a defense based upon the doctrine of diminished capacity." *Id.* Further, "[w]e continue to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea." *Id.* Thus, we agree with the lower court that counsel's failure to present this evidence did not constitute deficient performance and we affirm the lower court's denial of this claim.

Spencer v. State, 2002 WL 534441
*5-(Fla. 2002)(emphasis added)

No evidence that Henry was truly intoxicated at the time of the offense and no expert testimony was presented at the evidentiary hearing that would in any way support a finding that this newly asserted claim of defense would satisfy the test set forth in Bias. In fact, trial counsel was not even questioned as to his reasons for not presenting such a defense.

Moreover, unlike Bias, where the defendant had consumed 11 beers at the time of the crime, the evidence in the instant case refuted that Henry was truly intoxicated when he murdered Suzanne Henry. In order to successfully assert the defense of

voluntary intoxication, "the defendant must come forward with evidence of intoxication at the time of the offense *sufficient to establish that he was unable to form the intent necessary to commit the crime charged.*" Rivera v. State, 717 So. 2d 477, 485 n.12 (Fla. 1998) (quoting Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985) (emphasis added)). Thus, even if Henry was now suggesting that a straight forward voluntary intoxication defense should have been presented, the evidence below in no way supported such a defense.

At trial, Dr. James Fessler testified that Henry told him he had smoked crack cocaine, then borrowed a car to drive to her house. Henry told him he felt okay, that he did not feel messed up at that time. He later became angry when she asked him to leave. He told Dr. Fessler that she threatened him with a knife, he got the knife away from her and then just lost control. (OR V6/720-21) The doctor testified that the effects of crack cocaine fall off by fifteen, twenty minutes; they do not typically last very long. (OR V6/722) He concluded that when Henry reached the house he was in contact with reality and not having bizarre thoughts. (OR V6/723) Dr. Fessler also noted that, according to Dr. Berland's report, Henry was not suffering from any organic brain dysfunction. (OR V6/724) It was his opinion that Henry was able to appreciate the consequences of

what he was doing at the time, that he could distinguish right from wrong. (OR V6/726)

Dr. Daniel Sprehe testified that Henry told him he smoked crack in the morning before going to Suzanne's. He said he had no problems driving a car and that he got angry when she threatened him with a knife after he refused to leave. Dr. Sprehe testified that the effects of the cocaine would have had a relatively negligible effect on Henry. It might have made him more impulsive. It was his opinion that at the time Henry was angry and overwrought, that he was not in any way unable to control himself or not know what he was doing. (OR V6/737-39) Dr. Joan Wood also concurred that the effects of crack cocaine were relatively short lived. (OR V6/713-15)

None of this evidence was sufficient to establish that at the time of the offense Henry was unable to form the intent necessary to commit the crime charged. Rivera; Koon v. Dugger, 619 So. 2d 246, 248 (Fla. 1993) (denying claim that counsel should have presented a voluntary intoxication defense in order to negate the specific intent to commit premeditated murder based on failure to demonstrate deficient performance and prejudice.) Under similar circumstances, this Court in Stewart v. State, 801 So. 2d 59, 65-66 (Fla. 2001), rejected an argument that counsel was ineffective for failing to present a voluntary

intoxication defense. During Stewart's evidentiary hearing, trial counsel testified that he considered the defense of voluntary intoxication as some of the evidence indicated that Stewart had been drinking on the day of the offense, but opted against it after determining it was not a viable defense for Stewart. Specifically, he testified that his conversations with Stewart persuaded him that a voluntary intoxication defense would be inappropriate given Stewart's detailed account of the crime. Stewart's counsel further noted, as Henry's counsel in the instant case did, that he was concerned if he employed that defense the experts who examined Stewart to determine his competency to stand trial would have been available to testify about Stewart's detailed account of the circumstances of the crime. Stewart's counsel concluded that such testimony would more than negate any potential benefit of a voluntary intoxication defense. This Court concluded:

