IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

vs. **Case No. SC02-804**

THE STATE OF FLORIDA,

Appellee.
_____/

ON DIRECT APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PASCO COUNTY, FLORIDA, DENYING THE APPELLANT'S POST CONVICTION MOTION, FILED PER THE PROVISIONS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.850, TO VACATE HIS JUDGMENT OF GUILT AND DEATH SENTENCE.

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, John Ruthell Henry, was the defendant in the lower tribunal, the trial court. He will be referred to as "Henry" or "the defendant." Appellee, the State of Florida, will be referred to as "the state."

The record on appeal is in six (I-VI) bound volumes with a blue cover on the front of each volume. The Clerk of the Circuit Court for Pasco County, Florida has provided a page number for each page of the entire record on appeal in the bottom right hand corner of each page. Thus, with one exception, when referring to the record on appeal, Henry uses the symbol "R" followed by a page number located in the lower right hand corner of the page or, for example with regard to page 45 of the record on appeal, "R. 45." When referring to testimony from the November 19 and 20, 2001 evidentiary hearing on the Florida Rule of Criminal Procedure 3.850 motion, the defendant uses the symbol "EH" followed by the page number which is typed in the upper right hand corner of each page.

It was agreed among counsel in the 3.850 proceeding that the records on appeal regarding Henry's two direct appeals (as well as the records on appeal in his Hillsborough County trials) are a part of this record as well.

Citation to those records on appeal will be done in the same manner as they were cited at the time. For example, references to the record on appeal in Henry's first Pasco County trial are by the letter "T" followed by a page number. References to the record on appeal in Henry's retrial in Pasco County are by the letters "OR" followed by a page number.

STATEMENT OF THE CASE AND THE FACTS

A. Nature of the Case:

This is a direct appeal to the Supreme Court of Florida of the March 21, 2001 final Order (R. 844-846) of the lower tribunal in Pasco County, Florida Circuit Court Case No. 85-02685 CFAES denying Henry's complete second amended motion to vacate his judgment and death sentence (R. 736-791) for the murder of Suzanne Henry, filed per the provisions of Florida Rule of Criminal Procedure 3.850.

B. Course of the Proceedings Below:

Set out below, for the sake of clarity, is a chronology of the judicial proceedings regarding both the Hillsborough County homicide (State v. John Henry, Hillsborough County Circuit Court Case No. 85-12473) where Eugene Christian was the victim, and the Pasco County homicide, which is the subject matter of this appeal, where Suzanne Henry was the victim.

On January 15, 1986, a Hillsborough County, Florida grand jury returned an indictment against the defendant for the first-degree, premeditated murder of Eugene Christian. The indictment charged that Henry stabbed the victim with a sharp object on December 22, 1985.

On January 16, 1986, the defendant was indicted by a Pasco County, Florida grand jury and charged with the premeditated murder of his

estranged wife, Suzanne Henry. (R. 566) The Hillsborough case proceeded to jury trial on April 6, 1987 with the Hon. Donald C. Evans, Circuit Judge, presiding. On April 11, 1987, the jury found Henry guilty as charged. On April 13, 1987, a penalty phase proceeding was conducted. At the conclusion of this proceeding, the jury recommended the death penalty by a vote of 10-2. Judge Evans adjudicated Henry guilty and sentenced him to death on April 15, 1987.

The Pasco jury trial commenced on April 21, 1987 with the Hon. Ray E. Ulmer, Jr., Circuit Judge, presiding. (R. 645) Henry was represented during that trial by Robert Focht, Esq. Henry did not testify. Id. At the conclusion of the innocence/guilt phase, the jury returned a verdict of guilty as charged. Id. A penalty phase proceeding followed per the provisions of Section 921.141, Florida Statutes. Henry did not testify. After deliberations, the jury recommended, by a vote of 12-0, that the trial court impose the death penalty. Id. On May 21, 1987, the Trial Court accepted the jury's advisory recommendation sentencing Henry to death. (R. 646) In so doing, the Trial Court determined that the state had proven beyond a reasonable doubt that:

1. Henry had previously been convicted of a violent felony, second degree murder, Sec. 921.141(5)(a), Fla. Stat.

2. The murder was especially heinous, atrocious or cruel, Sec. 921.141(5)(h), Fla. Stat.

3. The murder was committed in a cold, calculated manner without any pretense of moral justification (the "CCP" aggravator), Sec. 921.141(5)(i), Fla. Stat.

The Trial Court determined that Henry had not established any statutory or non-statutory mitigating circumstances for his actions. Henry v. State, 574 So. 2d at 74.

A direct appeal to this Court ensued. (R. 646) On January 3, 1991, this Court reversed the Pasco conviction, judgment and death sentence remanding the cause for a new trial. Henry v. State, 574 So. 2d 73 (Fla. 1991). In so doing, the Court disapproved of the Trial Court's decision to allow the state to introduce a significant amount of detailed evidence concerning the fact that, after killing Suzanne Henry, he also killed her son, Eugene Christian. On that same day, January 3, 1991, this Court reversed the Hillsborough judgment and death sentence (regarding the death of Eugene Christian), remanding the cause for a new trial as well. Henry v. State, 574 So. 2d 66 (Fla. 1991).

On October 7, 1991, Henry was retried for the death of Suzanne Henry by a new jury in Pasco with the Hon. Maynard F. Swanson, Jr.,

Circuit Judge, presiding. (R. 646) The defendant was represented by Hon. Richard Howard[1] and Hugh Umsted, Esq. Mr. Henry did not testify during the proceeding. Judge Swanson strictly limited the state in terms of the evidence presented regarding Eugene Christian's death. At the conclusion of the guilt/innocence phase, the new jury found Mr. Henry guilty as charged. On October 10, 1991, the court reconvened for the penalty phase. Henry did not testify during this phase of the trial. At the conclusion of the penalty phase, the jury unanimously recommended that the Trial Court impose the death penalty. On October 18, 1991, Judge Swanson sentenced Henry to death. (OR. 958-964) This time, the Trial Court found that just two aggravating factors applied:

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

2. The murder was especially heinous, atrocious or cruel. Id.

Judge Swanson found that no mitigating circumstances applied. (OR 961-964) After a timely filed direct appeal to this Court on November 7, 1991, Henry's conviction, judgment and death sentence were affirmed. Henry v. State, 649 So. 2d 1366 (Fla. 1994). Rehearing was denied.

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[1] Henry's defense counsel in the second trial, Hon. Richard Howard, is now a circuit court judge. In order to avoid confusion, Judge Howard is usually referred to herein as "defense counsel."

Henry's counsel then filed a timely petition for writ of certiorari in the Supreme Court of the United States per the provisions of Title 28, United States Code, Section 1257. That petition was denied on June 19, 1995. Henry v. Florida, 115 S.Ct. 2591 (1995).

On August 24-31, 1992, Henry was retried regarding the death of Eugene Christian in Hillsborough with the Hon. Susan Bucklew, Circuit Judge, presiding. On August 28, 1992, the jury found Henry guilty as charged. The jury recommended death by a vote of 11-1. On October 16, 1992, Judge Bucklew sentenced the defendant to death. After the timely filing of a notice of appeal, the defendant again sought review of his judgment and sentence in the Supreme Court of Florida. He was again represented on appeal by the Office of Public Defender Marion Moorman. On December 15, 1994, the Supreme Court affirmed his judgment and death sentence. Henry v. State, 649 So. 2d 1361 (Fla. 1994).

On March 31, 1997, the Office of Florida Capital Collateral Regional Counsel for the middle district of Florida ("CCRC-Middle") filed an incomplete, duly sworn "shell" motion to vacate the defendant's conviction, judgment and sentence in the Pasco case per the provisions of Florida Rule of Criminal Procedure 3.850. (R. 55-83) On or about June 11, 1999, CCRC-Middle filed an incomplete, duly sworn, first amended motion to

vacate the judgment and sentence. (R. 334-440) On or about December 22, 1999, the state filed a detailed, documented response to that motion. (R. 448-534, 566-603) CCRC-Middle then moved to withdraw citing a conflict of interest. (R. 605, 606, 609, 610, 956-969) On December 13, 2000, the undersigned was appointed to represent Henry per Florida's "Registry" statute, Sections 27.710 and 27.711, Florida Statutes (1998), as amended, and CCRC-Middle was allowed to withdraw. (R. 615, 626)

On December 18, 2000, a Huff[2] hearing was held before Judge Swanson in Dade City, Florida, with the defendant, counsel for the state and the undersigned in attendance. (R. 968-981) At the conclusion of that hearing, Henry was afforded until March 21, 2001 to file a complete motion to vacate the defendant's judgment and sentence. Id.

On March 20, 2001, Henry and his counsel filed a duly sworn, complete second amended motion to set aside his judgment and death sentence with an appendix per the provisions of Florida Rule of Criminal Procedure 3.850. (R. 644-735) On April 19, 2001, the state served a response thereto. (R. 822-831)

The evidentiary hearing on the 3.850 motion commenced on November 19, 2001 in Dade City and continued the next day. (R. 986-

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[2] Huff v. State, 622 So. 2d 982 (Fla. 1993).

1112) William Mosman, Ph. D., a forensic psychologist, testified for the defendant. (R. 992-1053, EH 7-67) Judge Howard testified for the state. (R. 1060-1109, EH 74-124) Both witnesses were subjected to cross-examination. The defense introduced 11 exhibits in evidence. As stated above, it was agreed among the parties with the approval of the Trial Court that the entire records on appeal in Henry's Pasco County Case No. 85-02685 CFAES, and Hillsborough County Case No. 85-12473, were a part of the record regarding this post conviction proceeding.

C. Disposition in the Lower Tribunal:

On March 21, 2002, the trial court rendered a brief (two and one-half pages) Order denying Henry's post conviction motion to vacate and set aside his judgment and death sentence. (R. 844-846) On March 27, 2002, Henry filed a timely notice of appeal of that final Order to this honorable Court. (R. 918, 919)

D. Statement on Jurisdiction:

This Court has jurisdiction to review the lower court's final order denying Henry's Florida Rule of Criminal Procedure 3.850 in this capital case. Art. V, Sec. 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(I); Fla. R. Crim. P. 3.850(g).

E. Standard for Appellate Review:

This is a post conviction capital case involving mixed questions of law and fact. As such, the circuit court Order (R. 844-846) denying the Florida Rule of Criminal Procedure 3.850 motion is subject to plenary, *de novo* review except that deference is given to the Trial Court's findings of fact so long as there is competent and substantial evidence to support them. See Johnson v. Moore, 789 So. 2d 262 (Fla. 2001); Rose v. State, 675 So. 2d 567 (Fla. 1996).

F. Statement of the Facts:

The basic facts of the case in terms of how Suzanne Henry died are set forth in this Court's opinion rendered in Henry v. State, 574 So. 2d 73 (Fla. 1991) regarding the first trial.[3] At the time of Suzanne Henry's death, Mr. Henry was married to her but they were estranged and living apart. On December 22, 1985, Mr. Henry came to her residence ostensibly to talk. Id. at 74. The couple began to argue, and the dispute ended with Mr. Henry killing Suzanne by stabbing her repeatedly in the neck. Henry then took Eugene Christian, Suzanne's five-year-old son from a previous marriage, from the house and drove to a rural location in Hillsborough County where, some nine hours later, he killed Christian by stabbing him in the neck as well. Henry confessed to both deaths. Id. at 74. The constitutionality of

[3] The facts regarding the homicide are described in more detail below in the section of the brief related to the testimony presented during the retrial.

his confessions was raised in the first trial and on direct appeal, and resolved in favor of the state. Id. at 74.

