IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

vs. **Case No. SC 02-804**
(L.T. No. 85-2685-CF)

STATE OF FLORIDA,

Appellee.
_____/

ON DIRECT APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT DENYING APPELLANT'S FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION FOR POST CONVICTION RELIEF IN A CAPITAL CASE AFTER AN EVIDENTIARY HEARING.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

John Ruthell Henry, the appellant (defendant below), will continue to be referred to as "Henry" or the defendant. The appellee, State of Florida, will be referred to as "the state." Henry will use the same designations regarding the record on appeal he employed in his Initial Brief of Appellant. The record on appeal in this post conviction proceeding below, except for the 3.850 evidentiary hearing transcript, will be referred to by the letter "R" followed by a page number. The November 19 and 20, 2001 post conviction evidentiary hearing transcript will be referred to by the letters "EH" followed by a page number. Henry's original (first) trial record in Pasco County Circuit Court will be identified by the letter "T", followed by a page number. The retrial (second) record on appeal will be referred to by the letter "OR" followed by a page number.

Henry introduced exhibits in evidence during the 3.850 evidentiary hearing proceedings. Those exhibits will be identified by the exhibit numbers given to them during that hearing.

v.

AS TO THE STATE'S STATEMENT OF THE CASE AND THE FACTS

Henry agrees with the state's statement of the case as set forth on pages 2-5 of the Answer Brief of Appellee. Henry does not take issue with the state's statement of the facts as set forth on pages 6-21 of its Answer Brief except that it is only a partial rendition of the material facts in this case. Other relevant facts are described throughout the Initial Brief of Appellant and this Reply Brief.

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

The state frames Henry's first issue as nothing more than a strategic difference of opinion regarding what, if any, defense Henry could have presented during the guilt phase of the trial under the circumstances. (The Answer brief, p. 23.) Henry disagrees. Trial counsel was ineffective because he offered a self defense argument when there were no facts to support it and a back-up defense, which he called "diminished capacity," or "depraved mind," that is not recognized in Florida law.

The state argues that Henry suffered no prejudice because there was no defense as to his guilt. Henry disagrees because there was a strong factual framework upon which to establish a voluntary intoxication defense due in part to Henry's ingestion of cocaine prior to the homicide and the effect that had on his already unstable psychotic mental condition. If properly presented, there is a distinct probability that Henry would have avoided a first degree murder conviction in the context of Gurganus v. State, 451 So. 2d 817 (Fla. 1984).

The state argues that Henry's trial counsel was aware of the mental health data that Dr. Mosman testified about during the Florida Rule of Criminal Procedure 3.850 post conviction hearing but had good reason not to use it during the retrial. The state adds that even if defense counsel had presented the mental health evidence, it would not have made a discernable difference in the outcome (the death recommendation and sentence) of the proceedings. The state is wrong. Trial counsel's minimal effort

during the penalty phase is shocking. It would just past muster in a shoplifting case. Counsel either completely overlooked or ignored vital mental health information at his fingertips that would have established at least three statutory mitigating factors that would have dwarfed the one statutory aggravator[1] that the state really had. But counsel did not call a single witness, expert or otherwise, to attest to the fact that Henry was seriously mentally ill and psychotic when he killed his estranged wife. Instead, he allowed the state to completely outmaneuver him during the penalty phase and to present its experts whose understanding of Henry's mental state was flawed at best. Given the wealth of mitigating information available to counsel and his failure to present any of it, the death sentence that resulted was simply not constitutionally reliable under the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984) and must be set aside.

Issue V The state argues that Henry's Ring claim was procedurally barred and without merit. The state is incorrect. Henry raised Ring as soon as could be expected, and that decision should cause this Court to find that Florida's death penalty statute does not pass constitutional muster.

AS TO THE STATE'S ARGUMENT

Issue I: Ineffectiveness during the guilt phase.

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[1] The trial court found that Henry had previously been convicted of a prior violent felony and that the capital felony was especially heinous, atrocious or cruel. Had defense counsel been effective the HAC aggravator would not have been established.

Citing Brown v. State, 755 So. 2d 616 (Fla. 2000) the state attempts to justify the handling of the guilt phase of the trial in general and the reliance on a self defense strategy in particular, by citing the well-worn cliché to the effect that defense counsel's tactical decisions deserve judicial deference absent a clear showing that the strategy equaled ineffectiveness of constitutional proportions. According to the state, in the case at bar there was a factual basis for a self defense claim because (a) Henry told Detective Wilber that Mrs. Henry threatened[2] him with a knife and demanded that he leave her residence (OR 508), (b) when he did not depart, Mrs. Henry supposedly cut him[3] (the Answer Brief, p. 27), (c) at that point, according to Detective Wilber, the defendant said he became enraged and stabbed Suzanne to death. Id. The state adds in this regard that Henry's trial counsel believed and therefore argued to the jury that his client " . . . had no legal obligation to retreat." (The Answer Brief, p. 28.)

The problem with the self defense strategy, as Henry details beginning on page 47 of the Initial Brief, is that there were no facts to support it. Henry and his

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[2] The state notes that there was testimony that Mrs. Henry was a large woman who would not back down to someone and, at one time, had threatened another person with a knife. (The Answer Brief, p. 27.)

[3] Detective Wilber refuted Henry's self defense claim by noting that all he observed were scratches on Henry's arms consistent with walking in a wooded area such as the one where Mrs. Henry's son was found after Henry killed him. Henry v. State, 574 So. 2d at 74.

wife were estranged. He came to her residence.[4] He stabbed her at least 13 times![5] There was no evidence of a struggle. (OR 475) Thus, even if Suzanne initiated the confrontation while armed with a knife (which is doubtful),[6] the defendant had no right to continue to stab her once she was disarmed and unable to resist. Jones v. State, 286 So. 2d 29, 30 (Fla. 3d DCA 1973). A person may not resort to deadly force without first using every reasonable means within his or her power to avoid the danger, including retreat. See Bobbitt v. State, 415 So.2d at 725; Hedges v. State, 172 So.2d 824, 827 (Fla.1965). Henry had an obligation to retreat since he was in Suzanne's residence, not his own. Weiand v. State, 732 So. 2d 1044 (Fla. 1999). Judge Swanson therefore correctly labeled the self defense argument advanced by defense counsel "absurd" and "nonsense." (OR 963) The trial court was right and defense counsel was ineffective for asserting it in the first place.[7]

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[4] The state concedes that Henry killed Suzanne at her residence. (The Answer Brief, p. 10.)

[5] The medical examiner, Dr. Joan Wood, testified without refutation that Suzanne was stabbed 13 times. (OR. 404, 407) The doctor added that she found no wounds associated with defending against a knife attack. (OR 412)

[6] This was Henry's dubious excuse he gave to Detective Wilber. (The Answer Brief, pp. 27, 28.)

[7] The state argues in its Answer Brief that defense counsel must be credited for getting the self defense argument before the jury and obtaining an instruction on this defense from the trial court. (The Answer Brief, p. 28.) But that begs the question: What good is it for defense counsel to gain the right to argue a certain theory of the case before the jury if, having done that, counsel presents no evidence to back it up? This tactic seriously underestimates the intelligence of jurors when

As explained on pages 48-52 of Henry's Initial Brief, trial counsel's use of a fallback defense of "depraved mind" or "diminished capacity" constituted ineffectiveness under the circumstances as well. Trial counsel claimed during the 3.850 evidentiary hearing that such a defense was plausible given "the sheer ferocity of the attack" upon Suzanne. (The Answer Brief, p. 27.) In other words, according to defense counsel, the brutality inflicted upon Suzanne as evidenced by the bruises and 13 stab wounds supported a "mindless non-premeditated killing . . ." defense. This of course was incorrect since, by the state's own admission, " . . . at the time of this trial Florida did not recognize a diminished mental capacity defense . . ." [8] (The Answer Brief, p. 27.)

Unwilling to concede ineffectiveness, the state attempts to justify trial counsel's actions by noting, "(t)hus, contrary to collateral counsel's assertion that neither defense was legally viable, the record shows that counsel was, nevertheless, successful in being able to argue them to the jury and obtain jury instructions on

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it comes to following the judge's instruction to base their verdict not on legal theory and lawyer argument, but on evidence.

[8] According to the state, under Gurganus v. State, 451 So. 2d 817 (Fla. 1984), the decision relied upon by Henry to show prejudice in this case, evidence of voluntary intoxication cannot be misused to avoid a first degree, premeditated murder conviction ". . . as a label for what in reality is a defense based upon the doctrine of diminished capacity." (The Answer Brief, p. 32.) But is not "diminished capacity" exactly the back up defense that trial counsel argued during the guilt phase? Does this concession by the state not prove beyond any doubt that trial counsel offered a defense that was not recognized by law? If so, is doing so not ineffective assistance of counsel?

same." (The Answer Brief, p. 28.) The state fails to acknowledge, however, that once again having raised a supposed defense ("diminished capacity" or "depraved mind"), defense counsel did not back up the argument with any evidence to support it. The prosecutor and the trial court then proceeded to turn the argument against Henry by citing the ferocity of the killing as the primary basis for applying the HAC aggravator. See Judge Swanson's sentencing order at OR. 959 and Henry v. State, 649 So. 2d 1366, 1369 (Fla. 1994).

Issue II: Prejudice during the guilt phase.

The state's argument (the Answer Brief, pp. 31-37) that Henry suffered no prejudice as a result of his counsel's ineffective representation during the guilt phase overlooks the fact that, under the circumstances, Henry had a strong voluntary intoxication defense that, had it been properly presented, might well have resulted in the lesser-included offense conviction of second degree murder. The state acknowledges in this regard that "(t)his Court in Gurganus[9] held that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent." (The Answer Brief, p. 32.) As Henry points out on pages 41, 42 and 52-57 of the Initial Brief, there was ample evidence of an involuntary intoxication defense available to trial counsel at the time of the retrial since it was clear that Henry was psychotic when he killed Suzanne and his fragile mental

[9] Gurganus v. State, 451 So. 2d 817 (Fla. 1984).

condition was exacerbated by the use of crack cocaine. Rather than restate the nature and extent of that evidence, Henry refers the Court to these pages of his Initial Brief. In Gurganus, 451 So. 2d at 823, this Court held that "(w)hen 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." Gurganus' intoxicated state was based upon the ingestion of "Fiorinal capsules combined with alcohol." Gurganus, 451 So. 2d at 822. Henry's intoxicated state was due to the use of cocaine prior to the homicide, the effects of which were made far worse due to his history of mental illness. Dr. Afield testified in this regard during Henry's first trial, "I think Mr. Henry was psychotic in response to his underlying chronic paranoia, also, was essentially twice out of it as a result of the free basing cocaine and drinking. I think this took the lid of if it for him." (T. 104) Under these circumstances it is clear that trial counsel's failure to prepare for, present evidence of and argue a voluntary intoxication defense makes the premeditated first degree murder verdict constitutionally unreliable to say the least under the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). Thus, Henry proved prejudice during the post conviction proceedings, and the trial court erred in not granting the 3.850 motion accordingly.

Issues III and IV: Ineffectiveness and prejudice during the penalty phase.

On pages 37-46 of its Answer Brief, the state attempts to put a happy face on what the record reveals as trial counsel's unacceptable, marginal performance during the penalty phase of the retrial. Counsel's effort was chillingly similar to that found constitutionally insufficient in King v. Strickland, 714 So. 2d 1481 (11th Cir. 1983). As in King, trial counsel presented no mental health mitigation evidence whatsoever, and instead merely called two lay witnesses to briefly testify that Henry was a nice person. Also as in King, it appears that even this effort was a last-minute consideration as acknowledged by counsel when he advised the trial court at OR. 748:

> 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.

Trial counsel's failure to present a strong penalty phase case may have been because he had only six to eight weeks to prepare. (EH 91) Furthermore, he had not handled a penalty phase capital case as defense counsel before. (EH 93) This lack of experience may explain why he did not object to the state presenting testimony from Doctors Sprehe, Fessler and Wood during the penalty phase,[10] not

[10] Doctors Sprehe and Fessler testified that Henry did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as provided in Section 921.141(6)(f), Florida Statutes. Dr. Wood testified regarding proof of the HAC aggravator found in Section 921.141(5)(h), Florida Statutes.

because counsel intended to present any expert mental health mitigation of his own, but because he planned to "talk about it." (R. 717) Trial counsel apparently was influenced by the fact that mental health mitigation testimony was presented in Henry's previous trials in Pasco and Hillsborough counties to no avail. (The Answer Brief, p. 41.) Trial counsel overlooked the fact that the second Pasco trial afforded Henry a much better chance of avoiding the death penalty than the first, and than in the Hillsborough case. This Court eliminated the use of the CCP aggravator in Henry's Pasco County retrial.[11] It also severely limited the state's ability to present evidence regarding the facts and circumstances of Eugene Christian's demise. Henry v. State, 574 So. 2d at 74, 75.

The state also contends that counsel did not use expert mental health professionals because he was under the impression that they would do more harm than good. (The Answer Brief, p. 41.) For example, according to the state, counsel understood that one of Henry's doctors (Afield) had indicated that he was very "dangerous." (The Answer Brief, p. 41; EH 83.) This statement is taken out of context and does not accurately reflect what Dr. Afield testified to during the first trial. This psychiatrist indicated among many other things that Henry was paranoid and people who are paranoid are dangerous. (T. 115) More to the point, Dr. Afield's diagnosis was "1. chronic paranoia 2. drug and alcohol abuse – severe." (Defense Ex. 5, p. 2.) He determined that Henry was legally insane and seriously

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[11] See the state's Answer Brief, Appendix, pp. 1410, 1411 where the CCP aggravator was improperly applied during Henry's first trial.

mentally ill at the time he killed Suzanne. ("I think we have a combination of impairment here of organicity, psychosis and drugs, which caused a severe decomposition with this man. I do not believe he knew right from wrong at the time of the incident.") Id. Dr. Afield found that Henry ". . . had a problem with drug and alcohol abuse that was rather severe and he also was suffering from chronic paranoia." (T. 101) As noted above, Dr. Afield testified that "I think Mr. Henry was psychotic in response to his underlying chronic paranoia, also, was essentially twice out of it as a result of the free basing cocaine and drinking. I think this took the lid off if it for him." (T. 104) Dr. Afield also testified to the existence of two statutory mitigating factors, to wit: At the time of the homicide, Henry was under the influence of severe mental or emotional disturbance (T. 105) and the defendant's ability to conform his conduct to the requirements of law was seriously impaired (T. 106).

Defense counsel was also wrong about the valuable assistance that Dr. Berland could have added to the defense effort to establish statutory and non-statutory mitigating circumstances. Dr. Berland did extensive testing (for example, see Defense Ex. 7) regarding Henry's mental state at the time of the homicides. He noted " . . . major thought disorder or psychotic thinking . . ." (T. 47) He found that Henry had " . . . a lot of bizarre, disturbed ideas in his head . . ." (T. 49) He pointed out that misuse of alcohol and drugs made symptoms of psychosis much

more severe. (T. 55) He added that drug usage had an effect on many people with emotional problems that lasted for weeks, not days.[12] (T. 55, 56) He felt that at the time of the Eugene Christian homicide[13] Henry was substantially impaired in terms of his ability to conform his behavior to the requirements of law and that his mental disorder itself constituted an extreme emotional disturbance made worse by the use of cocaine. (T. 57-59) On cross examination in the first Pasco trial, Dr. Berland stood firm that Henry was psychotic when he killed Suzanne. (T. 65, 76) It is important to note that Dr. Berland's assessment of Henry's mental illness was made assuming that Henry was not necessarily on drugs at the time of the homicides. (T. 89) Dr. Berland's trial testimony was consistent with the findings in his mental health report of January 15, 1987 (Defense Ex. 6) produced after extensive testing including an MMPI[14] profile, the WAIS test and IQ studies. Id., p. 2. The results indicated the long term presence of "psychotic paranoid thinking and bizarre perceptual experiences . . ." which Dr. Berland felt were "genuine." Id. While organic brain damage might have been the cause, Dr. Berland felt that Henry's mental problems " . . . more likely suggested a genetically determined disorder." Id. He concluded by stating

[12] At trial and in its Answer Brief, the state relies heavily on the testimony of Doctors Sprehe and Fessler who stated that the effects of Henry's use of cocaine would have worn off by the time he killed Suzanne. (The Answer Brief, pp. 34, 35.) This testimony could have been refuted by Dr. Berland (T. 89), but defense counsel did not call his as a witness.

[13] The state has not sought to diminish the relevance of the information of mental health mitigation in the possession of Doctor Berland because his report was geared more to the Eugene Christian homicide than to Suzanne's. To do so would only emphasize the fact that trial counsel never made any attempt to have Henry examined by any mental health professional for any reason whatsoever.

[14] See Defense Ex. 7, 8.

that "I would therefore recommend that this defendant be found insane at the time of this (Eugene Christian) offense." Id., p. 7.

Failure of defense counsel to call Doctors Afield and Berland -- and then to stand by helplessly as the state used Doctors Fessler, Sprehe and Wood to its advantage– was lawyer ineffectiveness that Henry paid for dearly.

Henry cited the cases of Ragsdale v. State, 720 So. 2d 203 (Fla. 1998) and Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) as authority for this Court to reverse the trial court's denial of his 3.850 motion because the facts and circumstances are quite similar. Surprisingly, the state argues that the facts in Henry's case are "more like Van Poyck v. State, 694 So. 2d 686 (Fla. 1997)." (The Answer Brief, p. 42.) The state is mistaken. Van Poyck sought post conviction relief regarding the penalty phase of his murder trial claiming that his counsel should have presented "mental-health evidence." Van Poyck, 694 So. 2d at 689. Defense counsel testified in this regard that his search for mental health mitigation revealed little until he learned that Van Poyck had at one point in time been sent to the state mental institution at Chatahoochee after he was found supposedly eating a light bulb. Counsel questioned Van Poyck about it and was advised by the client that Van Poyck had "faked some of the brief mental illness. He faked the light bulb incident and we had a good laugh over that." He added that he did so "to get out of the prison population and go to Chatahoochee." Van Poyck, 694 So. 2d at 690,

691. Counsel's investigation revealed that Van Poyck had actually visited the prison library and read books on schizophrenia and mental illness. He then put something in his mouth that made it appear that he was chewing on a light bulb. Counsel noted in this regard that Van Poyck "had pulled a little sleight of hand on them." Van Poyck, 694 So. 2d at 691. The record shows that even though the light bulb caper was the only incident counsel could find indicating that Van Poyck had mental problems, he pressed on. He gave up only after a doctor who had examined the client told[15] him that Van Poyck was a sociopath and asked that he not be called to testify on his behalf. Van Poyck, 694 So. 2d at 692.

In its Answer Brief, the state chooses to essentially ignore the unrefuted evidentiary hearing testimony of Dr. Bill Mosman as set forth on pages 17-40 of the Answer Brief as well as the mental health records utilized by Dr. Mosman in the course of preparing his report that was introduced in evidence as Defense Ex. 1. Dr. Mosman, a psychologist and lawyer, went to great lengths to demonstrate the wealth of powerful evidence of statutory and non-statutory mental health mitigation available to defense counsel within the context of Section 921.141(6), Florida Statutes, which was not used to prevent Henry from being sentenced to

[15] Dr. Mosman contacted Dr. Berland to discuss the Henry case with him. (Defense Ex. 1, p. 21.) Dr. Berland told him that defense counsel did not contact him personally. Nor did Henry's counsel communicate with any of the mental health experts in writing. (EH 93, 94.) This is another reason the Van Poyck case is not applicable to the case at bar.

death. The persuasiveness of this exculpatory data is described in pages 17-39, 42-45 and 57-74 of Henry's Initial Brief. Again, it would serve no purpose to repeat it here. Suffice it to capsulate his main points:

1. Henry grew up in a family where violence and child abuse were virtually a way of life, resulting in a mental health history of attempted suicide, severe depression and hospitalization for a variety of emotional illnesses. See for example EH 25- 27, Defense Ex. 1, pp. 7-9, 13, Defense Ex. 3, 10. Trial counsel presented none of the data reflecting Henry's hospitalizations to the jury.

2. Henry suffered from a life-long history (beginning in early childhhod) of severe drug dependency including chronic abuse of alcohol, marijuana and cocaine. (Defense Ex. 1, pp. 11, 12, 29.) Defense counsel neglected to present the jury with evidence of this fact.

3. Henry had been involuntarily hospitalized under the Barker Act twice, and his medical records revealed head trauma and other indicators of organic brain injury. (Defense Ex. 1, pp. 8, 9, 13.) None of this information was brought to the jury's attention by trial counsel.

4. Doctors Afield and Berland were of the opinion that Henry was psychotic at the time of the homicide, and that this psychosis was exacerbated by drug abuse. Yet defense counsel did not advise the jury of these experts' findings. (EH 105-107)

5. Defense counsel's investigation regarding the mental health experts who had information regarding Henry's mental state in general and statutory mitigation in the context of Section 921.141(6), Florida Statutes in particular was marginal at best. See the evidentiary hearing testimony of defense counsel at EH 93-6 and the Initial Brief, pp. 33-4. Among other things, Dr. Afield conducted only a "sanity evaluation" (Defense Ex. 5) and Dr. Berland noted "(t)his report summarizes only the results of the insanity evaluation." (Defense Ex. 6, p. 7) Counsel was asked in this regard: "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 do more work on the statutory and non-statutory mitigating factors, or the possibility of that?' Do you remember doing that?" Counsel acknowledged: "No I did not do that." (EH 95-6)

6. No statutory mitigating factor was established by counsel during the retrial. Yet, according to Dr. Mosman, three factors could have been proven. They included (1) the fact that the homicide was committed while Henry was under the influence of extreme mental or emotional disturbance (Defense Ex. 1, p. 21, Sec. 921.141[6][b], Fla. Stat.), (2) Henry's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired (Id., Sec. 921.141[6][f], Fla. Stat.) and (3) his mental age at the time of the crime was about 14 years (Id. at 14, 21, Sec. 921.141[6][g] Fla. Stat.). Had defense counsel

established these three statutory mitigators, they would have outnumbered the two statutory aggravating circumstances[16] that the trial court determined the state had proven beyond a reasonable doubt at the retrial. (OR. 958-968) This would have afforded Henry an excellent opportunity for a life sentence as opposed to the death penalty.

7. Defense counsel's failure to present mental health mitigating evidence had a tremendous impact on the state's most powerful basis for demanding the death penalty – the brutality of the crime as reflected in the application of the HAC aggravator. Sec. 921.141(5)(h), Fla. Stat. Counsel offered absolutely nothing in the way of evidence to explain and refute the violent way Suzanne died. How could he possibly expect the jury and trial court not to find that the aggravator had been established? Clearly, if defense counsel had presented all of the mental health mitigation referenced above and in the Initial Brief, the HAC aggravator would have been seriously compromised and more than likely rejected.

Issue V. The Ring issue.

Henry will rely upon the argument set forth on pages 74-76 of the Intial Brief of Appellant regarding this issue.

CONCLUSION

[16] Henry had been convicted of a prior violent felony and the HAC aggravator.

Under no circumstances does Henry question the good intentions of his trial counsel. This is very difficult work. But the progress made over the past 25 years in Florida to make sure that persons facing the death penalty receive effective assistance of counsel is not reflected in counsel's performance in this case. Therefore, the Court is requested to reverse the Order of the trial court that denied Henry's 3.850 motion, remand the cause to the trial court with instructions to vacate Henry's judgment and death sentence, and afford Henry new guilt/innocence and penalty phase trials.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply brief of appellant has been furnished to Hon. Candance M. Sabella, Senior Assistant Attorney General, the Office of the Attorney General of Florida, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366, this 17th day of March, 2003, by United States mail delivery.

CERTIFICATE OF COMPLIANCE

This Reply Brief of Appellant was prepared using a 14 point Times New Roman font not proportionally spaced in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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But in the very next sentence the state acknowledges that (t)his Court in Gurganus

> held that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent." (The Answer Brief, p. 32.)