In sum, the record demonstrates that counsel made an informed and reasoned decision not to pursue a voluntary intoxication defense. See *Occhicone*, 768 So. 2d at 1048 (affirming denial of petitioner's ineffectiveness claim for counsel's failure to present additional evidence in support of voluntary intoxication defense where defense counsel testified that they chose against presenting the additional evidence because of taped statements made by the petitioner to a psychologist which demonstrated that the defendant "had a good recall of what transpired the night of the murders and therefore was not intoxicated to the level of not being able to

premeditate the murders"); *Johnson v. State*, 593 So. 2d 206, 209 (Fla.1992) (holding that counsel's decision not to pursue voluntary intoxication defense was a strategic decision, not deficient performance, where defense counsel testified that he rejected the defense because the defendant "recounted the incident with 'great detail and particularity' in his confession").

Stewart v. State, 801 So. 2d 59, 65-66 (Fla. 2001) (footnote omitted)

As previously noted, trial counsel Howard was not asked by collateral counsel regarding the failure to present a voluntary intoxication defense. It is clear, however, that counsel considered all possible defenses. There was no evidence to support the defense and, as trial counsel Howard stated, he did not present the experts because their testimony was very damaging to Henry. (R V6/1068, 1099) Accordingly, as neither the evidence nor the law support the intoxication defense and as the defenses presented were based on counsel's tactical decisions, counsel cannot be deemed ineffective for failing to present the intoxication defense or for failing to assert the alleged Gurganus defense. Based on the foregoing, appellant's claim of ineffective assistance of guilt phase counsel must fail.

ISSUES III & IV

DID THE TRIAL COURT ERR IN FINDING THAT HENRY HAD NOT ESTABLISHED EITHER DEFICIENT PERFORMANCE OR PREJUDICE

SUFFICIENT TO REQUIRE A FINDING THAT HENRY HAD BEEN DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE.

Appellant claims in his Points 3 and 4 that counsel was ineffective for failing to present expert testimony in mitigation at Henry's penalty phase.² As this Court has repeatedly recognized that to successfully prove an ineffective assistance of counsel claim a defendant must establish *both* prongs defined by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), the State has combined the claims. As the following will establish, Henry has neither established deficient performance nor prejudice and is not entitled to relief.

Recently, in Gudinas v. State, 816 So. 2d 1095 (Fla. 2002) this Court further explained a defendant's burden under Strickland, stating:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance

² Point 3 asserts deficient performance and Point 4 asserts prejudice.

prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052.

According to Strickland, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Strickland court also explained how counsel's actions should be evaluated:

Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. Id. at 691, 104 S.Ct.

2052.

Gudinas v. State, 816 So. 2d 1095, 1101-1102 (Fla. 2002)

In support of his claim of deficient performance he relies on this Court's opinion in Ragsdale v. State, 720 So. 2d 203 (Fla. 1998)(Ragsdale II) and Ragsdale v. State, 798 So. 2d 713 (Fla. 2001)(Ragsdale III). Neither opinion supports his claim that Henry's trial counsel was ineffective in the instant case. In Ragsdale II this Court reviewed a summary denial of Ragsdale's Rule 3.850 motion to vacate and remanded for an evidentiary hearing as to the claim of ineffective assistance of penalty phase counsel. After an evidentiary hearing was conducted this Court reversed for a new penalty phase finding that counsel did not conduct a reasonable investigation and, as he was not informed as to the extent of the child abuse suffered, he could not have made an informed strategical decision not to present mitigation witnesses. Ragsdale III at 720. This Court specifically stated:

Counsel was appointed to the case after various lawyers had withdrawn. Although counsel had five years of experience in criminal defense work in Georgia and worked for several months as an assistant state attorney before entering into private practice, this case was his first and last capital murder case. The only assistance counsel received with the case was from his wife. Counsel testified that, as all but one deposition needed to be completed, he felt that the essential discovery had been done and that all the

preparation he needed to do was to learn the material to try the case. Indeed, the record reflects that counsel's entire investigation consisted of a few calls made by his wife to Ragsdale's family members. Counsel did not know who his wife contacted or the content of the conversations between his wife and the individuals contacted. Further, counsel did not talk to any family members himself; he only understood from his wife that Ragsdale's family was not particularly helpful or interested.