Summary Of The Witness Testimony At The Second Trial

Because the essence of Henry's issue on appeal in this post conviction proceeding is alleged ineffective assistance provided by defense counsel during his second jury trial, the testimony presented during that retrial is summarized below. The "OR" citations employed in this section of the brief are to the record on appeal in that second trial. Appellant begins by summarizing the testimony presented by the state during the guilt/innocence phase of that retrial. On December 21, 1985, Curtis Clark, the brother of Suzanne Henry, kept Eugene overnight while Suzanne was at work. Curtis drove them both home the next day. At that time, Suzanne told Curtis that she had evicted Mr. Henry and was angry at him. (OR. 290)

Ray McAddams lived across the street from Suzanne Henry. He stated that on the morning of December 22, 1985, a person he could only identify as a black male, drove up to Suzanne's house, knocked on the door, and was admitted. (OR. 299)

Marion Crooker lived next door to the Henry duplex. On December 22, 1985, at about 1:00 or 2:00 p.m., after hearing a door slam at the duplex, he went to investigate and saw Eugene sitting in the passenger seat of an old, blue-green Chevrolet. He then saw a person he could only identify as black, not knowing if the person was male or female, get into the car and drive away. (OR. 304) Crooker added that he had previously witnessed an argument between Suzanne and Mr. Henry, where Suzanne told Mr. Henry to take his clothes and get out of the house. Crooker could not say how long before December 22, 1985 that was. (OR. 307, 308)

Bonnie Cangrow, Suzanne's sister, testified that on December 21, 1985, she gave Suzanne a ride to work. (OR. 309) Suzanne had a ride with someone else the next night, but when Bonnie called her at work and was told that Suzanne never showed up, she went to Suzanne's house. Cangrow found the door locked. The bedroom light and the television were on. Suzanne was not in bed, so she left. (OR. 311) She returned the next day, found everything the same and went to her neighbor Dorothy's house to see if she knew anything about Suzanne, but Dorothy did not. Cangrow was also concerned because Eugene was not there. (OR. 312) Cangrow returned to the house, unlocked the door, went in and found Suzanne's body. (OR. 313) Cangrow noted that the Henrys' relationship was very

rocky, and one time she witnessed Mr. Henry sitting on top of Suzanne, slapping her face. (OR. 316) Cangrow noted also that Suzanne was a large woman, 5'5" and 165 pounds, who would not tolerate anyone hitting her, and would hit back. She added that Suzanne owned gold jewelry, and that after December 22, 1985, she (Cangrow) did not find any of it or any money in Suzanne's house. (OR. 316) Cangrow also testified that Suzanne had once brandished a knife at a woman she found Mr. Henry with, and that he stopped her from hurting the woman. (OR. 319, 320)

Dorothy Clark, a sister of Suzanne Henry and Bonnie Cangrow, and the wife of Curtis Clark, was at a convenience store the morning of December 23, 1985, when Mr. Henry came in, bought a beer and asked her if she had seen Suzanne that day. Later that day, her sister, Bonnie, came into the store hysterically screaming that she had found Suzanne dead. (OR. 324) Ms. Clark described Suzanne as heavy-set and tough, not afraid to fight. (OR. 326) She confirmed that the relationship between the Henrys was rocky. (OR. 327)

Deputy Dale Neuner was dispatched to the Henry home on December 23, 1985, and found Suzanne's body. (OR. 330)

John Mathis stated that in December of 1985, he owned a 1978 Chevrolet. On December 22, 1985, Henry borrowed the car and did not

return it. The car was returned to Mathis by the police a week later. (OR. 388) Mathis added that he had seen Mr. Henry smoke crack cocaine, but could not specifically recall whether he used it on December 22nd. (OR. 390)

Dr. Joan Wood, the Sixth Judicial Circuit Chief Medical Examiner, examined Suzanne's body at about 7:00 p.m. on December 23rd. She determined that the victim had been dead about 24 to 36 hours, had sustained thirteen stab wounds, and had bruises on her upper body. (OR. 407) She noted that there were no wounds associated with defending against a knife attack. (OR. 412) Dr. Wood added that the victim would have survived five or ten minutes after all the injuries were inflicted and might have remained conscious for three to five of those minutes. (OR. 422)

Rosa Mae Thomas testified that Mr. Henry lived with her after being evicted by Suzanne, that she saw him on the morning of the 22nd -- but not again until 8:00 or 9:00 p.m. on December 23rd. (OR. 431) They (Rosa Mae and Mr. Henry) were then given a ride to a motel by Henry's brother, Willie Henry. At about 10:00 p.m. that night, the police came, arrested Henry and took him away. (OR. 435) Thomas noted that, on several occasions, Suzanne had come to her house and initiated an altercation with

her. On one occasion, Suzanne was arrested in Ms. Thomas' front yard. (OR. 437)

Willie Henry, the defendant's brother, testified that he gave Mr. Henry and Rosa Mae a ride to the motel on December 23rd. (OR. 441)

Detective William Ferguson was dispatched to the Twilight Motel where Detective Wilbur had custody of Mr. Henry. Detective Ferguson found wet clothes, wet shoes and two towels with blood on them in the motel room. (OR. 449)

Mary Cortese, a serologist, found human blood on a shirt and towel found in the motel, but she could not establish a particular blood type. (OR. 454-56)

Detective Fay Wilbur stated that when he arrived, Suzanne's apartment was not in disarray but a knife was missing. There was blood on the wall and drapes and around the body. (OR. 475) Henry did not appear to be under the influence of either alcohol or drugs while at the motel. Henry told him that he did not know where Suzanne or Eugene was. After further conversation, Henry conceded that he knew where they were and led Wilbur and other officers to Eugene's body and the Chevrolet. (OR. 502) Detective Wilbur added that Henry told him that he went to the house to give Eugene a Christmas present and got into a fight with Suzanne. Henry

went on to state that Suzanne got a knife and cut him. He then stabbed her, took Eugene and left. Mr. Henry admitted killing Eugene as well. (OR. 505)

Defense counsel presented no testimony or other evidence on behalf of Mr. Henry during the guilt/innocence phase of the capital trial.

During closing arguments, the prosecutor painted Mr. Henry as a cold-blooded murderer who virtually tortured Suzanne before she died by repeatedly stabbing her in the throat, in the process of killing her. He emphasized the murder of Eugene Christian as well. Defense counsel, in closing arguments, suggested that Mr. Henry acted in self defense, although he had offered no proof of same. (OR. 556-572, 601-605)

The jury returned a verdict of guilty as charged. (OR. 665)

The state's first witness at the penalty phase was Debbie Fuller whose deposition was read into the record by stipulation. She testified that in August of 1975 she was living with her grandmother, Irene Wilson, and Patty Roddy, Mr. Henry's first wife. Mr. Henry and Patty were in the process of getting a divorce. (OR. 680) Sometime during that month, Mr. Henry had come to their house. Patty went outside with the defendant, despite Ms. Fuller's warnings not to do so. Ms. Fuller called the police and

then saw Mr. Henry and Patty in the car, struggling. She then heard Patty scream. (OR. 684) When Ms. Fuller got to the car, Mr. Henry got out and walked away. Ms. Fuller then reached into the car and discovered that Patty had been stabbed. (OR. 686)

Gloria Nix testified that she lived across the street from Ms. Fuller, Irene Wilson and Patty Roddy in August, 1975. After hearing an argument outside, Ms. Nix went to investigate and saw Mr. Henry striking Patty. Ms. Nix saw Patty's hand fall out when Ms. Nix opened the car door, and saw Mr. Henry walk away. (OR. 689)

Detective Wilbur returned to the stand and stated that he had arrested Henry in August of 1975 for the murder of Patty Roddy. He added that Henry pled guilty to second degree murder. (OR. 695)

Dr. Wood was recalled and testified that she reviewed the autopsy report done on Patty Roddy by the late Dr. John Shinner. That report described some thirty knife wounds inflicted upon Ms. Roddy. (OR. 708) She also testified that, in her opinion, the maximum effect of crack cocaine is reached in a few minutes, and that the significant effects of the drug wear off within an hour. (OR. 713, 714)

Dr. James Fessler, a psychiatrist, testified that he did not believe that Mr. Henry was under the influence of any extreme mental or emotional

disturbance at the time of the crime, or that he was unable to appreciate the criminality of his conduct. (OR. 726) Dr. Fessler added that Henry told him that he began drinking alcohol at age ten, that he was soon consuming up to a fifth of alcohol per day, and that he had auditory hallucinations even without using alcohol or drugs. (OR. 728)

Dr. Daniel Sprehe, also a psychiatrist, testified that in his opinion Henry was not suffering any specific mental disorder and was able to control himself when he stabbed Suzanne. (OR. 739) He added that he did not believe cocaine would have had much of an effect on Henry at the time of the killing. (OR. 739)

Henry's counsel called two lay witnesses during the penalty phase. Stephanie Thomas, Rosa Mae Thomas' daughter, testified that Henry lived with them for five or six months in 1985. She noted that Henry was pleasant and very nice to her and her brother. She never saw her mother and Mr. Henry argue. (OR. 751) Ms. Thomas added that Suzanne would often come to their house and start fights with Mr. Henry. On one occasion, the police had come to the residence and Suzanne continued to threaten Mr. Henry. (OR. 753) Rosa Mae Thomas testified that she had known Henry since high school. When he moved in with her, Suzanne would often come to her house, tell her that she could not have Mr. Henry and start fights with

him. (OR. 772) Ms. Thomas added that Henry was very nice, a good provider and good around the house. (OR. 762) She said he had a problem with crack cocaine and alcohol, but that he did not use them in front of her children. (OR. 764)

The Evidence Presented During The Rule 3.850 Motion Hearing

An evidentiary hearing on the defendant's 3.850 motion was held on November 19 and 20, 2001 before Judge Swanson in Dade City. William Mosman, Ph. D., a clinical psychologist, was permitted to testify as an expert witness for the defense. (EH 15) Hon. Richard A. Howard, Henry's counsel in the retrial, testified as a state witness. (EH 75-125) Dr. Mosman's psychological report (Defense Ex. 1) was introduced in evidence (EH 18) and formed the centerpiece of Henry's ineffective assistance of counsel claim.

Dr. Mosman is a licensed forensic psychologist who holds a law degree as well. (EH 8, 9) He was retained to evaluate the data that existed at the time of the homicide regarding Henry's mental condition to determine whether it was sufficient to have established statutory and non-statutory mental health mitigation in the context of Section 921.141(6), Florida Statutes. (EH 18, 19, 23) He was also to determine whether the mitigating information, if any, was presented effectively by defense

counsel. (EH 18, 19, 23) His evaluation included a review of Henry's medical and mental health records and reports, clinical testing done on the defendant and Florida Department of Corrections records. (EH 18-20) Dr. Mosman studied the mental health and psychiatric hospitalization records regarding the defendant's sister, Dorothy Toomer, whose mental health history was similar to Henry's. (Defense Ex. 1, p. 4) He also read the defendant's complete 3.850 motion and the state's response thereto. (EH 18, 19) He discussed some of the issues with Dr. Robert Berland, a clinical psychologist who had examined and tested Henry before the retrial, and with the defendant. (EH 20, 21)

Dr. Mosman explained that knowledge of the defendant's family background should have been stressed to the jury and the trial court because that background impacted a number of statutory and non-statutory mitigating factors under Florida's death penalty statute. (EH 24) Each of the background circumstances, as outlined below, are significant factors in the psychological diagnostic process, according to Dr. Mosman's testimony and report. (EH 21-68, Defense Ex. 1) In this regard, Dr. Mosman noted that Henry was born into a large family (eleven children, some of whom died in childhood) of severe poverty and extreme violence, brutality and aggression. The father was alcoholic, the mother was chronically ill, and

both parents were violently abusive. (Defense Ex. 1, p. 5) The family worked as sharecroppers and moved frequently, living in shacks with no indoor plumbing, with a fireplace for heat and a wood stove for cooking. Id. at 5, 6. The father would often use the family money to make moonshine instead of buying food. Id. at 6.

The abuse of the children was compounded by neglect, including an almost complete lack of medical care. One of the rare occasions that medical attention was sought was when the mother cut the father open "so bad his intestines were hanging out of his stomach." (Defense Ex. 1, p. 6.) The violence in the home was brutal and constant. Dr. Mosman states in his report: "(t)he violence in the nuclear and extended family can be described as nothing short of a war zone." Id. at 7. Quoting from family members and acquaintances, he wrote:

> Both parents were consistently described as violent people. The father was "mean and vicious," he drank all the time and "would fight with anyone, man or woman." He would beat the children "all the time, used a wide strap, the kind they use to discipline prisoners; if he couldn't get the strap he would pick up anything and beat them." The parents "butchered each other with knives, I have seen the cuts, scalded backs, and bruises, they used irons, sticks, knives, hoses, rakes." The parents fought daily even while the mother was pregnant . . . and "used anything they could get their hands on, chairs, glasses, irons"; "mamma cut daddy a lot"; "we were afraid they would kill one another." The mother would retaliate by "stabbing" the father. Over the years, "she stabbed him several times in the chest, I have seen this a heap of times." . . .

> Another incident involved the father coming home and "beating the mother with the barrel of a .22 rifle, he would beat her to the floor and keep beating her . . ."

(Defense Ex. 1, pp. 7, 8) Dr. Mosman stated in this regard that people who grow up as the defendant did, in an environment of chronic violence, "learn this as a scripted response . . . these children traditionally . . . become homicidal or suicidal." (EH 25, 26) Henry had a history of suicide attempts and self mutilation stemming from chronic childhood depression. (Defense Ex., p. 10) Dr. Mosman said that the defendant had been involuntarily hospitalized under the Baker Act and attempted suicide twice. (EH 27) He also noted that the several closed head injuries Henry incurred,

> . . . with post concussive episodes of alterations in functioning and personality, at minimum, met and meet all criteria for postconcussion syndrome and subsequent, Mild Acquired Traumatic Brain Injury (MATBI), as defined by the Brain Injury Interdisciplinary Special Interest Group of the American Congress of Rehabilitation Medicine. Additionally, defense experts would have relied upon that information in formulating a series of diagnoses with direct implications for both the guilt and penalty phases.

(Defense Ex. 1, pp. 8, 9, 13)

Dr. Mosman determined that there was a substantial history of mental and cognitive deficits, mental illness, violence, drug abuse and delusional behavior in Henry's nuclear and extended family. (Defense Exhibit 1, p. 9)

Several family members hallucinated, talked to themselves and heard voices talking back to them.

> Henry's sister Dorothy was and is chronically psychotic, paranoid, and has a long history of psychiatric hospitalizations, of being a danger to self and others, and has a history of incarcerations and violence; and another sister is described as violent and paranoid . . . Another brother, Marvin Henry, was an alcoholic who would become "very aggressive and dangerous when he drank. He always wanted to fight." He had auditory hallucinations for years. Another sister, Ruby, was in crisis centers several times for hearing voices telling her to kill her mother. The father himself would hallucinate and was delusional. He would look out the window for imaginary people trying to kill him. One of the defendant's nieces . . . had childhood onset mental illness (possibly schizophrenia) and had multiple hospitalizations for hearing voices telling her to kill people. The defendant himself has a continuous and consistent record of hallucinations and has been witnessed to hallucinate and have delusions since age 10, both while under the influence of a variety of drugs and also when not under the influence. There are literally pages of data in the records documenting a forty year history of delusions and a variety of hallucinations . . .

(Defense Exhibit 1, p. 10.)

Dr. Mosman found that Henry had several events of severe, life-changing trauma during his childhood. As stated above, his mother abandoned them (there were nine children in the family). (Defense Ex. 1, p. 10) His favorite sister (who had become a surrogate mother to him) then left home. As also mentioned, his favorite brother died in an automobile accident. Id. at 10. Compounding the trauma of his brother's death was

the guilt Henry felt because he was the driver, even though under-aged, and the cause of the deadly accident. That event was made more traumatic because his brother was not taken to a doctor and instead died painfully at home two days later. (EH 25, Defense Ex. 1, p. 10) Dr. Mosman, alluding to the significance of these events, stated: "If you actually prorate that out, that's one major loss approximately every four to five years . . . (a)nd that set in motion . . . very, very significant mental and emotional deficits and illnesses throughout those childhood, adolescent, and adult years." (EH 26)

Henry also had a life-long history of substance abuse. Dr. Mosman found that the children of the Henry family were given alcohol by the father when they were infants. (Defense Ex. 1, p. 11) As a young child, Henry would put a hose into the exhaust pipe of a vehicle and suck the fumes to the point of passing out. At age five, Henry began sniffing gasoline, and in his teens he used alcohol and marijuana heavily. He went on to crack cocaine after his release from prison and became a chronic user of cocaine and alcohol. Id. at 11, 12. According to Dr. Mosman, Henry should not to be grouped with those who abuse toxic substances experimentally. He explained:

> But what's found in these types of cases is that's exactly what we see with children begin to anesthetize or self-medicate

> because of their own trauma, then they start at a young age using drugs. If it's experimental issues, it's easy to see. They use it for a few times and stop. We're not dealing with an experimental issue at age five all the way through the years. We're talking now about in times of stress, a way to self-medicate to relieve anxiety and depression. And that developed from gasoline into large doses of marijuana, cocaine, alcohol. And during these times, the records indicate that he would be homicidal.

(EH 29)

According to Dr. Mosman, there was abundant information available regarding Henry's mental condition at the time of the homicide which supported the following statutory mitigating circumstances:

1. The homicide was committed while under the influence of extreme mental or emotional disturbance. (Defense Ex. 1, p. 21)

2. Henry's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Id.

3. The mental/developmental age of the defendant at the time of the crime was about 14 years. (Defense Ex. 1, pp. 14, 21) In this regard, Dr. Mosman noted that one of the most critical statutory mitigating factors in this case was the issue of age. (EH 41) He pointed out that the death penalty statute defines age, not as chronological age, but as the "(m)ental, social and/or developmental age of the defendant" in comparison to the

norm for his chronological age group. (Defense Ex. 1, p. 13) Dr. Mosman testified that this singular issue was pivotal to the case, even if counsel had done nothing else to protect the client from the death penalty. (EH 38) He said Dr. Berland had conducted clinical tests and could have testified to the significance of the scores obtained. Based on the results of these tests, Dr. Mosman observed:

> Dr. Berland's assistance and testimony was fundamentally necessary to the understanding and development of the concepts of extreme mental disturbance, capacity to appreciate, and of age as separate and independent statutory mitigators as well as several significant non statutory mitigators. Dr. Berland's clinical testing showed a valid FSIQ of 78 attained at a chronological age of 35 years 9 months. Dr. Berland, as a licensed psychologist, is well familiar with the conversion charts and accepted statistical methods which would result in that score being converted to an intellectual and cognitive mental age of a 13 year 11 month old child. Scores on a test are absolutely meaningless unless and until they are explained and translated in a manner that is understandable and relevant to a decision at hand. Age as a statutory mitigator is not limited and restricted to chronological age per se and has and is meant to mean, e.g., the "mental, social, emotional," age of the defendant in comparison to the norm for his chronological age group. Clinical testing as provided by Dr. Berland was critical and maybe even the only objective manner in which "age" could have been evaluated and presented for the court's understanding. Mr. Henry had the mental age of a 13 to 14 year old child. The jury should have been informed of that fact. Dr. Berland was never asked to present that information.

(Defense Ex. 1, p. 14.) Dr. Mosman stressed the fact that a grown man thinking like a child of 12 or 13 is an extreme condition under any professional definition, yet it was not even discussed in the trial. (EH 54)

> Dr. Berland could have carried the analysis one step further . . . Dr. Berland could have unrefutably explained that the Comprehension score is related to "the degree to which the subject understands basic social customs and situations" and "social knowledge, verbal abstract reasoning and logical thinking and is also sensitive to left hemisphere brain damage;" damage which Mr. Henry sustained on many occasions. Dr. Berland would then have been able to testify that by using accepted procedures and methods related to the issue of age as reflected in social/emotional development, Mr. Henry's Comprehension score of 5, would be similar to a person with an IQ of 70 which is equal to that of a mentally retarded person under then accepted criteria. Dr. Berland could have then testified that such a score could have been statistically extrapolated to that of a child 12 years 0 months old. That information, coupled with the history of abuse (developmental retardations) and trauma (emotional as well as closed head injury), was essential for a meaningful defense. This type of testimony and assistance had direct implications for the mental defect and infirmity prongs of the Insanity Defense and was applicable to several statutory and non statutory mitigators. A 35 year 9 month old man with a cognitive age of a 13 year 11 month old child and a social/emotional age of a 12 year 0 month old child is "extreme" and "substantial" under any accepted definition of the terms. I am not familiar with any "strategy" which would, if familiar with the above data, justify holding this type of information from the Court.

(Defense Ex. 1, p. 14.) Dr. Mosman added that in Henry's case, the additional stresses when added up, lowered the age even further. (EH 53) He said that knowledge of that fact was, "very, very informative to decision

makers." (EH 53) Dr. Mosman stated that it was absolutely clear that the state's expert witnesses would have had to support the age issue since there was a factual basis for it. (EH 55)

Dr. Mosman also found that there was abundant information to support non-statutory mitigation which could have been presented including the following (as set forth in his report):

1. Ability to be rehabilitated.

2. Abuse/Neglect.

3. Background, including a possibly genetically linked mental disorder.

4. Severely disadvantaged or deprived childhood.

5. Emotional impairment.

6. Emotional distress even if not extreme.

7. Family life.

8. Extreme mental or emotional disturbance.

9. Good prison record.

10. History of growing up, including issues associated with domestic violence.

11. Iatogenises from systems (system failure at key junctures).

12. Medical problems.

13. Mental impairment.

14. Military record.

15. Potential to be rehabilitated.

16. Previous charitable or humanitarian deeds.

17. Psychological difficulties.

18. Remorse.

19. Utilization of alcohol or drugs.

(Defense Ex. 1, pp. 21, 22) Although some of the categories seem to overlap, Dr. Mosman explained that a mental health expert could define each with specificity and explain how they are different and separate.

Dr. Mosman added that, in light of this overwhelming evidence of mental health mitigation referenced above, had defense counsel provided it to his experts and advised them to consider their findings in conjunction with statutory mitigating factors (referring to those found in Section 921.141[6], Florida Statutes), Doctors Afield and Berland would have known how to present the mitigating circumstances in line with Florida's death penalty statute. Instead, defense counsel limited their inquiry just to the questions of whether Henry was competent to stand trial and whether he was sane at the time of the commission of the crime. (EH 38) Dr. Mosman stated: "they specifically testified they were hired to do competency and

sanity evaluations, not mitigation evaluations. There's entire hosts of diagnoses that could have been presented that, clearly, were there . . . ." (EH 38) Dr. Mosman added that the experts could have explained and supported their findings of important mitigating factors with specific clinical diagnoses, using the Diagnostic and Statistical Manual (DSM – the guidelines manual for the profession) as their authority. Dr. Mosman pointed out that Dr. Berland told him that he was willing and prepared to testify, but that he simply was not contacted. (Defense Ex. 1, p. 21.)