* * *

[W]e find no evidence that Ragsdale was uncooperative or that he precluded his counsel from investigating and presenting evidence in mitigation. In addition, Ragsdale's siblings testified that they were never contacted and that they would have testified if they had been contacted at the time of Ragsdale's trial. Ernie Ragsdale, Ragsdale's younger brother, had been deposed by Ragsdale's predecessor counsel and even came to Ragsdale's trial pursuant to a State subpoena and, after talking to prosecutors, was released from the subpoena. Ernie, however, was never contacted by counsel. Byron Ragsdale, Ragsdale's cousin, lived in Pasco County at the time of Ragsdale's trial, yet he was never contacted by counsel. Darlene Parker, Ragsdale's cousin, and Byron drove eight hours from Georgia to Pasco County, Florida, to testify on Ragsdale's behalf. Rebecca Lockhart, Ragsdale's aunt, and Sheila Adams, Ragsdale's cousin, provided corroborative testimony of Ragsdale's child abuse by way of depositions to perpetuate testimony. Therefore, the evidence establishes that these witnesses would have been available if counsel had conducted a minimal investigation.

Id. 718-719 (footnote omitted)

In contrast, in the instant case, trial counsel, Judge Richard A. Howard testified that at the time he undertook representation of Henry he had available to him all of the files and records from Henry's first trials. (R V6/1064) He was

aware that Henry had been examined by a number of mental-health professionals, both psychiatric and psychological. He had their reports, depositions and trial testimony. He also had conversations on the phone with some of them. (R V6/1065) He was aware that this evidence had been presented in both the Hillsborough and prior Pasco trials and that the jury recommended death in both cases. (R V6/1066) He was also aware of Henry's childhood and developmental years. (R V6/1066) Judge Howard testified that he argued the mental health mitigation without expert witnesses. (R V6/1067) He chose not to present them because after reviewing all of the reports, he felt they were devastating to Henry. He thought the comments made by his own expert witnesses were very bad for him in front of the jury. For example, one of the doctors testified that Henry was a very, very dangerous man. His theory was to establish the mental mitigators from family members, try to argue cocaine intoxication, self-defense and to do it without having to put on the experts who were like a two edged sword. (R V6/1068) He felt he had a better shot by putting on witnesses who could testify that Henry was non-violent when he was not under the influence. In addition they presented evidence concerning the victim as "she was not the type of victim a jury could warm up to." (R V6/1069) Judge Howard also

noted that Dr. Berland recommended against using a mental health defense as it was subject to serious attack on the specific intent issue in Pasco County. (R V6/1071) He testified that he discussed his penalty phase strategy with Henry prior to trial. He explained to Henry that the mental health experts were not helping him and Henry agreed. (R V6/1073)

At Henry's first trial for the murder of Suzanne, at least 4 doctors testified that they had examined Henry. (TR V5/770, 822; V6/875, 879) In addition, as Judge Howard testified, he also had access to the files from the Hillsborough trial for the murder of Eugene. Based on his review of these files and reports and on Dr. Berland's recommendation, counsel made a tactical decision to stay away from the experts and to present this evidence through lay witnesses who could paint a picture of Henry as a generally nonviolent man.

Thus, unlike counsel in Ragsdale whose decisions were based on minimal investigation, counsel in the instant case had sufficient information upon which to base his tactical decisions. Additionally, in contrast to Ragsdale where a number of family members testified at the evidentiary hearing as to what they would have added to the testimony, no such evidence was presented at the instant post-conviction evidentiary hearing.