In addition to a constructive defense on mitigating factors, defense mental health experts and counsel should have pointed out the serious errors made by the state's experts according to Dr. Mosman. In particular, Dr. Mosman stated that they could have corrected Dr. Fessler's misstatements and inaccurate analyses, which Dr. Mosman believed were purposefully limited, clinically meaningless and simply wrong. (Defense Ex. 1, p. 17) According to Dr. Mosman, throughout his testimony, Dr. Fessler used terminology and constructs that were not recognized by experts in the mental health field. For example, Dr. Fessler stated that Henry had a "smoldering schizophrenia." (Defense Ex., p. 19) Even the state's other expert had no idea what this meant. When asked to describe what Dr. Fessler meant by the term, Dr. Sprehe admitted, "It's not a diagnostic term

in the diagnostic statistical manual. That sounds like a term of art, someone describing someone with a schizoid personality." Id. at 19.

Dr. Mosman emphasized that defense counsel had a duty to challenge the state's experts and make them substantiate their opinions, otherwise the jury and judge would simply accept them on faith because the statements were made by experts:

> . . . if expert opinions are not based upon a careful and accurate analysis of diagnostic criteria and the application of valid data in relationship to those diagnostic opinions, the expert's statements are nothing more than speculation and/or conjecture. The opinions expressed, if founded upon carefully presented factual data, enable the triers of fact to understand and apply them rather than be forced to accept or reject them on their determination of the reliability of the expert only.

(Defense Ex. 1, p. 19, f. 110) Asked about Dr. Sprehe's report of February 16, 1987, in which he indicated that the defendant had a long-standing anti-social personality, Dr. Mosman testified:

> It's interesting, not a single doctor diagnosed anti-social personality, not a single one made the comment. That is pivotal to the death-penalty case because it begins to separate out those that are anti-social are bad people from those that do the same crime, but they're not inherently – got those types of personality problems. That was never brought out. So, what . . . the doctor was talking about is that there was some characteristics there that, certainly, were similar to those of anti-social people . . .

(EH 33) He continued:

> . . . So, the question to the doctor would have been did you do a specific and formal diagnostic workup to identify the presence of anti-social personality, yes or no. He would have said no. The reason I know that is what is factually, he cannot diagnose anti-social personality on the history and the character of Mr. Henry because the early criteria that have to be present for an adult, anti-social personality are not present in Mr. Henry.

(EH 40, 41) Dr. Mosman's written report makes the point more clearly and notes the very important distinction that the jury would have had to make as a result:

> [I]t is evident to a mental health professional from his testimony, that he did not have access to the developmental history of the defendant, which is necessary for that diagnosis. Secondly, he was basing his diagnoses on an outdated diagnostic manual. Drs. Berland and Afield could have easily shown that Dr. Sprehe's opinion did not meet the standard of Antisocial Personality Disorder as defined in section 301.70 of the Diagnostic and Statistical Manual (DSM) III-R. This issue is very important, because it would have helped the jury to make the distinction between "a person who has chosen evil" and "a person whose homicidal behavior arose from significant impairment in his psychological controls."

(Defense Ex. 1, p. 13)

Dr. Mosman added that, not only was Dr. Sprehe using the older DSM, he also incorrectly stated that the revised version, the DSM III R, was due out in the future. (Defense Ex. 1, p. 18) In fact the DSM III R was already available at the time of his testimony. Id. This was very important because the newer version had major additions and changes in

distinguishing levels of impairment and more clearly describing diagnoses, which have a significant impact on Henry. Id. at 18, 19.

As to Doctors Sprehe's and Fessler's testimony to the effect that Henry's cocaine use did not qualify the homicide as an act of legal insanity or mental impairment, Dr. Mosman noted that they made that finding without investigating the issue in conjunction with Henry's underlying condition:

> That at the instant in time that the cocaine was not enough to move it into an insanity issue. The doctors kept testifying to that. It did not produce psychosis. It did not produce hallucinations. Did not produce those types of things. That would be true for the insanity issue, but that does not deal with the issue in any definitive way in terms of going into the capacities and the combination of that. Whatever level they agree on in the other things that we would talk about.
>
> So, to that extent, I think it was, from a defense point of view, not only in terms of bringing in experts to outline these issues, but, also, in terms of being prepared to handle those types of cross-examinations, I think, that certainly was not done in a way that allowed the jury or the Judge to have a full picture or a larger picture to make decisions from.

(EH 31) In other words, according to Dr. Mosman, the issue of Henry's cocaine ingestion had to be considered in the context of his known life-long history of drug abuse and underlying mental deficiency, which then makes it a very significant factor. (EH 34, 35) Dr. Mosman also took exception to the state's claim that the effects of Henry's ingestion of cocaine shortly

before the crime would more than likely have worn off by the time of the homicide. He testified that the effects of cocaine last much longer than fifteen minutes. (EH 30-34)

Dr. Mosman concluded as follows on the issue of ineffective assistance of counsel.

> . . . in view of the fact that only two lay witnesses were called at sentencing and the Court's findings being what they were, I have no choice but to conclude from a forensic perspective that there was ineffectiveness of counsel in this matter. Expert assistance from Dr. Afield and Dr. Berland would have likely made a difference. The crime itself is too closely attached and dynamically similar to Mr. Henry's own traumatic childhood experiences. The mental and brain impairments which were present in the defendant, and the topography and forensic classification of the crime itself, all call into serious question the guilt phase process used and the final penalty results. The entire record, character, and history of Mr. Henry in comparison to the findings of the court, understanding there was nothing presented for the jury or judge to seriously examine, is a violation of the respect and gravity of the forensic process.

(Defense Ex. 1, p.22)

The second witness at the evidentiary hearing, Hon. Richard A. Howard was Mr. Henry's trial lawyer in the second Pasco County trial in 1991. He acknowledged that he was appointed only about six to eight weeks before the trial began (EH 91)[4] and that, "I hadn't been through

[4] Hugh Umsted, Esq. was co-counsel. (EH 91, 92) Mr. Umsted had never handled a death case before this one. (EH 92)

penalty phase because I never got the . . . first-degree murder cases wherein there looked like there was going to be a really good chance of death. I usually got the barroom fightings and those kind of things." (EH 93) He studied the materials available from the first Pasco County trial as well as those from the Hillsborough case, including the depositions, documents and testimony regarding mental health issues. (EH 79-82) Defense counsel stated that he "tried to nonetheless argue mental-health mitigation without expert witnesses" using the testimony of family members who could relate the history of cocaine intoxication. (EH 83) He said that using experts would have been "a two-edged sword" harmful to Henry in that one of the experts told him that the defendant was a very dangerous man. (EH 83) Defense counsel added that Dr. Berland related to him that it (his testimony) would hurt the defendant (EH 86) and that Henry agreed with his strategy of not calling on mental health experts. (EH 87, 88)

However, defense counsel testified that in drawing that conclusion, he had not communicated with any mental health experts in preparing for the trial.

> Q. . . . I know it's been a long time, and all you can do is remember as best you can, but you never even had any written correspondence with Doctor Fessler, Berland, Afield –
>
> A. Majumdar –

Q. Right.

A. -- I think, was another one in there.

Q. Right. You never really even communicated with them in writing, did you?

A. No, I didn't.

Q. And do you remember actually sitting down with Doctors Berland and Afield, for example, and actually having an intense –

A. No.

(EH 93, 94)

Q. . . . Well, did you ever talk to Doctor Afield or Berland and say something to the effect, "Look, you guys were just appointed on the issue of insanity. I need you to do more work on the statutory and non-statutory mitigating factors, or the possibility of that?" Do you remember ever doing that?

A. No, I did not do that.

Q. Okay. So, when you talked about Doctors Berland and Afield, you know, their reports not being really very helpful, that in part is because all they were asked to do was talk about sanity or lack thereof; isn't that true?

A. No, that's not correct, because when I looked at those reports, you can, you know, try to delineate the sanity issue, but when you read the comprehensive reports and then you look at their own trial testimony, you can see where if there's mental-health mitigators it would have been found in the reports that I reviewed. <u>And I didn't see anything in there that was going to help Mr. Henry</u>.

(EH 95, 96, emphasis added) He stated that, with regard to the guilt/innocence phase of the trial, his strategy was to argue self-defense, attacking the victim as "not the kind of victim who a jury could immediately warm up to," and contend that the defendant suffered from "a depraved mind." (EH 92) That way, counsel insisted, he hoped to establish a basis for a second-degree murder verdict. (EH 97) However, he did not present any evidence during the guilt phase to support his proposition that the victim had a propensity for violence. (EH 96, 97) He also testified that he did not want to present witnesses during the guilt/innocence phase because he wanted to preserve the right to make the opening and closing arguments. (EH 98) He stated that he relied instead on the cross-examination, on the direct testimony that was read into the record, and on the crime scene evidence presented, from which "I think a juror could logically concede that there was violence in this home." (EH 97) He agreed that the defendant did not have any injuries associated with self-defense. (EH 99) It was pointed out that Florida law provides that, when a person attacks someone and then repeatedly stabs him/her, the defendant is not usually entitled to a jury instruction on self-defense. Defense counsel countered that it might be so in regards to a legal instruction, but that if the

jury believes it, they might return a verdict of second-degree murder on their own initiative. (EH 100)

His focus was also to pursue a depraved mind theory in trying to get a second degree murder verdict, explaining:

> 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 then you get a second degree.

(EH 101) Counsel defined his use of the term "depraved mind" as "a diminished mental capacity given the serious ferocity of the attack on the woman." (EH 102) He acknowledged that Florida did not recognize a "diminished mental capacity" defense to mitigate a first-degree verdict down to a second-degree finding. (EH 102) He agreed that the depravity and ferocity of the attack were exactly what the state attorney and the judge used to find premeditation, but testified that a juror could use the same information to find second degree:

> But you don't know what a jury – a juror – might take into account with depravity, whether it's one stab wound or more. If you can then argue to the jury that the – again, like I said in my letter, the sheer ferocity of the attack would show that the person was blind with rage, perhaps, and then you can argue second degree.

(EH 103)

As far as the penalty phase was concerned, defense counsel confirmed that he had access to Dr. Afield's letters and reports concerning the status of the defendant's mental health:

> Q. First of all, in his report, as indicated, he was of the opinion that your client was insane at the time of the commission of the crime, but also let's skip to the penalty phase for a second.
>
> ****
>
> Q. -- isn't it also true that he determined that your client suffered from chronic paranoia and from severe drug and alcohol abuse?
>
> A. That's his diagnosis in his letter of '86.
>
> Q. Isn't it true that he determined that your client might be psychotic?
>
> A. He mentioned – he says, "yes, this man may well be psychotic."
>
> Q. And didn't he find that when he was on drugs he became floridly psychotic?
>
> A. That was his apparent recommendation.
>
> Q. Didn't he say, "I think we have a combination of impairments here, of organicity, psychosis and drugs, which caused a severe decompensation of this man?"
>
> A. Yes, that's what he says.
>
> Q. All right, sir. Now, under the history section . . .
>
> A. History.

> Q. . . . doesn't he set forth those things that you already knew? That is, the defendant's very very serious problems with drugs, with a violent upbringing in his family, with a lot of domestic disturbances with Suzanne and things of this nature.
>
> A. Brings up the whole history including his prior second-degree murder.
>
> Q. All right, sir. Well, now, how is it – or let me just ask you this: After reviewing Doctor Afield's report, don't you think you were mistaken at the time of – in suggesting that Doctor Afield – that he could not have helped you in the penalty phase of the second trial, given what he found?
>
> A. I'm convinced that Doctor Afield could not have helped me in the penalty phase, but most importantly could have hurt Mr. Henry because of his testimony in the first trial, of his direct and cross-examination in the penalty phase. He hurt Mr. Henry every bit as much as he could have possibly helped him.

(EH 105-107)

Counsel affirmed that in remanding the case for a new trial, this Court rejected the CCP (cold, calculated and premeditated) aggravator and ruled that very little evidence regarding the Hillsborough case would be admitted. (EH 108)

He was asked whether, therefore, it became "critical for you to put on a very strong case regarding statutory mitigators based upon the testimony of Doctors Afield and Berland?" (EH 109) Counsel responded "Mr. Van Allen was able to discount in cross-examination all of the mental-health

issues that were trying to be raised by Mr. Focht and in fact, I felt, turned those witnesses against Mr. Henry." (EH 109)

Counsel was then questioned about the age mitgator. The undersigned read from Dr. Berland's report that provided in part: "One of these tests indicates the defendant was functioning in the borderline intellectual function range, below the normal level, but not technically retarded." (EH 111) Counsel responded by stating that he took issue with Dr. Mosman's testimony that Dr. Berland's tests showed that the defendant had the psychological age of a thirteen year old, stating:

> Well, I am no psychologist, but I know I was able to discuss adult concepts with Mr. Henry. The fact is, I mean I have raised children through 13 and 14 . . . if you take a quote, normal range 13 or 14 year old, I would vigorously disagree with the doctor on that.

(EH 112) Yet, defense counsel acknowledged a significant mental deficiency related to Henry's intellectual age when he testified:

> Q. . . . I think it was your point that you had no problem conversing with Mr. Henry.
>
> A. I had no problems conversing with him.
>
> Q. Okay. But you knew, at the very least, he was – had limited intellectual ability?
>
> A. Yeah. Yeah, he had a limited intellectual ability. So, what you have got to do is speak slower, speak in more concrete terms. I even asked him if he was a volunteer, and I explained to him what a volunteer was.

(EH 122, 123)

SUMMARY OF THE ARGUMENT

Henry's trial counsel was ineffective during the guilt/innocence phase of the trial for three reasons: He offered one defense, self-defense, notwithstanding the fact that there was no factual basis whatsoever to support it. The trial court correctly labeled the self-defense claim "absurd" and "nonsense." (OR 963) He offered a second defense, "diminished capacity," that is not a recognized defense to premeditated murder in a capital case in Florida as a matter of law. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). Finally, he failed to familiarize himself with and present the one strong defense he did have to avoid a first-degree murder conviction in the context of Gurganus v. State, 451 So. 2d 817 (Fla. 1984). By his own admission, defense counsel realized the need to offer the jury a factual basis to convict Henry of a lesser-included offense. This could have been done by presenting evidence to show that Henry lacked the ability to form the requisite premeditated intent to commit first-degree murder due to the ingestion of cocaine (prior to killing Suzanne) that exacerbated his chronic psychotic condition. Gurganus, supra. Evidence supporting this defense was compelling and at his finger tips. Had he made himself aware of the defense and presented this evidence to the jury, there is a reasonable

likelihood that the jury would not have returned a first-degree murder verdict.

The failure to investigate and present to the jury and trial court available mitigating circumstances related to the client's emotional and mental condition at the time of the capital offense, especially within the context of Sections 921.141(6)(b), (e) and (g), Florida Statutes, constitutes classic ineffective assistance of counsel. Riechmann v. State, 777 So. 2d 342 (Fla. 2000). When the mental health mitigating evidence is significant but the judge and jury are prevented from even considering it, the reliability of the outcome of the proceeding is seriously undermined, and the death sentence must be reversed. Ragsdale v. State, 798 So. 2d 713 (Fla. 2001).

In the case at bar, the trial court was presented during the 3.850 evidentiary hearing with a substantial body of evidence, in the form of existing medical/mental health records and Dr. Mosman's report (Defense Ex. 1) and testimony, to the effect that at the time of the homicide, Henry's mental health history and emotional condition were so bad that three statutory mitigating circumstances applied: The defendant was under the influence of extreme mental or emotional disturbance; his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his mental and emotional age was only about 14 years. (Defense Ex. 1, pp. 13, 14) All of this information was available to defense counsel prior to the retrial. Id. at

13-15. Yet the jury and trial court heard none of that available evidence for one reason only: the inexcusable failure of defense counsel to gather and present it. Id. at 14, 15, 20, 22; EH 93, 94. Doctors Afield and Berland, had examined Henry and were available to testify on his behalf. Id. at 24, 25, EH 94. There were many lay witnesses available to testify regarding Henry's impaired mental state at the time of the homicide as well. (Defense Ex. 1, p. 25) None was called to the stand. This is the tip of the iceberg regarding lawyer ineffectiveness. It appears that defense counsel had not participated in a penalty phase proceeding before representing Henry in this case. (EH 92) He had less than 60 days to prepare. (EH 91) The prosecutor came to the penalty phase of the trial armed with Doctors Sprehe, Wood and Fessler ready to testify, albeit incorrectly, that Henry was sane and not suffering from any real mental impairment at the time of the homicide. (R. 748) He was able to do so in part because defense counsel had failed to challenge this flawed testimony. (Defense Ex. 1, pp. 12, 14, 15, 17-19) Apparently, the prosecutor did not intend to present these experts unless defense counsel first presented expert testimony of his own to the contrary. (R. 712) Defense counsel then did the unthinkable: He stipulated to the admissibility of testimony from Doctors Sprehe, Fessler and Wood, not because he planned to present any expert testimony of his

own regarding mental health mitigation, but merely because he intended to "talk about it." (R. 712) But there is more.

Instead of presenting any kind of meaningful mental health mitigation against imposition of the death penalty during the penalty phase, defense counsel gambled that he could get away with offering the non-existent defense of "diminished capacity" during the guilt/innocence phase of the trial hoping that would bleed over into the penalty phase. (Defense Ex. 12) The "strategy" was bizarre and doomed to fail. Defense counsel presented no evidence of diminished capacity during the guilt/innocence or the penalty phases. He stated that he attempted to establish it through the testimony of Dr. Wood, the medical examiner, who performed the autopsy. She had absolutely no way of knowing of Henry's mental state, and instead testified as to what defense counsel described as the "ferocity of the attack on the woman." Id. If defense counsel's strategy was that the "ferocity" of the way in which Henry stabbed his wife to death formed the basis for a lesser included offense conviction, that was certainly lost on the trial court who used that very "ferocity" as a basis for determining that what Henry did was especially heinous, atrocious or cruel. (OR. 960)

Henry suffered prejudice as a result of his lawyer's ineffectiveness during the penalty phase. The most damaging evidence presented in the

first trial regarding Eugene Christian and the manner in which he was killed was excluded from the retrial. The CCP statutory aggravator could not be applied. Henry v. State, 574 So. 2d at 73, 75. Thus, at best, the state had only two statutory aggravators that it could establish against the defendant, not three. And even the HAC aggravator would have been in jeopardy had defense counsel presented the mental health mitigation referenced herein to explain Henry's actions. The state had expert testimony (from Doctors Fessler, Sprehe and Wood) to take issue with the mental health mitigating evidence defense counsel should have presented (from Doctors Afield and Berland, the mental health records and the lay witnesses) but the latter was much more compelling. Because the jury and trial court heard only one, incorrect side of the story, the outcome (the death penalty) was not reliable -- and a new penalty phase proceeding is required.

For these reasons, the trial court erred in not granting the 3.850 motion and Henry a new trial. This Court must do so if justice is to be served.

ARGUMENT

Point I. The Trial Court erred in finding that Henry was not denied effective assistance of counsel during the guilt/innocence phase of the retrial when counsel relied on a non-existent self-defense argument and failed to present evidence to show that Henry's ability to form the requisite intent to commit premeditated murder was absent due to substance abuse.

In order to put this issue in perspective, it is necessary for the Court to recall what took place during Henry's first trial in Hillsborough County regarding the death of Eugene Christian. Henry filed a notice of intent to rely upon the defense of insanity. Two psychiatrists (Doctors Fessler and Sprehe) were appointed and reported that Henry was sane at the time of the homicide. (OR. 722, 723, 739, 740) Two defense experts (Doctors Afield and Berland) were appointed and arrived at the opposite conclusion[5] although their opinions were not as emphatic as those of Doctors Sprehe and Fessler. A fifth expert was then appointed but, on the advice of counsel, Henry refused to submit to further examination. The trial court therefore struck the insanity defense. This Court upheld that decision. Henry v. State, 574 So. 73 (Fla. 1991). For these reasons, Henry cannot in good faith fault defense counsel for not relying upon an insanity defense during the guilt/innocence phase of the retrial since it could be considered a tactical decision. That is, the fifth mental health expert appointed by the Trial Court might have agreed with Doctors Fessler and Sprehe thus further weakening an insanity defense. This concession, however, by no means excuses the ineffective manner in which defense counsel handled this part of the trial.

It appears that defense counsel was seriously misinformed regarding the law of self-defense (justifiable homicide) even though this is the only defense he relied upon in his closing argument during the guilt/innocence phase of the trial. (OR. 556-572, 601-605) That is, as the state correctly emphasized in its closing argument, even if it is assumed that Suzanne Henry initiated the confrontation armed with a knife, once Mr. Henry had the knife (so that she could not longer use deadly force against him), he did

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[5] Dr. Afield's report is in evidence as Defense Ex. 5. Dr. Berland's report is in evidence is Defense Ex. 6.

not have the legal right to stab her some 13 times![6] See Jones v. State, 286 So. 2d 29, 30 (Fla. 3d DCA 1973) where the court held:

> [d]efendant herself testified in regards to her claim of self-defense that the victim pulled a knife on her, but she managed to get the knife from the victim who she then stabbed. It is well-established that once the aggressor is disarmed as in the case sub judice there exists no real necessity for the taking of the aggressor's life, as the pursued is no longer in imminent danger of death or great bodily harm, and therefore, the pursued in this posture cannot inflict bodily injury or death upon the disarmed aggressor and claim self-defense.

See also Sec. 776.012, Fla. Stat.[7] Judge Swanson described the self-defense argument as "nonsense."[8] (R. 963) It is ineffective assistance of counsel to rely upon a defense that has absolutely no basis in fact.

Nor was there a legal basis for defense counsel's fall back "diminished capacity" (a/k/a, according to counsel, the "depraved mind") defense. (EH 109-111) Defense counsel testified in this regard during the 3.850 hearing:

> Q. Judge, I want to ask you a question about that. You indicated that in addition to a self-defense argument that you had kind of another indirect backup theory; what was that?
>
> A. The depraved-mind theory, to go for second.

---

[6] Doctor Wood's testimony as to the number of stab wounds (13) inflicted upon Suzanne Henry was not refuted. (OR. 404, 407)

[7] Nor would Henry have had a right to find relief in the excusable homicide provisions of Section 782.03, Florida Statutes, because a deadly weapon (a knife) was used.

[8] Detective Fay Wilber pointed out that scratches on Henry's arm were probably the result of him "crawling around through briars and shurbs" as opposed to defensive knife wounds, thus further weakening Henry's self-defense claim. Henry v. State, 574 So. 2d at 74.

Q. All right. Now, what do you mean "a depraved-mind theory"?

A. Well, depraved mind would go to the – for second-degree murder. 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 then you get a second degree.

Q. Alright, sir. Well, let me ask you this question: In paragraph 3 –

A. Could I see the letter again?

Q. Yes, yes. I'm going to give this back to you.

A. Okay.

Q. And I have this question: When you mentioned a depraved-mind theory –

A. Uh-huh.

Q. I want to ask you this question: In your letter you say, in the third paragraph, "In my cross-examination of the Medical Examiner, I took great advantage of my argument in that I was trying to establish a diminished mental capacity" –

A. Uh-huh.

Q. -- "given the serious ferocity of the attack on the woman."

A. Right.

Q. -- is that what you mean by this depraved mind?

A. Yes, that's what I meant by depraved mind.

> Q. Now, sir, isn't it true that at the time of this trial, Florida did not recognize a diminished mental capacity defense to get something from first-degree murder down to second or whatever?
>
> A. Right. I couldn't stand up there and say diminished capacity if that's not the law, but the idea was to go for depravity because of the number of wounds and the direction, all located in the neck area, and again trying to go for a second. That was diminished – diminished capacity, slash, depravity.
>
> Q. Sir, isn't it true that that very theory that you talk about trying to get across to the jury is the very same theory that Mr. Van Allen used – the 17 knife wounds to the throat – that Mr. Van Allen used and that Judge Swanson also used in his findings proving premeditation?
>
> A. But you don't know what a jury -- a juror -- might take into account with depravity, whether it's one stab wound or more. If you can then argue to the jury that the -- again, like I said in my letter, the sheer ferocity of the attack would show that the person was blind with rage, perhaps, and then you can argue second degree.

First of all, defense counsel was wrong to think that "diminished capacity" and "depraved mind" are one and the same thing. "Diminished capacity" is described by various experts as a mental state, often brought on by head trauma, that does not rise to the level of legal insanity under the M'Naghten Rule but results in such symptoms as a diminution in cognitive skills, neurological disorders (such as epilepsy), retardation, learning difficulties and passive personality disorders. Chestnut v. State, 538 So. 2d 820, 821-23 (Fla. 1989). Evidence of a defendant's "diminished" mental capacity is

not admissible to prove an absence of the ability to form the requisite intent to commit premeditated murder in a capital case in Florida as a matter of law. Id. at 825. It is ineffective assistance of counsel to rely upon a defense that has no basis in law.

What defense counsel was really stating is that he wanted to do what he could to convince the jury to convict Henry of a lesser-included offense of first-degree murder. (EH 109-111) In Florida, second-degree murder is defined in part as an act "evincing a depraved mind" See Sec. 782.04(2), Fla. Stat. (1986). While this strategy certainly makes sense, defense counsel did not know how to go about it. By his own admission, defense counsel attempted to disprove premeditation and show, instead, the defendant's "depraved mind" at the time of the homicide by emphasizing the "ferocity" of the attack on Suzanne Henry and the extraordinary number of stab wounds to her neck. (EH 109-111) This "strategy" was, to put it mildly, unreasonable. It was precisely the ferocity of the attack and the unnecessary number of stab wounds that both the Trial Court and this Court referenced in determining that what Henry did was especially heinous, atrocious and cruel. See Judge Swanson's sentencing order at OR 959 and Henry v. State, 649 So. 2d 1366, 1369 (Fla. 1994). It is ineffective assistance of counsel to fail to properly present a defense in a criminal case.

Clearly then, defense counsel was ineffective regarding the guilt/innocence phase of the trial because he asserted one defense (self-defense) that had no basis in fact, and another, ("diminished capacity") that had no basis in law. And, as noted below, he totally overlooked and failed to properly present the one valid defense that was available to him.[9]

Point II. The trial court erred in not finding that Henry suffered prejudice as a result of ineffective assistance of counsel during the guilt/innocence phase of the retrial.

Henry suffered prejudice as a result of counsel's ineffectiveness because he had available to him a strong defense against a first-degree murder conviction, but his counsel failed to properly present it. Had defense counsel done so, there is a distinct likelihood that the jury would not have convicted Henry as charged.

In Gurganus v. State, 451 So. 2d 817 (Fla. 1984), this Court considered the proffered testimony of two mental health experts who were not prepared to state that the defendant was insane at the time of the commission of his capital offense. However, they would testify that due to Gurganus' mental condition and use of drugs and alcohol prior to the homicide, he suffered from a "depraved mind" in the context of the

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[9] In its Order denying the 3.850 motion, the Trial Court does not address any of Henry's specific ineffectiveness claims but, instead, merely states that defense counsel's effort was "reasonable and within the wide range of professional assistance in a capital case." (R. 844, 845)

definition of second-degree murder set forth in Section 782.04(2), Florida Statutes. Id. at 819, 820. This Court held that the trial court was correct in not allowing the testimony for that purpose because:

> We find that the opinions the psychologists were asked to give in this case were not the proper subject of expert testimony. The defense was attempting to elicit a bottom-line opinion as to whether the actions of Gurganus were those of a "depraved mind" or a "premeditated plan." Both of these terms are legal terms with specific legal definitions. Essentially, the defense was attempting to elicit the psychologists' opinions as to whether Gurganus committed second-degree or first-degree murder. Such a conclusion was a legal conclusion no better suited to expert opinion than to lay opinion and, as such, was an issue to be determined solely within the province of the jury. (Citation omitted.) We find that the trial court did not abuse its discretion and we uphold the trial court's exclusion of the psychologists' testimony on this basis.

Id. at 821. However this Court ruled that the trial court erred in not admitting this testimony for the purpose of supporting the defendant's claim that he lacked the mental capacity to form the specific intent to commit premeditated murder due to substance abuse, stating:

> On the third basis in which the testimony was not admitted as evidence, we find merit to Gurganus' argument. As discussed earlier, Gurganus intended to use the testimony as evidence of his intoxication and resulting inability to entertain a specific intent at the time of the offense. To set up the proper foundation for the expert testimony the defense questioned the psychologists on the basis of a hypothetical set of facts, the most important of which was the hypothetical fact of Gurganus' consumption of the Fiorinal capsules combined with alcohol. The record certainly contained sufficient facts from which the jury could have properly inferred Gurganus'

consumption of the drugs and alcohol and, therefore, questions and opinions regarding his state of mind at the time of the offense based on such hypothetical facts were proper. (Citation omitted.)

It is clear that Gurganus' ability to entertain a specific intent at the time of the offense, an element required to be proved by the state, was a relevant issue pertaining to both the first-degree murder and the attempted first-degree murder charges regardless of whether the state sought conviction under either a premeditated or a felony murder theory. To convict an individual of premeditated murder the state must prove, among other things, a "fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 72 L. Ed. 2d 862, 102 S. Ct. 2257 (1982). Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. (Citation omitted.)

****

When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Cirack v. State, 201 So.2d 706 (Fla. 1967) Garner v. State, 28 Fla. 113, 9 So. 835 (1891). As such it is proper for an expert to testify as to the effect of a given quantity of intoxicants on the accused's mind when there is sufficient evidence in the record to show or support an inference of consumption of intoxicants. Cirack, 201 So.2d at 709. In this case, after having been told to presume that Gurganus had ingested Fiorinal and alcohol the psychologists testified that Gurganus would have a lessened capability for making rational choices and directing his own behavior, he would not be in effective control of his behavior, and would have had a mental defect causing him to lose his ability to understand or reason accurately. We find these responses to be relevant to the issue of Gurganus' ability to form or entertain a

> specific intent at the time of the offense. Their exclusion from evidence was error.

Id. at 822-23.

There was more than ample evidence available to defense counsel to the effect that Henry was psychotic when he killed Suzanne Henry and that his condition was exacerbated by the use of crack cocaine. For example, Henry told Dr. Fessler that he had smoked cocaine before borrowing a friend's car, driving to Suzanne's residence and stabbing her. (OR 723) He told Dr. Sprehe the same thing. (OR 737) Henry was already suffering from "chronic paranoia" along with what Dr. Afield described as "drug and alcohol abuse-severe." (Defense Ex. 5, Afield Report, p. 2) He also was suffering from severe depression, blackouts and suicidal thoughts and attempts which were made worse by drug abuse. ("In view of the chronic childhood depression reflected in the records and depression and self destructive and self medicating and anesthetizing behaviors of polysubstance abuse with pre-adolescent onset, it is understood that Mr. Henry has been burdened with suicidal ideation the majority of his life." Defense Ex. 1, Mosman Report, p. 10) See Defense Ex. 3, East Pasco Medical Center Reports, p. 3. ("Because of the patient's suicide threats and bizarre behavior in the hospital, he was referred to Human Development Services in New Port Richey.") See also Ex. 4, the Pasco County Sheriff's

Office missing person report of June 24, 1985 evincing that Henry had been subjected to the Baker Act during this time. ("Writer received information from Sgt. Harrison that missing person was not missing because he was in the Hospital at St. Joseph's in Tampa under a Baker Act for trying to commit suicide.") Dr. Afield offered an explanation of Henry's state of mind: "He is totally depressed and is very vague about the child's death and the mother's death and feeling that he wanted to unite himself to the mother." (Defense Ex. 5, Afield Report, p. 2) Dr. Afield added "[h]e says that he does have a history of hallucinations, which occurred in his adolescence but, again, he says these occurred more so when he was on drugs." Id. This state of mind certainly runs counter to a mindset that could form the premeditated intent to commit first degree murder. Dr. Mosman was of a similar view describing Henry's frequent hallucinations and chronic symptoms of psychosis, paranoia and mental confusion. See Defense Ex. 1, p. 10. ("The defendant himself has a continuous and consistent record of hallucinations and has been witnessed to hallucinate and have delusions since age 10, both while under the influence of a variety of drugs and also when not under the influence. There are literally pages of data in the records documenting a forty year history of delusions and a variety of hallucinations.")

The point is not whether the evidence was in dispute regarding the extent to which Henry had abused crack cocaine shortly before killing Suzanne Henry. It was disputed just as was Dr. Wood's opinion that the effects of cocaine use would have worn off by the time Henry entered Suzanne's residence. See for example the findings of Doctors Berland and Mosman that the effect would have been more long term. (EH 27-30) Nevertheless, defense counsel, through his utter neglect to even understand, much less investigate and litigate the issue, forfeited a golden opportunity to show the jury that Henry was simply not capable of forming the premeditated intent to kill Suzanne within the context of Section 782.04(1)(a)1, Florida Statutes, given his abuse of crack cocaine prior to killing Suzanne which exacerbated his underlying psychotic mental condition. How can there be any real reliability to the jury's verdict under these circumstances when the jurors hear only one side of the story and were offered no explanation whatsoever for the "ferocity" of Henry's attack upon his wife?

Point III. The trial court erred in finding that Henry was not denied effective assistance of counsel during the penalty phase.

The circumstances in Henry's case are similar to those in Ragsdale v. State, 720 So. 2d 203 (Fla. 1998). Ragsdale collaterally attacked his judgment and death sentence asserting in part that his trial counsel failed to

gather and present available evidence of his abusive childhood, life-long history of substance abuse and mental illness. The trial court summarily denied the 3.850 motion and the defendant appealed. This Court affirmed in part and reversed in part stating:

> With regard to the penalty phase, however, we conclude that an evidentiary hearing was required. During the penalty phase, defense counsel put on only one witness, Ragsdale's brother, who provided minimal evidence in mitigation. That witness had also testified on behalf of the State during the guilt phase. Additionally, the witness, when cross-examined by the State during the penalty phase, testified that it did not surprise him that his brother committed the murder and he provided other derogatory information about Ragsdale.
>
> In Ragsdale's rule 3.850 motion, he states that testimony was available to show that Ragsdale's life was marked by poverty and deprivation and that he suffered from a lifetime of drug and alcohol addiction, yet no witnesses were called by the defense to present this testimony. More importantly, he contends that defense counsel never had him examined by a competent mental health expert for purposes of presenting mitigation. He asserts that he has now been examined by a mental health expert who has found that he suffers from organic brain damage; is mentally retarded; has severe language and listening comprehension difficulties; and has difficulties with concentration, attention, and mental flexibility. Additionally, he alleges the evidence will show that his ability to reason and exhibit appropriate judgment, as well as determine and assess the long-term consequences of his actions, is also substantially impaired.
>
> ****
>
> We conclude that Ragsdale has stated sufficient allegations of mitigation that are not conclusively refuted by the record to warrant an evidentiary hearing to determine whether counsel

> was ineffective in failing to properly investigate and present this evidence in mitigation.

Ragsdale, 720 So. 2d at 208. The Court directed the lower tribunal to "hold . . . an evidentiary hearing on the contention that Ragsdale's trial counsel was ineffective for failing to properly investigate and present evidence in mitigation and that Ragsdale was deprived of an effective mental health expert." Id. at 209. After conducting an evidentiary hearing, the trial court denied Ragsdale's 3.850 motion. Ragsdale again appealed. This Court reversed, finding, based upon the evidence presented during the 3.850 post conviction hearing, that Ragsdale's counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase.

Ragsdale's siblings and relatives described a disturbing account of Ragsdale's early life. Like Henry, the defendant grew up in Pasco County, Florida, in a family consisting of his parents and his three brothers. Early in Ragsdale's life, his father became disabled and thus was unemployed throughout most of Ragsdale's childhood. Id. at 208. The impoverished family moved about from trailer to trailer. Ragsdale's father dominated the household, and Ragsdale's mother followed orders without argument. If Ragsdale's mother talked back or attempted to stand up for her children, she would be beaten. Ragsdale v. State, 798 So. 2d 713, 717 (Fla. 2001). Ragsdale's father would become even more violent upon taking his

medication, much like Henry's father. The children were frequently beaten by their father with fists, tree limbs, straps, hangers, hoses, walking canes, boards, and the like, until bruises were left and blood was drawn. Id. at 717. As additional punishment, Ragsdale and his brothers would be made to fight until blood was drawn or handcuffed to a pole for a period lasting from ten minutes to hours. Id. The father always carried a pistol, which he once pulled on Ragsdale's mother and twice fired at Ragsdale. The abuse was such that Ragsdale began to run away from his home to an aunt's house at the age of eight. At the age of about fifteen or sixteen, without ever advancing past the seventh grade, Ragsdale permanently left his home by moving in with a cousin.

Also as in Henry, Ragsdale's relatives were aware of Ragsdale's extensive drug and alcohol abuse. They described Ragsdale's abuse of an assortment of drugs and other substances beginning at age eight when Ragsdale would sneak his father's medication pills. Ragsdale, supra, 798 So. 2d at. 717. This was followed by his abuse of inhalants, marijuana, and cocaine. Id.

The siblings were aware of various head injuries suffered by Ragsdale. While playing as a child, Ragsdale's brother accidentally blinded him in one eye by shooting him with an arrow. Id. At the age of twelve or

thirteen, Ragsdale was involved in a car accident in which the car hit a tree and he was propelled through the front windshield. At the age of sixteen or seventeen, Ragsdale was struck in the head with a metal pipe. Id. His brothers testified that after these accidents, Ragsdale would complain about severe headaches. Also, after these accidents, Ragsdale went through behavioral changes in which he would violently "snap" over anything. Id.

Again as in Henry, Ragsdale's pitiful childhood and history of drug and alcohol abuse were not presented to the jury during the penalty phase. His history of head trauma was presented in a very limited fashion. Id. The only mitigation witness who testified on behalf of Ragsdale at the penalty phase was his brother. He testified about blinding him in one eye and about the auto accident in which his head went through the windshield. Id. However, as this Court pointed out, he also testified for the State. This Court held therefore:

> No expert testimony was presented at the penalty phase regarding how the child abuse, the drug and alcohol abuse, and particularly the history of head trauma may have contributed to Ragsdale's psychological status at the time of the murder. At the evidentiary hearing, Ragsdale established the existence of mental mitigating evidence through the expert testimony of a forensic psychologist, Dr. Robert Berland. Dr. Berland's conclusions were based on interviews with Ragsdale and on Dr. Berland's review of relevant documentation such as police reports, witness statements, depositions, and prison records. Dr. Berland conducted various tests including a Minnesota Multiphasic Personality Inventory ("MMPI"), in order to

> measure symptoms of mental illness, and a Wechsler Adult Intelligence Scale test ("WAIS"), in order to detect brain injury. Dr. Berland also interviewed Ragsdale's siblings, reviewed the raw data of the evaluations conducted by the State expert, Dr. Sidney Merin, and reviewed Dr. Don Delbeato's evidentiary hearing deposition and psychological report ("Delbeato report"), which was produced at the time of the trial. Dr. Berland concluded that Ragsdale was psychotic at the time of the offense, and thus the statutory mitigating circumstances of extreme mental or emotional disturbance and inability to conform to the requirements of law applied in the instant case. Dr. Berland also identified a list of nonstatutory mitigating factors including organic brain damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability.
>
> In rebuttal to Dr. Berland's testimony, the State presented Dr. Merin, a clinical psychologist specializing in neuropsychology. Dr. Merin based his conclusions on fifteen psychological tests, a clinical interview of Ragsdale, and a review of Ragsdale's records. In essence, Dr. Merin disagreed with Dr. Berland's conclusion that Ragsdale was psychotic and suffered organic brain damage. Dr. Merin offered no opinion as to the applicability of the statutory mental mitigators. Dr. Merin did, however, testify as to the existence of mitigating evidence which was not presented at the penalty phase of Ragsdale's trial. Dr. Merin's tests revealed that Ragsdale had a severe learning disability and that Ragsdale's IQ score was in the borderline retarded range. While Dr. Merin concluded that Ragsdale was not psychotic, he diagnosed that Ragsdale's brain was impaired and that Ragsdale had a personality disorder with paranoid features. Thus, the conclusion is inescapable that there was available evidence from experts which would have supported substantial mitigation but which was not presented during the penalty phase.

Ragsdale, 798 So. 2d at 717, 718.

Virtually the same situation existed at the time of Henry's retrial.[10] As documented above, there was a substantial amount of evidence indicating that Henry met the criteria for at least three statutory mitigating circumstances that the jury and judge never heard during the penalty phase related to issues of mental health. This omission was inexcusable and constitutes ineffective assistance of trial counsel. Ragsdale, supra. See also Hildwin, 654 So. 2d 105, 110 (Fla. 1995) (ineffective assistance found where counsel failed to present evidence of defendant's mental mitigation and several categories of non-statutory mitigation including defendant's abuse and neglect as a child and his history of alcohol abuse); Rose v. State, 675 So. 2d at 567, 572 (Fla. 1996) (counsel ineffective at penalty phase for failing to present evidence of severe mental disturbance, alcoholism and mistreatment as a child); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (ineffective assistance of penalty-phase found where, although counsel presented some evidence in mitigation**,** he did not present lay testimony concerning defendant's childhood riddled with abuse, and expert testimony describing defendant's mental and emotional deficiencies); and Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989) (counsel's failure to investigate defendant's background, to present mitigating evidence during the penalty

[10] The Trial Court, in its order dismissing the 3.850 motion, does not reference Henry's mental health claims at all. (R. 844-846)

phase, and to argue mental health mitigation at penalty phase was ineffective).

Point IV. The trial court erred in finding that Henry did not suffer prejudice as a result of defense counsel's failure to effectively represent him during the penalty phase.

This Court concluded in Ragsdale:

> In sum, Ragsdale has clearly established that counsel deficiently handled the penalty phase, and <u>when the evidence which was available is measured against the evidence presented at the penalty phase, there is a reasonable probability of a different result</u> . . .

<u>Ragsdale</u>, 798 So. 2d at 719, 720. (Emphasis supplied) Likewise, when the evidence of Henry's impaired mental condition presented at the 3.850 hearing is compared to the utter dearth of evidence presented during the retrial, there is the reasonable likelihood that the outcome of the penalty phase would have been different. Henry is therefore entitled to post conviction relief. It is important to remember that the state's most compelling evidence supporting the death penalty presented during the first trial, the details of the Eugene Christian homicide, was ruled inadmissible in the retrial. This Court noted in that regard:

> [S]ome reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness.

> However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. Sec. 90.403, Fla. Stat. (1985). Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.[11]

Henry v. State, 574 So. 2d at 75. This Court also determined that the CCP statutory aggravator should not have been applied. Id. at 74. Thus, the statutory aggravating factors that the jury could consider were reduced from three (prior violent felony conviction, CCP and HAC) to two (prior violent felony conviction and HAC). Dr. Mosman substantiated a factual/mental health basis for three statutory mitigators (felony committed while defendant under the influence of extreme mental or emotional disturbance, capacity to appreciate criminality of conduct substantially impaired and age) and a host of non-statutory mitigators as well. (Defense Ex. 1, p. 21, 22)

No Strategic Reason for Failing to Present Expert Mitigation Testimony

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[11] In the Trial Court's brief order (R. 844-846) denying the 3.850 motion, it bases its decision on the fact that Henry was convicted as charged in the first Pasco trial. However, the Trial Court does not address the fact that evidence regarding Christian was severely restricted and the CCP aggravator not allowed as referenced herein.

At the November 20, 2001 evidentiary hearing, defense counsel asserted that he did not call either Dr. Berland or Dr. Afield to the stand in Henry's behalf because their testimony in the penalty phase of the first trial revealed that they would hurt the defendant, not help him. (EH 93, 94) That is simply not correct. It was not a reason for not calling them. It was an excuse for not doing so.

Dr. Berland's Pasco I Penalty Phase Testimony

During the penalty phase of Pasco I, Dr. Berland testified that he conducted several well established psychological tests to get different sources of information about Mr. Henry rather than depending on one interview alone. (T. 41[12]) After a lengthy explanation of how the tests reveal when the patient is faking mental illness (and that Mr. Henry was not malingering), he stated that Henry's MMPI scale was very high and revealed that

> . . . he has been disturbed quite some time, that his particular problems revolve around what is called major thought disorder or psychotic thinking; that he has a lot of disturbed ideas, unrealistic ideas that he entertains in his head regardless of how he acts.

(T. 47) He went on to state:

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[12] In order to avoid confusion, when referring to the trial transcript in the first Pasco County trial, Henry cites to the page number appearing in the upper right hand corner of each page preceded by the letter "T."

> When someone is psychotic, which is out of touch with reality, they are unable to either think logically and realistically. They may have perceptual distortions like hallucinations, they may have emotional disturbances or some combination of the three. That's a biological disturbance and this indicates that he has some kind of biological disturbance which renders him diminished in his ability to think realistically and logically.

(T. 47) Dr. Berland also conducted a Rorschach test that supported the findings noted above regarding the MMPI. Dr. Berland stated in this regard:

> He was able to hide it fairly well in the Rorschach and it also showed that he was capable of recognizing and producing conventional thinking. What that means is that even though he had a lot of bizarre, disturbed ideas in his head, he knew what it meant to think normally. He knew what normal people thought and he could produce when it was required of him normal sounding thinking.

(T. 49) Dr. Berland explained that the Wechsler Adult Intelligence Scale (WAIS) test gives not only a good measure of intelligence, but is also a sensitive estimate of whether there is an impairment from some kind of brain damage. (T. 49, 50) He stated that Henry probably has a genetically determined mental disorder and a significantly low level of intelligence. (T. 50) In summarizing, Dr. Berland stated that Henry was an ambulatory, or walking around psychotic, meaning he could function in his daily life, but:

> Basically the principal thing that happens with people who have these disorders is they entertain paranoid thinking, they believe that there's harm in things that the rest of us would not see potential harm in. They have a lot of experiences of feeling that

> they are being followed, that people are singling them out for mistreatment, that they are in some kind of unspecified danger which makes them particularly edgey . . . He was very highly energized or impulsive and likely to act on his disturbed thinking.

(T. 53, 54)

As to how cocaine would have affected Henry at the time of the Suzanne Henry homicide, Dr. Berland stated unequivocally:

> It's been my observation that with almost no fail, including alcohol, psychoactive drugs will take somebody who is already psychotic and make their symptoms more severe. Cocaine and amphetamines, particularly, tend to not only energize someone, make them much more agitated, excitable, quick to respond and harder to control their impulses, but it will make their delusions and hallucinations considerably more severe.

(T. 55)

Dr. Berland stated that the effect of cocaine on mentally disordered people varies considerably, lasting three to eight weeks for some or only for the length of the intoxication for others. (T. 56) He added that Henry was substantially impaired in terms of his ability to conform his behavior to the requirements of law, that his mental disorder itself constituted an extreme emotional disturbance and that cocaine made him worse. (T. 57-59) Dr. Berland stated on cross-examination that Henry's disorder is at the core of his being, that it can wax or wane, but;

> it's not like smoking a cigarette where you really like to smoke and you have the urge to smoke but you know it's bad for you

> and out of habit you have a cigarette in your mouth before you know what you're doing. If someone held a gun to your head you could stop yourself from smoking. With the kind of paranoid thinking we're talking about . . . it's considerably more powerful and it's very believable. (T. 60)

When the state attorney indicated that Henry might have lied to him in the course of his testing, the psychologist said that his professional opinion still stood, and that he was 100 percent certain that Henry was psychotic when he killed Suzanne. (T. 65, 76) Dr. Berland clarified professional terminology stating that Henry was not acutely disturbed, but actively psychotic, in that there is a substantial, major disturbance and there are bizarre perceptions on an ongoing basis which influences his behavior. When asked what Henry's state of mind would have been assuming that he had not been smoking crack cocaine, he stated that he might be able to appreciate the criminality of his conduct and he might not be totally out of control, but he would not be able to control his bizarre thinking. (T. 88, 89) Dr. Berland concluded by stating, "I did it on the basis of my assessment on his mental illness without drugs and information I had from him about the kind of things he was thinking and reacting to at that time. I made no assumption that drugs were present." (T. 89)

Dr. Afield's Pasco I Testimony and Misunderstanding of Same by Defense Counsel

Many of Dr. Afield's findings and opinions are set forth above. During his trial testimony in the penalty phase of the first Pasco trial, he stated that, "this man had a problem with drug and alcohol abuse that was rather severe and he also was suffering from chronic paranoia." (T. 101) He confirmed that his diagnosis regarding severe paranoia was "essentially separate from the cocaine and drug abuse." (T. 102) When asked about the "level of his illness," Dr. Afield stated, "it's reasonably extreme." (T. 102) The psychiatrist added that, at the time Henry killed Suzanne, "I think Mr. Henry was psychotic in response to his underlying chronic paranoia and, also, was essentially twice out of it as a result of the free basing cocaine and drinking. I think that it just took the lid off of it for him more." (T. 104) Thus, according to Dr. Afield, at the time of the Suzanne Henry homicide, the defendant was under the influence of extreme mental or emotional disturbance. (T. 105) Dr. Afield also felt that the defendant's ability to conform his conduct to the requirements of law was seriously impaired. (T. 106)

On cross-examination by Mr. Van Allen, Dr. Afield did not recant his previous testimony. In fact, Dr. Afield noted that even if Mr. Henry ingested only a small amount of crack cocaine before killing Suzanne, it

would not change his diagnosis.[13] (T. 113) In particular, Dr. Afield noted that regardless of the amount of cocaine Henry ingested before the homicide, he was still chronically paranoid. (T. 114)

During the 3.850 evidentiary hearing, defense counsel said that he did not call Dr. Afield as a witness because, at some point, he (Dr. Afield) said that Henry was "dangerous." (EH 83) Defense counsel missed the mark in this regard. What Dr. Afield actually said, when describing Henry's mental illness related to chronic paranoia, was that "(p)aranoid people are dangerous." (T. 115) In other words, Dr. Afield was not stating that Mr. Henry was a cold blooded, mean-spirited killer. On the contrary, he was pointing out that he was mentally ill, chronically paranoid, and that made him dangerous. For defense counsel not to recognize this distinction,

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[13] The prosecutor was effective in making it appear that Doctors Afield and Berland's diagnoses to the effect that Henry was seriously mentally ill at the time he killed Suzanne was flawed due to the issue of the use (or lack thereof) of crack cocaine shortly before the incident. That is, both Doctors Berland and Afield believed that Henry became much more psychotic when he was under the influence of cocaine. Mr. Van Allen asked hypothetical questions based upon the underlying assumption that Henry had not used cocaine before he killed Suzanne. Mr. Van Allen relied in this regard upon the testimony of Deputy Fay Wilber and his conversation with Henry. However, even Dr. Fessler acknowledged that the history he took from Henry revealed that he had used cocaine shortly before he killed Suzanne. See OR. 723 where Dr. Fessler states: "My conclusions were that based on the history he gave me, he had smoked crack cocaine before going to the house." Defense counsel did not mention this in his closing arguments to the jury even though Mr. Van Allen argued in his closing argument that Henry had not used cocaine before killing Suzanne. See OR. 556-625.

and therefore to deny him a chance to avoid the death penalty by failing to present mitigating mental health evidence, is not excusable. It also constitutes ineffective assistance of counsel.[14] Riechman v. State, 777 So. 2d 342 (Fla. 2000), (Fla. 2000); Arbelaez v. State, 775 So. 2d 909 (Fla. 2000); Torres-Arboleda v. State, 636 So. 2d 1321 (Fla. 1994).

King v. Strickland, 714 F.2d 1481 (11th Cir. 1983) is another case on point. The federal appeals court addressed the importance of diligence by counsel in the penalty phase, especially in a capital case. The Court first explained in detail the parameters of the issues it could consider:

> In order to understand the basis on which we hold counsel to have been ineffective at the penalty stage of the trial, it is helpful to discuss petitioner's arguments as to the guilt phase.
>
> The sixth amendment guarantees a criminal defendant the right to counsel reasonably likely to render, and rendering, reasonably effective assistance. (Citations omitted.) In judging whether this standard has been met, the totality of circumstances and the entire record must be considered. (Citation omitted.)

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[14] The depositions of Doctors Afield and Berland are a part of Defense Composite Ex. 11 in evidence. While it is true that the state's counsel makes some inroads into their testimony in the depositions and during their testimony at Pasco I, neither doctor receded from his very favorable testimony on Henry's behalf as noted above.

Id. at 1485. The Court outlined counsel's deficiency in not calling important available mitigating witnesses in the penalty phase, as was the situation in the Henry case.

> Counsel's duty to his client extends beyond the guilt stage of the trial to the sentencing proceeding. Stanley v. Zant, 697 F.2d 955, 963 (11th Cir. 1983). King argues that lead counsel Cole was ineffective at the penalty phase of the trial because he failed to present available character witnesses and made a weak closing argument.

Id. at 1490. As in Henry, there were mitigating witnesses available, but they were not called. Instead two rather weak witnesses testified to his character. The Eleventh Circuit said in this regard:

> There are indications in the record that counsel failed to conduct an exhaustive investigation for potential mitigating evidence. Prior to the penalty stage, Cole told the trial judge he had not discussed this part of the trial with his client and asked for a one-day continuance so he could speak to possible defense witnesses. The court denied the request. Although King apparently furnished his lawyer with a list of six possible character witnesses, there is no indication the lawyer contacted all of them to determine whether their testimony might be helpful.

Id. at 1486, 1487. Virtually the same situation occurred in Henry's case as evidenced by the following exchange between the court and defense counsel:

The Court:	Does the defendant intend to present testimony or evidence?
Defense Counsel:	We do, Your Honor.

The Court: Bring in the Jury. (R. 748)

Defense counsel then stated:

> Before we bring them in I disclosed to Mr. Van Allen the recent discovery of one witness. Let me back up. I intend to put on Rosa Mae Thomas. I intend to put on Stephanie Thomas, the twenty year old daughter. I did not know of Stephanie Thomas' existence until a few minutes ago. I've briefly contemplated them and placed them on the witness list.

Id., emphasis supplied.

Point V. The Trial Court erred in not granting Henry's request to set aside the death sentence based upon Ring v. Arizona.

In February, 2002, Henry filed with the Clerk of the Circuit Court in Pasco County a request for the Trial Court to take judicial notice of two United States Supreme Court cases: Jones v. United States , 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000), and declare the Florida death penalty statute unconstitutional. It was noted that these two cases cast doubt on the constitutionality of Section 921.141, Florida Statutes, a crucial part of Florida's death penalty laws. That Court accepted *certiorari* jurisdiction regarding a third case, Ring v. Arizona, 200 Ariz. 267; 25 P.3d 1139 (Ariz. 2001). On June 24, 2002, the United States Supreme Court ruled in favor of Ring holding that Arizona's death penalty statute was unconstitutional. Ring v. Arizona, ___ U.S. ___; 122 S.Ct.

2428 (2002).

The issue in Ring was whether the Sixth Amendment to the Constitution of the United States was violated by Arizona's death penalty statute that, by its very terms and conditions, did not require the jury to make all the findings necessary to expose the defendant to a death sentence. The Supreme Court ruled in the affirmative.

Under Florida law, the trial judge makes the ultimate determination regarding whether the defendant is sentenced to death, not the jury. Sec. 921.141(3), Fla. Stat. More to the point, the trial judge, not the jury, determines whether the aggravating factors necessary to authorize a death sentence have been proven beyond a reasonable doubt and whether those aggravating factors outweigh mitigating factors presented in the defendant's behalf. Id. The Florida jury's function is only to provide the trial court with an "advisory" opinion regarding what sentence should be imposed. Sec. 921.141(2), Fla. Stat. Thus, in Florida, the judge is permitted to determine the existence of a factor or factors which make a crime a capital offense, not the jury. Based upon the Ring decision, Florida's death penalty statute is constitutionally flawed as well.

While the Trial Court did not grant Henry's motion to amend the 3.850 motion regarding Ring, it did consider the issue in its March 21, 2002

Order denying the 3.850 motion. The Trial Court noted that it could not speculate on cases pending in the nation's highest court. Judge Swanson stated in part in this regard: "This court must rule upon the law and evidence as they now exist, and must leave to the appellate courts in reviewing this order to determine the effect of any future rulings of the U. S. Supreme Court." (R. 846) Henry concedes that Florida's death penalty statute has yet to be declared unconstitutional. It should be based upon Ring.

CONCLUSION

For the reasons set forth above, the Court is requested to reverse the Order of the Trial Court denying Henry's Florida Rule of Criminal Procedure 3.850 motion to vacate his judgment and death sentence, remand the cause to the lower tribunal, order that Henry be granted a new trial and order such other relief as is deemed appropriate in the premises.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of Appellant has been provided counsel for appellee, Hon. Candance Sabella, Assistant Attorney General, the Office of the Florida Department of Legal Affairs, 700 North Lois Avenue, Tampa, Florida, and Philip Van Allen, Esq., Office of the State Attorney, the Pasco County Courthouse, Suite 204, Dade City, FL 33525, counsel for the appellee, this _____ day of October , 2002, by United States mail delivery.

CERTIFICATION OF FONT AND SIZE

I certify that this Initial Brief of Appellant has been prepared using a 14 point Times New Roman font not proportionally spaced. The brief is on a disk provided the Court as well per the Court's rules.

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