The instant case is more like Van Poyck v. State, 694 So. 2d 686, 692 (Fla. 1997). In Van Poyck, the record demonstrated that trial counsel had limited the presentation of Van Poyck's mental-health history in order to limit the introduction of prison records. Further, this Court noted that the existence of evidence that the defense expert asked not to be called as a witness because his findings would not be helpful, strengthens the tactical choice. Thus, this Court rejected a claim of ineffective assistance of counsel. As counsel in the instant case was aware of the now urged evidence and chose to not present it based on a reasoned determination that it was potentially more harmful to the defendant, counsel cannot be deemed ineffective. See Asay v. State, 769 So. 2d 974, 988 (Fla. 2000) (counsel not ineffective for failing to investigate and present nonstatutory mitigation where counsel was aware of the evidence and made a decision to not present it, and where any such mitigating evidence would not have outweighed aggravating circumstances); Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (no error in the trial court's finding that trial counsel was aware of possible mental mitigation, but made a strategic decision under the circumstances of this case to instead focus on the "humanization" of Rutherford through lay testimony); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994)

(affirming denial of 3.850 relief where mitigation strategy was to "humanize" the defendant and trial counsel made a tactical decision not to call mental health expert, noting that "[t]his is not a case which defense counsel failed to prepare").

Appellant contends that counsel's testimony that he did not call either Dr. Berland or Dr. Afield because of the potential harm of their testimony is not a reason for not calling them, but is merely an excuse for not presenting their testimony. (Brief of Appellant, pg. 66) It is illogical to suggest that although counsel had this information, reviewed all of the files, called the doctors and discussed the information with Henry, that he simply was too lazy to put it on. While current counsel may not agree with the strategy taken by Judge Howard during his representation of Henry, that does not support a finding that his tactical decision constitutes deficient performance or prejudice. This Court has repeatedly stated that it will not second-guess clearly tactical choices. See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (concluding that present counsel's disagreements as to strategy does not necessarily satisfy Strickland because standard is not how present counsel would have, in hindsight, proceeded); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (Counsel cannot be deemed ineffective merely because current counsel disagrees with

trial counsel's strategic decisions.) See also Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight....") Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. See Occhicone at 1048; Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1999); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987).

Finally, even if counsel's strategic decision could constitute deficient performance, Henry has failed to show that he was prejudiced. As this Court stated in Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997), "in light of the substantial, compelling aggravation found by the trial court [i.e., under sentence of imprisonment, prior violent felonies, committed during a burglary, and CCP, there is no reasonable probability that had the mental health expert testified, the outcome would have been different." Id. at 226. In the instant case, the trial court found in aggravation 1) prior violent felony - Henry had murdered his first wife, Patricia Roddy by stabbing her thirty times, and 2) heinous, atrocious or cruel - Suzanne Henry was stabbed thirty-six times while she

fought for her life. The murder of Eugene Christian was not considered. Balanced against these weighty aggravating factors, the mitigating circumstances now asserted by counsel do not support a conclusion that there is a reasonable probability that had the mental health experts testified, the outcome would have been different.

Further vitiating against the claim of prejudice is the fact that in Henry's three other trials stemming from this criminal episode, the mental health evidence now being urged was presented to each jury. In the prior trial for the murder of Suzanne, the jury heard the mental health evidence and, nevertheless, unanimously recommended death. (See attached Findings in Support of Death Sentence, dated May 21, 1987). In both trials for the murder of Eugene, the mental health evidence was also presented and the statutory mental mitigators were found. Death was, nevertheless, recommended by both sentencing juries and a death sentence was imposed. Henry v. State, 574 So. 2d 66, 69 (Fla. 1991); Henry v. State, 649 So. 2d 1361, 1363 (Fla. 1994). Given the facts of this case, appellant cannot establish that there is a reasonable probability that had the mental health expert testified, the outcome would have been different. Relief was properly denied.

ISSUE V

**DID THE TRIAL COURT ERR IN NOT DECLARING FLORIDA'S
DEATH PENALTY STATUTE UNCONSTITUTIONAL BASED UPON RING
V. ARIZONA? (AS STATED BY APPELLANT)**

Henry next asserts that Florida's death penalty statute is unconstitutional. Citing Ring v. Arizona, 122 S. Ct. 2428 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999), he claims that Florida's death penalty statute is unconstitutional. This Court's review is de novo; however, Henry's allegations do not present any basis for relief. This Court has declined to invalidate Florida's capital sentencing law based on Ring. Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002).

It must be noted initially that this issue is not properly before this Court. Henry concedes that the claim was only presented to the post conviction court by way of a motion to amend and that the motion was denied. Although the trial court noted in the order denying post conviction relief that no relief was warranted on the claim, it is not a claim that is properly raised in a motion for post conviction relief. A challenge to the sentencing statute is an issue that could have been and should have been raised on direct appeal. This Court has repeatedly held that a motion to vacate is not to be used as a second appeal. Rutherford v. State, 727 So. 2d 216 (Fla. 1998);

Robinson v. State, 707 So. 2d 688, 690 n.2, 690 (Fla. 1998); Clark v. State, 690 So. 2d 1280, 1282 n.3 (Fla. 1997); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994). See also Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982) (challenge to constitutionality of statute as applied must be raised at the trial level and presented on appeal). Therefore, this claim should be rejected as procedurally barred.

Even if this claim was properly before this Court, the argument that Ring overruled implicitly prior United States Court opinions upholding Florida's sentencing scheme has been rejected by this Court. See Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002) (concluding that Florida's system of imposing the death penalty is not constitutionally infirm); King v. Moore, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002) (same). In deciding Bottoson, this Court reasoned:

Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are

areas of "irreconcilable conflict" in that precedent, the Court in *Ring* did not address this issue. In a comparable situation, the United States Supreme Court held:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989).

Bottoson, 27 Fla. L. Weekly at S891 (footnote omitted) (emphasis supplied).

Henry's claim is premised on a fundamental misunderstanding of Florida law. In *Ring*, the United States Supreme Court applied Apprendi to invalidate Arizona's capital sentencing scheme, which required a judge, acting alone, to determine a capital defendant's eligibility for the death penalty. In Florida, unlike Arizona, death eligibility is determined by the jury upon conviction for first degree murder. See Bottoson, 27 Fla. L. Weekly at S893; S902 (Quince, J., concurring; Lewis, J., concurring); Shere v. Moore, 27 Fla. L. Weekly S752, S754 (Fla. Sept. 12, 2002) (statutory maximum sentence for first degree murder is death); Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001) (same). Ring is not applicable in Florida because capital punishment is not an

"enhanced" sentence for first degree murder; accordingly, no further jury findings are required.

Since the existence of an aggravating factor in Florida is a determination that concerns the defendant's selection for capital punishment, rather than his eligibility for the death penalty, Henry's argument is without merit. Clearly, Ring does not require jury findings for sentencing, only for eligibility. As Justice Scalia stated, Ring "has nothing to do with jury sentencing." Ring, 122 S. Ct. at 2445 (Scalia, J., concurring). Apprendi and Ring involve the jury's role in determining death eligibility, but do not require that the actual selection of sentence be made by a jury. Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required."³ Ring, 122 S. Ct. at 2447, n.4. Rather, Ring involves only the requirement that the jury find the defendant death eligible. That determination must be made by the jury, while the actual sentencing decision may constitutionally be made by the trial court. See Spaziano v. Florida, 468 U.S. 447,

³ See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

Even if a jury finding of an aggravating factor were to be deemed necessary for a jury conviction of a death-eligible offense, Henry's death sentence satisfies the Sixth Amendment. His prior violent felony conviction permitted the judge to impose a capital sentence, even without further jury involvement. See Bottoson, 27 Fla. L. Weekly at S898; S900 (Shaw, J., concurring in result only; Pariente, J., concurring in result only); Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). Additionally, after penalty phase proceedings on October 10, 1991, the jury returned a 12 to 0 recommendation of death. (OR V7/954). Hence, it is unquestionable in the instant case that the jury determined, unanimously and beyond a reasonable doubt, that at least one aggravating factor existed. Therefore, as Ring merely requires a jury, rather than a judge acting alone, make the determination of certain factors and that those factors be established beyond a reasonable doubt, any requirement that a jury determine the conviction to have been a capital offense through the existence of an aggravating factor is fulfilled.

Moreover, Henry has not demonstrated that any possible

impact of Ring in Florida can be applied retroactively under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). There is no basis for consideration of this claim at this time, and no basis for the granting of any relief.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Baya Harrison, Esq., 738 Silver Lake Road, Post Office Drawer 1219, Monticello, Florida 32345-1219, this _____ day of January, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLEE