IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

vs.

CASE NO. SC04-153
Lower Tribunal No. 85-14273

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Chief of Capital Appeals
Florida Bar No. 0445071
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Issues

Although Henry has divided his ineffective assistance of

counsel claim into two issues: 1) ineffective assistance and 2) prejudice, undersigned counsel has addressed both issues as one as the law is clear that to establish a claim of ineffective assistance of counsel, a defendant must establish *both* deficient performance and prejudice. Accordingly, the state has addressed both prongs in responding to the general claim of ineffective assistance of counsel.

Citations to the record

The appellate record from Henry's first trial, Florida Supreme Court Case No. 70,554, will be designated as "TR" (for trial record on appeal) followed by the appropriate volume and page number (TR #/#). The appellate record from the 1991 retrial, Florida Supreme Court Case No. 80,941, will be designated as the letters "RTR" (for retrial record on appeal) and "RTT" (for the retrial transcripts) followed by the appropriate volume and page number. References to the instant record will be designated as the letter "PCR" (for postconviction record on appeal) followed by the appropriate volume and page number (PCR #/#).

STATEMENT OF THE CASE

The Grand Jury for the Thirteenth Judicial Circuit indicted appellant, John Ruthell Henry, on January 15, 1986 for the first-degree murder of his stepson, Eugene Christian. Appellant was convicted and sentenced to death. (PCR 1/29-33) This Court overturned his conviction and remanded the case for a new trial. See Henry v. State, 574 So. 2d 66 (Fla. 1991).[1]

On August 24-31, 1992, a new trial was held before the Honorable Susan Bucklew, Circuit Judge. (RTT 4-11/1-1162) The jury again found appellant guilty as charged. (RTT 11/1162)

After penalty phase proceedings, the jury returned a recommendation of death by a vote of eleven to one and Judge Bucklew re-imposed the death penalty, finding the following in aggravation: (1) Prior violent felony;[2] and (2) during the course of a kidnapping. The court gave some weight to the following statutory mitigating factors: (1) the murder was committed while Henry was under the influence of extreme mental or emotional disturbance; and (2) Henry's capacity to appreciate the criminality of his conduct or conform to the

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[1] Henry was also tried and convicted in Pasco County for the first-degree murder of Christian's mother, Suzanne Henry. Henry v. State, 649 So. 2d 1366 (Fla. 1994).

[2] Henry had previously been convicted of second-degree murder for the stabbing death of his first wife, Patty Roddy and had been convicted of first-degree murder for the stabbing death of his second wife, Suzanne Henry.

requirements of law was substantially impaired.

The court also gave some weight to the following non-statutory mitigating factors: (1) Henry pled guilty and turned himself in for the murder of his first wife; (2) Henry was cooperative with law enforcement; (3) Henry exhibited good conduct in jail; (4) Henry was good to Christian while he was alive and is truly remorseful for the murder; (5) Henry has a history of drug and alcohol abuse; and (6) Henry fell as a child and suffered some brain injury. The court found that the aggravating factors outweighed the mitigating factors and again sentenced Henry to death. (RTR 3/441-47)

Appellant then sought review in this Court. This Court affirmed the conviction and sentence. Henry v. State, 649 So. 2d 1361 (Fla. 1994). After rehearing was denied, a Petition for Writ of Certiorari was taken to the United States Supreme Court. Certiorari was denied. Henry v. Florida, 516 U.S. 830 (1995).

Postconviction Proceedings

The Office of the Capital Collateral Regional Counsel-Middle filed a shell Motion to Vacate Judgment of Conviction and Sentence on March 28, 1997. (PCR 1/67) After CCRC-Middle filed a motion to withdraw, registry counsel, Baya Harrison was appointed to represent Henry. (PCR 2/396) On September

12, 2002, Henry filed a complete motion to vacate to which the state filed a response. At the case management conference, Judge Beach summarily denied some of the claims and granted an evidentiary hearing regarding the remaining claims. (PCR 5/908-1023; 6/1024-1121)

An evidentiary hearing on the motion commenced on October 17, 2003. Judge Beach issued a written order denying all relief on December 17, 2003. (PCR 7/1263-1291) This appeal follows.

STATEMENT OF FACTS

Trial

This Court's rendition of the facts, as set forth in Henry v. State, 574 So. 2d 66, 67-68 (Fla. 1991) and adopted by this Court in Henry v. State, 649 So. 2d 1361, 1363 n.1 (Fla. 1994), is set forth below in pertinent part:

Suzanne Henry's body was found in her home in the Pasco County town of Zephyrhills, Florida, at 4:20 p.m. on December 23, 1985. She had been stabbed thirteen times in the throat, and her body had been covered with a rug and left near the living room couch. Her son, five-year-old Eugene Christian, was missing.

Within a short period of time, the sheriff's office discovered enough evidence to arrest Henry for his wife's murder. The two chief investigators in the case were Pasco County detectives Fay Wilber and William McNulty. Wilber and McNulty tracked Henry to the Twilight Hotel in Zephyrhills, where he was staying in a room with Rosa Mae Thomas. He was arrested shortly after midnight. Detective Wilber read, Henry his "Miranda rights," [n1] and asked about Eugene Christian. Henry denied knowing his whereabouts.

* * *

. . . Ultimately, Wilber said he was going to have to leave and find Eugene without Henry's help. At this point, Henry said Eugene was in Plant City. Wilber asked if the boy was alive, and Henry said he was not. Henry said he would take police to the site, and he did so. When the body was found, it appeared that the victim had been stabbed five times in the

neck. Once the body was recovered, Henry was taken back to Dade City, where, after again being informed of his Miranda rights, he made a full confession concerning both murders.

Henry related that he had gone to his estranged wife's house before noon on December 22 to discuss what Christmas present to buy Eugene. While he was there they got into an argument over his living with Rosa Thomas. After he refused to leave, she attacked him with a kitchen knife. They "tussled" and after he was cut three times on his left arm, he "freaked out," took the knife away from her, and stabbed her. He then covered her body and went into another room to get Eugene, who had been watching television.

Henry said that he then took Eugene with him and drove to Plant City, in Hillsborough County. They stopped for him to buy the boy a snack and later for him to buy some cocaine, before heading back toward Zephyrhills. When Henry thought he saw flashing lights behind him, he said he turned into an isolated area near a chicken farm because he believed police were after him. When the car got stuck in some mud, Henry and Eugene got out and walked a short distance away. They stopped and Henry smoked his cocaine while holding Eugene on his knee. He then stabbed the boy to death and considered killing

himself, but could not bring himself to do it. He walked around for awhile before dropping the knife in a field. Some nine hours had passed since he killed his wife. He walked back to Zephyrhills, went to Rosa Thomas' house, and changed clothes. The two then went to the motel. Henry said he did not know why he killed Suzanne and Eugene.

> Henry v. State, 574 So. 2d 66, 67-68 (Fla. 1991)(footnote omitted)

In addition to the foregoing, the following evidence was also presented.

John Henry testified that he had been convicted of several felonies and had been in prison twice, where he did not receive psychological treatment. (RTT 8/584-85) At the time of the instant offense, he had pled guilty to cocaine charges and was awaiting sentencing. (RTT 8/586) Henry also testified that he had been convicted and sentenced to death for the murder of Suzanne Henry and admitted stabbing Patricia Roddy to death in 1975 for which he was convicted of second-degree murder. (RTT 8/587-89) He explained that he had two daughters by Patricia Roddy, to whom he was formerly

married, who are now nineteen and twenty. (RTT 8/599) He was 24 years old and under the influence of alcohol when he stabbed Roddy. (RTT 8/591)

Psychiatrist Daniel Sprehe was appointed by the Hillsborough and Pasco County courts to examine John Henry. He interviewed him for over an hour on February 12, 1987, and reviewed other reports. (RTT 8/646-47, 685) Dr. Sprehe testified that John Henry had at one time been "Baker Acted." (RTT 8/654) John Henry told Dr. Sprehe virtually the same story he told Detective Wilber and to which he testified. Dr. Sprehe recalled that Henry thought he saw a man in medieval armor in the woods that night. The doctor considered this an hallucination but admitted that Henry could have seen a deputy or some one and have had a visual distortion. (RTT 8/666) He said Henry knew he was killing Eugene but did not know why he did it. He loved Eugene very much. He cried and regretted it. (RTT 8/650-53)

Dr. Sprehe did not diagnose any psychotic state, but testified that John Henry was in a state of cocaine intoxication at the time of the crime. He concluded that Henry's ability to form specific intent was impaired from cocaine use. (RTT 8/659-

60) Within a reasonable probability, Henry was unable to form the specific intent to commit first-degree murder on the night in question. (RTT 8/686, 690)

Dr. Walter Afield, a specialist in neurology and psychiatry, first examined John Henry in December of 1986. (RTT 8/691) At that time, Henry was quite paranoid and disturbed and he believed people were plotting against him and everyone was out to get him. He was somewhat vague, did not seem very intelligent, and wanted to unite with his dead wife and child. Henry had a longstanding history of mental illness and drug abuse and had been hospitalized for attempted suicide. (RTT 8/696-98)

Dr. Afield testified that Henry had a very serious and severe drug and alcohol addiction, and was deteriorated. His diagnosis was "chronic paranoia and drug and alcohol abuse, severe." He noted that psychotic persons often use drugs such as cocaine to medicate themselves -- to control the voices and hallucinations. Eventually, the drugs make it worse. (RTT 8/699-702)

Dr. Afield testified that Henry's ability to form the specific intent to commit first-degree

murder at the time of the homicide was “seriously compromised, if he even had the ability at all.” He thought Henry was burned out on drugs, craziness and alcohol and could not form the intent at all. (RTT 8/705)

Psychologist Dr. Robert Berland, testified that he spent at least ten hours talking with John Henry, in addition to which he reviewed reports of other experts, talked with witnesses, and administered psychological tests. (RTT 9/784, 789-90) He administered the Minnesota Multiphasic Personality Inventory (“MMPI”) on two occasions; the Wechsler Adult Intelligence Scale (“WAIS”); the Bender-Gestalt, and the Rorschach or “ink blot” test. The Rorschach test showed that Henry was not capable of much conventional thinking. His scoring showed a disturbed thinking process, symptomatic of psychosis. (RTT 9/791, 844-45)

John Henry’s December, 1991, MMPI test showed that he had a chronic mental illness. “Chronic” meant that he was mentally ill so long that he was used to hallucinations and delusions and was no longer feeling a great deal of discomfort from his symptoms. He was still considerably disturbed even

when the inflammatory effect of drugs was gone. Henry scored high for schizophrenia, paranoia and depression. (RTT 9/802-05)

Dr. Berland had administered an earlier MMPI to John Henry in October of 1986, about ten months after his arrest for the instant homicide. (RTT 9/806) At that time, Henry was quite severely disturbed and scored more like someone in a state hospital than someone out on the street. (RTT 9/807) Berland noted that Henry's 1991 MMPI profile, on which his decreased "F" score showed no attempt to fake, confirmed his diagnosis of chronic mental illness. (RTT 9/808, 884-99)

The WAIS test, administered to John Henry in October, 1986, showed that Henry's IQ was 78, indicating borderline intellectual functioning. Henry could not read the MMPI which requires a sixth grade reading level. Dr. Berland had to read it to him. (RTT 9/810-12) Henry's highly variable scores (two full standard deviations) on the WAIS indicated brain damage. (RTT 9/814-15)

Henry's brain damage was corroborated by interviews with others. Henry's sisters told Dr. Berland that his father physically abused their

mother before, during and after her pregnancy with Henry, necessitating medical attention in some cases. (RTT 9/824) His mother suffered from serious sickle cell anemia. (RTT 9/825) Henry had severe asthma from infancy which caused him to have trouble sleeping prior to the age of four or five, raising the possibility of prolonged oxygen deprivation. It was reported that Henry sniffed gasoline for weeks at a time from age five or six, particularly between the ages of nine and thirteen. Dr. Berland testified that gasoline causes oxygen deprivation and is extremely damaging to brain tissue. Henry fell off a trailer and hit his head at age ten and experienced blurred vision for weeks after that, a symptom of brain injury. At age sixteen, he was in an automobile crash. (RTT 9/824-25)

During clinical interviews in 1986 and 1991, Henry reluctantly admitted to auditory, visual and tactile (things felt on the skin) hallucinations. (RTT 9/811-12) In 1986, Henry said he had believed, since he was nineteen years old, that unknown people were talking about him as they walked past him. Also since age nineteen, he had experienced

“impending doom,” unrelated to anything going on around him. This is an early symptom of psychosis. He claimed to hear voices, which increased with his drug use, since his late teens. He had visions, mostly when on drugs, since age 25. He thought his wife was plotting behind his back. (RTT 9/820-21)

The doctor testified that Henry was guarded about what was going on inside his head and that his longstanding psychotic disturbance appeared to be a combination of brain damage and inherited mental illness. (RTT 9/826) His condition would cause disturbances in judgment and distortions in his perception of what was happening to him and what others intended when they did things. (RTT 9/829)

Dr. Berland summarized Henry’s 1986 description of the events leading up to and the stabbings of Suzanne and Eugene. Henry reported feeling frightened when looking at Suzanne that day. He felt that he was in grave danger when he knocked on her door and sensed the presence of an unknown person in the house. He lost control while stabbing her. He reported that she had threatened him with a knife before. (RTT 9/822, 831-33)

Henry found Eugene sitting on his bed watching

TV in the next room. He asked Eugene if he wanted to go with him. He kept Eugene from seeing his mother so he would not ask questions. He intended to take him to his sister-in-law's house because he could not leave him there alone. He took Eugene to Plant City because the boy wanted Church's Fried Chicken. He bought beer on the way. In Plant City, they got chicken and Henry purchased cocaine, drove around smoking cocaine, and bought more three or more times. (RTT 9/834)

Henry told Dr. Berland that when he left Plant City at nearly midnight after spending the last of his money, Eugene went to sleep in the car. On the way to Zephyrhills, Henry saw flashing lights, and was afraid it was the police. He tried to take the back way to Zephyrhills. He was smoking cocaine as he drove. Although he thought the lights were following him, he later realized he was hallucinating. (RTT 9/834-35)

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

saw a man in shining armor. (RTT 9/835) Things got silent and he felt like things were closing in on him; people were crowding around him. He smoked more cocaine. Everything started up again and seemed to get worse the more he smoked; yet, he could not stop because he was addicted. He continued to smoke until he smoked everything he had. He felt people closing in on him. (RTT 9/835)

It occurred to Henry that, with Suzanne dead, he wanted Eugene to stay with her. He thought about killing himself and Eugene so they could both go with her. He did not want to live without them. He did not want to leave Eugene alive if he went to prison and could not be with him. He had never even spanked Eugene and did not want to hurt him. He felt possessed by something.

Dr. Berland testified that Henry claimed to have told Eugene over and over that he loved him and that Henry planned to take his own life before being caught. Although he knew it was wrong, Henry claimed to have stabbed the child without thinking, it "just happened." He felt that rather than be separated from Eugene, he would rather be with him in heaven. He tried to kill himself but felt some

force stopping him. He sat there and held Eugene in his arms. He felt he had made a mistake and asked himself how he could have done something like that. (RTT 9/837)

Dr. Berland thought that Henry, an unsophisticated person, gave a very accurate description of what people go through in an acute psychotic state, including the inflammatory effects of drugs. It was his expert opinion that Henry's state of mind was so contaminated by mental illness that he could not rationally and deliberately form the specific intent to commit first-degree murder. (RTT 9/838-39)

Dr. Mark Montgomery, a biochemical toxicologist, testified in rebuttal that cocaine builds up in the body to an extremely small degree. (RTT 10/952-53) Half of the cocaine is gone in 45 minutes to one hour. Although cocaine remains in the system for four to six hours, the user is under the direct influence of cocaine for only about fifteen to thirty minutes. (RTT 10/957) Dr. Montgomery admitted he knew nothing of the psychologic effects of long-term use of cocaine and that its effect on brain tissue is not yet known. (RTT 10/959-60)

Dr. Fesler, a psychiatrist, testified in rebuttal for the state. (RTT 10/979) He examined John Henry for an hour in October of 1987 pursuant to court orders from Pasco and Hillsborough Counties. He reviewed Detective Wilber's deposition and Drs. Afield and Berland's reports. (RTT 10/982-83) Henry told him about his unhappy and abusive childhood. At age seventeen, Henry had an accident while driving and his brother was killed. His father was shot and killed. (RTT 10/983) He began to drink at age nine or ten and soon was drinking a fifth of liquor a day. He continued that during much of his life. He was once hospitalized for three days for drug abuse but was released when he told them he had no drug problem. (RTT 10/985)

Dr. Fesler diagnosed long-term extensive substance abuse and, possibly, a low grade or "smoldering" schizophrenic illness for which he had never been treated. (RTT 10/994, 1003) He said it was nearly impossible to tell whether Henry was psychotic when not on drugs because of the long-term substance abuse. Henry described occasional hallucinations or delusions while in prison. Cocaine would certainly aggravate an existing

psychosis. (RTT 10/1004-05)

Dr. Fesler found it "most probable" that Henry was capable of forming specific intent when he killed Eugene, although he had some impairment. (RTT 10/996) He based this finding on his "common sense" inability to believe some of the things Henry told him, especially as to his lack of reasoning or intent. He suspected Henry killed Eugene to eliminate a witness, but only because that was a logical motive. (RTT 10/998-99) He admitted that it was possible that Henry was not capable of forming specific intent at that time. (RTT 10/1009)

Penalty Phase

Dr. Joan Wood, Pinellas County medical examiner, testified concerning the autopsy of Patricia Roddy, Henry's first wife. She also identified autopsy photographs showing Roddy's injuries. Roddy's death was caused by a combination of many stab wounds. (RTT 12/1211-25) Dr. Wood described the autopsy she performed on Suzanne Henry in 1985 and photographs showing Suzanne Henry's body, the scene of the crime, and Suzanne Henry's stab wounds. (RTT 12/1226-40)

Gloria Nix, a friend of Patricia Roddy, described Roddy's death in 1975. She saw Henry stabbing Roddy in her car. When she opened the car door, Henry walked away. She stayed with Roddy until the police came but did not know if she was conscious. (RTT 12/1246-50)

Detective Fay Wilber testified for the defense. (RTT 12/1259) He arrested Henry for the 1975 murder of Patricia Roddy in a predominately black area of Zephyrhills where Henry had relatives. When he was cuffing Henry, a number of people began coming out of a nearby house. Henry told Wilber to get out of there before he got hurt. (RTT 12/1260-63)

Dr. Berland diagnosed John Henry as psychotic but said that it is sometimes difficult to differentiate between various psychoses because the symptoms are similar. He found evidence of organic personality syndrome, a psychosis that results from brain damage. (RTT 12/1270) He also found evidence of paranoid schizophrenia, an inherited mental illness. Symptoms of paranoid schizophrenia are hallucinations, delusions, unrealistic beliefs, and certain mood disturbances. Schizophrenia can be controlled with antipsychotic medications, but

cannot be cured. (RTT 12/1271-72)

John Henry's WAIS IQ of 78 placed him in the borderline intelligence range. The tests indicated that his functional IQ might be lower. Henry had a substantial history of alcohol abuse which began at age nine or ten. (RTT 12/1276-78) Two older sisters corroborated a pattern of sniffing gasoline, which may cause oxygen deprivation resulting in brain damage. (RTT 12/1279)

James McKay, John Henry's best friend when he was about fourteen or fifteen years old, testified that when Henry's brother died in a car accident, Henry blamed himself because he turned in front of another car. After that, Henry changed; he clammed up. (RTT 12/1292-93) When he was a teenager, Henry smoked marijuana and was "strong on alcohol," then drugs and pills. (RTT 12/1297)

Ruby Henry was ten years older than her brother, John Henry. When John was born, the family lived in Dothan, Georgia. (RTT 12/1303) There were five boys and three girls in the family. When John was five, his mother went to Florida where she stayed most of the time until her death in 1971. Ruby was primarily responsible for taking care of John. (RTT

12/1305)

When John was about fourteen, he and his brother Lonnie ran away to Zephyrhills. (RTT 12/1308) John did some seasonal work in the fields. He sniffed diesel fuel. (RTT 12/1310) After John married Suzanne, Ruby often babysat for Eugene, sometimes for weekends or weeks at a time. John often took Eugene and other children on outings. He and Eugene got along well. (RTT 12/1311)

Postconviction Evidentiary Hearing

At the 3.851 evidentiary hearing, two witnesses were presented, Dr. Bill E. Mosman and the Honorable William Fuente.

Dr. Mosman testified that he was a neuropsychologist and that for the evidentiary hearing, he reviewed the testimony of Doctors Montgomery, Fesler, Afield, Sprehe and Berland from the second trial. In his opinion the information that was generated was "absolutely incorrect, was not relevant to this particular case." (PCR 7/1143-44) He testified that only one doctor testified in a manner that attempted to connect the actual effects of cocaine to this particular individual.

"All others were hugely globalization types of comments, and that discussion that was provided was technically incorrect in material ways, that there was major pieces of information that were not available and could not have been available during the [guilt phase] because Dr. Berland never discussed it until the sentencing and, therefore, that was never factored in." (PCR 7/1144) He opined that it was a pivotal issue on the voluntary intoxication issue. He asserted that Dr. Berland's failure to test for an intelligence level for the guilt phase defense precluded the jury from evaluating the cocaine evidence in its proper context. Dr. Mosman claimed that Henry was actually functioning in a mentally retarded range with an IQ of 71.[3] He admitted, however, that Dr. Berland's testimony during the trial was that Henry presented a score of 78 on the WAIS. (PCR 7/1144-46)

While conceding that the jury knew that Henry was functioning at a low level, Dr. Mosman claimed at the hearing that the intellectual level of the

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[3] Henry has not raised a claim of mental retardation under Atkins v. Virginia, 536 U.S. 304 (2002). Accordingly, the state objected to this line of questioning as outside the scope of the hearing. (PCR 7/1146)

> defendant was absolutely critical and important and the equivalent of a nine-year, ten-month-old child. Accordingly, he claimed that the question for voluntary intoxication is what would be the effects of cocaine upon -- or any

intoxicant, upon pre-adolescent (PCR 7/1146-48) and that this information was minimally critical to reach the specific intent question. (PCR 7/1153) In his opinion, Dr. Afield was the only one, of all the doctors that testified, that gave diagnoses that actually exist. (PCR 7/1160) Accordingly, he contends the jury was also denied what they needed. (PCR 7/1164)

On cross Dr. Mosman agreed that counsel tried to establish a voluntary intoxication defense, that the defendant did not have the ability to premeditate this crime and have the specific intent to commit kidnapping because of his intoxication state, under cocaine. He also conceded that toward that end, counsel presented experts in psychology and psychiatry who were then viewed as experts by the Court. (PCR 7/1165-66) He also conceded, as an attorney, knowing that Dr. Sprehe, Dr. Afield and Dr. Berland have testified in numerous criminal cases and numerous first-degree murder cases, that it was reasonable for defense counsel to have reached out to these individuals to evaluate Mr. Henry. He acknowledged that

Dr. Afield and Dr. Berland testified to the jury that the defendant did not have the ability to form specific intent because of his cocaine intoxication. (PCR 7/1167) Additionally, he agreed that defense counsel put on lay witnesses to try to establish and to corroborate Mr. Henry's statement that he had used cocaine the day of the murder. (PCR 7/1169)

Dr. Mosman also admitted that he had not spent any clinical time interviewing the defendant. In response to questions from the court, Dr. Mosman stated that the fact that he picks up a knife and that he takes one with him, does suggest an intent to hurt that person. (PCR 7/1184-86)

He qualified this answer by explaining that under domestic situations there are "incredible amounts of emotion and anger and anxiety, depression and everything else." (PCR 7/1190) In relation to Eugene, there were significant emotional issues there with the depression, there were also significant issues because of his mental age and when "you throw the drugs on, you've got a real problem with specific intent." (PCR 7/1194) Finally, Dr. Mosman affirmed his belief that with regard to the two women, Henry had the specific intent to commit murder, but with regard to Eugene, he lacked the specific intent to commit first-degree murder. (PCR 7/1195)

The state then called former defense counsel, the Honorable William Fuente, Circuit Judge in and for the Thirteenth Judicial Circuit. Judge Fuente testified that he represented Henry during his second trial in Hillsborough County. He testified that after passing the bar in 1976 he was a prosecutor for five years, before going into private practice. (PCR 7/1196) He was appointed county judge in 1994 and was appointed circuit judge in 1997. His experience was primarily in the criminal arena. (PCR 7/1197) As a private defense counsel, he handled between 10 and 15 capital cases. He noted that not all of them were death cases, but that many of them started out with the death penalty on the table and then it was removed; in some instances it was negotiated around. Only five of the death penalty cases he had actually went to trial; three of which ended up in a death sentence being imposed. (PCR 7/1198)

With regard to his representation of Henry, Judge Fuente testified that he had a co-counsel and that they worked on both phases together; they were both involved in decision making in the guilt phase and both involved in decision making in the penalty phase. (PCR 7/1200-1201) They had personal meetings with the defendant during the course of the representation. He described Henry as being one of the most cooperative clients he'd ever had charged with this serious an

offense. Henry was extremely cooperative, very receptive to suggestions and very candid. Henry gave his lawyers the names of several potential witnesses. They spoke with all of them over the course of the time that they represented Henry. Henry was able to assist his defense. Judge Fuente had no difficulty communicating with Henry and never perceived that he was incompetent. (PCR 7/1202)

As to their strategy, Judge Fuente testified that from their perspective it was a very difficult case. First of all, he had been convicted once before. Secondly, the underlying facts were that he had confessed to the authorities to the offense, so that

was difficult. (PCR 7/1203) Once the motion to suppress was denied, he believed, based on his experience as a prosecutor and a defense attorney, that the defendant would be convicted of the murder of Eugene Christian; they surmised that a conviction was inevitable. That's why they chose the course of action that they did. The decision they made to let Mr. Henry testify and acknowledge everything, was arrived at fairly late. (PCR 7/1206) At the time, the thinking was that Henry had already been convicted once of this offense, and then again in [Pasco] County of a homicide that occurred previously, and based upon their assessment of the evidence the state had against him, it was highly unlikely that they

were going to achieve an acquittal. So their best hope was to try to achieve a conviction on a lesser on some defense where they could get into his mental history, and the only way that could happen was they would agree with an insanity defense or a voluntary intoxication defense. After much consideration, they chose the latter defense. They excluded considering the insanity defense because of the flip-flopping of one or two of the doctors. (PCR 7/1207) Also, they were not comfortable with the insanity defense, because they thought it would be more realistic and more palatable for a jury of 12 to find him guilty of some lesser offense based on cocaine usage and his mental history. (PCR 7/1207-08) The other concern was that after discussing the options with Mr. Henry, and based on counsel having been in this situation before, they decided that if they approached this case on a pure not guilty basis, then denying the offense, it would have likely culminated in a situation where that jury would not have known about the Pasco County murder, which happened very shortly before and the Roddy murder which happened some ten years before.[4] So they would have been faced with a defendant who a jury just found guilty and then at penalty phase for the first time that jury

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[4] Although counsel testified that the jury would not have known about the Henry murder, the state pointed out on cross that this Court had already found it admissible as inextricably intertwined. (PCR 7/1209)

would have known about two other homicides. They believed that under those circumstances, they would almost certainly recommend death. So their strategy was to lay it all out on the table so that the jury would not be surprised, they would know everything that there was to know. (PCR 7/1208-1209) That was a calculated decision on all of their parts. He did not recall that the Florida Supreme Court had already determined that the facts of the Suzanne Henry murder were inextricably intertwined with the subsequent murder of Eugene Christian. (PCR 7/1209)

Judge Fuente also noted that they had factual evidence to corroborate the use of a voluntary intoxication defense, but noted that unfortunately, most of it was with the declarations of the defendant himself relating to his cocaine usage at or about the time that the homicide of the child occurred. Henry did give them the names of independent witnesses to corroborate that he actually had ingested, snorted, or used cocaine beforehand.[5] (PCR 7/1209-10)

Judge Fuente noted that Drs. Sprehe, Berland and Afield were called by the defense to support the defense theory of voluntary intoxication. (PCR 7/1210) Judge Fuente reiterated that Mr. Henry agreed with the trial strategy of going forward

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[5] Nathan Giles and Sharon Toomer corroborated his use of cocaine earlier in the day at Grant's Pool Hall. (RTT 9/744-771)

with a voluntary intoxication defense and letting the jury know about his other murder(s). He explained that the three of them contemplated the pros and cons before deciding on the strategy. (PCR 7/1225) There never came a point in the trial that Mr. Henry withdrew his consent to going forward with informing the jury of those two murders.

Judge Fuente explained that he was convinced that the jury would not completely acquit Henry, that he was going to be found guilty of either first-degree murder, or second-degree murder if we were successful. The only way they had a prayer of him being convicted of second-degree murder was through the voluntary intoxication defense because it allowed them to get into all the mental health stuff, as evidence of diminished capacity. (PCR 7/1231) Judge Fuente, Henry and co-counsel Wells all felt that it was almost a foregone conclusion that he would be convicted of something and they hoped it would be second-degree murder. The plan to deflate some of the horror that the jury might feel if they were unaware of the two murders and then they found that out during a penalty phase proceeding was a calculated decision by the entire defense team. (PCR 7/1236) Judge Fuente explained that he did not think Henry got convicted of first-degree murder because of the fact that he killed a second woman but because he killed a six-year-old child. (PCR 7/1240)

As far as telling the jury about his death sentence for Suzanne Henry's murder, the thinking was the jury may be lenient on him for this murder knowing he had already been sentenced to death for another case where there was no evidence that he was intoxicated at the time he killed her in contrast to this case where the evidence was that he was intoxicated at the time he committed the second homicide. He and Mr. Wells, an experienced capital litigator, conferred about the case each step of the way. (PCR 7/1241-48)

STANDARD OF REVIEW

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001), citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). "So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter at 923. Accord Bruno v. State, 807 So. 2d 55 (Fla. 2001) (Standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: the appellate court must defer to the trial court's findings on factual issues, but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.)

SUMMARY OF THE ARGUMENT

ISSUES I & II: Appellant claims that the trial court erred in failing to find that Henry's trial counsel was ineffective during the guilt/innocence phase of the trial for, among other things, allowing Henry to admit on direct examination that he murdered his first wife, Patricia Roddy, by stabbing her to death, that he served only 7 ½ years for that offense, and that he had previously been sentenced to death for the murder of Suzanne Henry. It is the state's position that appellant's claim of ineffective assistance of counsel was properly denied after an evidentiary hearing. The record shows that this decision was made after much consideration and consultation with co-counsel and the defendant. Moreover, the facts are on this same evidence and with this same defense at Henry's first trial, the jury found him guilty of first-degree murder. In the face of this insurmountable fact, Henry's argument that counsel's performance was deficient and that he suffered prejudice because the tactic undermined a "very strong voluntary intoxication defense" is sheer sophistry. Given the overwhelming evidence against Henry and the fact that one jury had already found him guilty on these facts, Henry cannot establish that confidence in the outcome of the proceedings is undermined. Relief was properly denied.

ARGUMENT

ISSUES I & II

WHETHER THE TRIAL COURT ERRED IN DENYING HENRY'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL.

Appellant claims that the trial court erred in failing to find that Henry's trial counsel was ineffective during the guilt/innocence phase of the trial for, among other things, allowing Henry to admit on direct examination that he murdered his first wife, Patricia Roddy, by stabbing her to death, that he served only 7 ½ years for that offense, and that he had previously been sentenced to death for the murder of Suzanne Henry. This issue was the subject of the evidentiary hearing below. After reviewing the testimony, evidence and arguments presented at the October 17, 2003 evidentiary hearing, the court file, and the record, Judge Beach found that former defense trial counsel, Judge Fuente, made tactical, strategic decisions to have Henry to fully discuss his prior two murder

convictions.[6] Judge Beach further found that this decision had already been decided prior to trial, in a joint decision by Judge Fuente, experienced co-counsel Dwight Wells and John Henry. In the order denying relief, the court set forth Judge Fuente's extensive explanation for pursuing the strategy that they did:

Well, the decision to proceed the way we did, and that is let Mr. Henry testify and acknowledging everything, was arrived at fairly late in the game, I mean, it was within a couple of months of the trial commencing. And my recollection of this we had a -- we had a meeting, Mr. Henry, Mr. Wells and myself, I don't recall where that took place, obviously it was at the jail, and just throwing this idea around. At the time, the thinking was he had already been convicted once of this offense, if memory serves me correctly, he had already been convicted once and then again in Dade County of a homicide that occurred previously, and based upon our assessment of the evidence the state had against him, it was highly unlikely that we were going to achieve an acquittal. So our best -- our thought was our best hope was to try to achieve, number 1,

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[6] In the lower court's December 17, 2003 order denying relief after the evidentiary hearing, Judge Beach thoroughly sets out the factual basis for his findings of fact and legal conclusions. (PCR 7/1263-1291)

a conviction on a lesser on some defense where we could get into the -- his mental history, and the only way that could happen was we would agree with an insanity or a voluntary intoxication defense, and we chose the latter. We excluded considering the insanity defense because of the, really the flip-flopping of one or two of the doctors. I believe Dr. Sprehe at one point opined that he thought he was insane and then changed it, or vice versa, I forget, but we didn't feel comfortable with the insanity defense, the primary reason was we would be standing in front of a jury, asking that jury to find him not guilty because he was insane and we thought it would be more realistic and more palatable for a jury of 12 to find him guilty of some lesser offense based on cocaine usage and his mental history.

And the other concern was that after discussing with Mr. Henry, my having been in this situation before and Mr. Wells having been in the situation whereby if we approached this case on a pure not guilty, then denying the offense, if you will, it would have likely culminated in a situation where that jury would not have known, likely would not have known about the Dade County murder and about the --

...

I'm sorry, the Pasco County murder, which happened very

shortly before and the Roddy murder which happened some ten years before. So we would have been faced with a client whose jury just found guilty and then at penalty phase for the first time that jury would have known about two other homicides. We were almost certain that would result in a recommendation of death. So our strategy, if you will, was to lay it all out on the table so that the jury would not be surprised, they would know everything that there was to know and, again, that was a calculated decision on all of our parts. And obviously in retrospect, it didn't work, but that was our decision.

(PCR 7/1267-68)

The court further noted that when asked on cross-examination what potential benefit there was to telling the jury about the Roddy homicide in the guilt phase, Judge Fuente gave the following response:

The potential benefit, as we perceived it, was simply to let the jury know everything there was to know upfront, be completely candid, and if they returned a verdict of first degree murder, there would be no surprise, nothing more for them to consider, nothing more aggravating, if you will.

Based on this evidence, the lower court concluded that Henry failed to meet the second prong of Strickland, and that it was unnecessary to address the performance component. It is the state's position that, for the following reasons, the lower court properly denied the ineffective assistance of counsel claim with regard to the strategy to have Henry testify during the guilt phase. Moreover, although the court did not reach the deficiency question, as the following will show, counsel's performance was within the wide range of acceptable reasonable professional assistance.

The Test for Claims of Ineffective Assistance of Counsel

Recently, this Court in Howell v. State, 877 So. 2d 697, 702 (Fla. 2004), set forth the test for claims of ineffective assistance of counsel, as follows:

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right to assistance of counsel. A defendant seeking to establish a denial of this right because of counsel's ineffectiveness must

make a two-pronged showing of deficient performance by counsel and resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See id. The two prongs are related, in that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. (quoting Strickland, 466 U.S. at 686) (alteration in original).

Howell v. State, 877 So. 2d at 702.

This Court has further held that:

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

norms and that the challenged action was not sound strategy." Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) (quoting Strickland, 466 U.S. at 688-89). This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. See Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). Moreover, "to establish prejudice [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1511-12, 146 L. Ed. 2d 389 (2000) (quoting Strickland, 466 U.S. at 694); see Rutherford, 727 So. 2d at 220.1.

Valle v. State, 778 So. 2d 960, 965-966 (Fla. 2001)

> Moreover, this Court has explicitly recognized that "'[t]here is no reason for a court deciding an effective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.' Strickland, 466 U.S. at 697, 104 S. Ct. 2052. '[A] court need not

> determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial.' Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1989)." Schwab v. State, 814 So. 2d 402, 408-409 (Fla. 2002). Notwithstanding, the foregoing, the state maintains that Henry has failed to carry his burden of establishing both deficient performance and prejudice.
>
> Strickland counsels that a review of counsel's performance should not be made in hindsight. Accordingly, it is necessary to view the case in the context that faced defense counsel *at the time of Henry's retrial*. This Court explained the factual and legal posture upon the affirmance of Henry's Hillsborough conviction:

Henry was convicted of the first-degree murders of Eugene Christian and Suzanne Henry in separate trials and received a sentence of death for each murder. This Court subsequently reversed both convictions and sentences. Henry v. State, 574 So. 2d 66 (Fla. 1991); Henry v. State, 574 So. 2d 73 (Fla. 1991). Regarding the murder of Eugene Christian, a majority of the Court held that considering the totality of the circumstances, continued questioning of Henry after he made the statement to one of the detectives that he was "saying

nothing" to him did not violate the principles of Miranda. [n2] A majority of the Court also held that the trial court did not err in striking Henry's insanity defense and rejected Henry's other guilt-phase claims. [n3] **However, because a majority of the justices believed that reversible error was committed, albeit for different reasons, the judgment and sentence were reversed and the case was remanded for a new trial**.

> Henry v. State, 649 So. 2d 1361, 1363 (Fla. 1994)(emphasis added)(footnotes omitted)

> Because no majority of the justices agreed on the same error as reversible, new trial counsel was faced with the same evidence being introduced at Henry's retrial that resulted in his conviction the first time. Specifically, with regard to the admission of evidence concerning the murder of Suzanne Henry, this Court stated:

Henry further asserts that the trial court erred by allowing mention of Henry's conviction for the murder of Suzanne Henry and by admitting evidence relating to her murder. After a careful review of the record, we reject Henry's claim. As we pointed out in our opinion in the initial appeal, the State was faced with proving that Henry premeditated the murder of Christian and that Christian was kidnapped rather than taken lawfully. Henry, 574 So. 2d at 70. Given this burden of proof, evidence from the Suzanne Henry murder was necessarily admitted to adequately describe the events leading up to Christian's death. Further, the facts of Suzanne Henry's murder were so inextricably intertwined with Christian's murder that to separate them would have resulted in disjointed testimony that would have led to confusion. Griffin v. State, 639 So. 2d 966 (Fla. 1994); Erickson v. State, 565 So. 2d 328, 333 (Fla. 4th DCA 1990), review denied, 576 So. 2d 286 (Fla. 1991). **Therefore, because the evidence relating to Suzanne Henry's murder was inseparable crime evidence, we hold that its admission was proper**.

Id. at 1365 (emphasis added)

This Court similarly agreed that the admission of Henry's confession to Eugene's murder was proper

because “the suppression issue was raised in Henry’s prior appeal and denied by a majority of th[e] Court. Therefore, the ‘law of the case’ doctrine applies.” Id. at 1364.

Thus, with the full knowledge that based on this same evidence, the prior jury had convicted Henry of first-degree murder, defense counsel stated that they did not believe that Henry would be acquitted, that the best they could hope for was to get a second-degree murder conviction. The main focus though was to save Henry’s life. Although postconviction counsel suggests that defense counsel was resigned to the “inevitability of a first-degree murder verdict” and, thus failed to represent his client zealously, the record simply does not bear this out. (Initial Brief at pages 41-42)

To the contrary, counsel testified that he, his co-counsel Dwight Wells, an experienced capital litigator, and John Henry throughly discussed the pros and cons of being completely candid with the jury in the hopes that they would either return a second-degree verdict or a life recommendation. Defense counsel’s strategic choices do not constitute deficient conduct if alternative courses

of action have been considered and rejected. Valle 778 So. 2d at 966-967; Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). Moreover, "if the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel." Gamble v. State, 877 So. 2d 706, 714 (Fla. 2004), citing Nixon v. Singletary, 758 So. 2d 618, 623 (Fla. 2000). The lower court made a specific factual finding that "Judge Fuente made a tactical, strategic decision, with the joint consent of both co-counsel Mr. Wells and Defendant, to disclose the Roddy murder to the jury during the guilt phase." (PCR 7/1270)

Henry challenges that although this may have been a tactical decision, it was not a reasonable one. (Initial Brief at page 29) However, it is well recognized strategy to admit otherwise unfavorable facts in the attempt to establish credibility with the jury. Yarborough v. Gentry, 540 U.S. 1, 9-10 (2003); Chandler v. State, 848 So. 2d 1031, 1041-1043 (Fla. 2003); Gilliam v. State, 817 So. 2d 768 (Fla. 2002); Atwater v. State, 788 So. 2d 223, 230 (Fla. 2001); Faraga v. State, 514 So. 2d 295, 308 (Miss. 1987).

The holding in Yarborough v. Gentry, supra, is especially instructive. Upon rejecting a charge that counsel was ineffective for admitting his client's shortcomings during closing argument, the United States Supreme Court explained:

By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument § 204, p 10 (1992-1996) ("[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate"). As Judge Kleinfeld pointed out in dissenting from denial of rehearing en banc, the court's criticism applies just as well to Clarence Darrow's closing argument in the Leopold and Loeb case: "'I do not know how much salvage there is in these two boys . . . . [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind.'" 320 F.3d, at 895 (quoting Famous American Jury Speeches 1086 (Hicks ed. 1925) (reprint 1990)).

Id. at 9-10.

Indeed, this Court has also said:

Sometimes concession of guilt to some of the prosecutor's claims is good trial strategy and within defense counsel's discretion in order to gain credibility and acceptance of the jury.

When faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime, such as a deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position.

Atwater v. State, 788 So. 2d 223, 230 (Fla. 2001)(quoting McNeal v. State, 409 So. 2d 528, 529 (Fla. 5th DCA 1982))

Similarly, in Faraga, supra, the Court found no ineffectiveness where counsel's strategy focused on making admissions during the guilt phase in an

attempt to maintain credibility in the sentencing phase. The court explained:

It should also be borne in mind that the candor by Taylor at the guilt phase could have helped Faraga in the sentencing phase. An attorney who, while sincerely trying to help his client, at the same time is open and honest with the jury is more likely to receive a sympathetic and open ear in his other arguments.

Id. at 308 (emphasis supplied)

Analogous strategies have been employed and approved in a number of Florida's death penalty cases. For example, in Chandler supra, this Court rejected Chandler's claim that counsel was ineffective during his guilt phase by conceding that the state could prove a collateral rape. This Court had already held in the direct appeal that it was "a classic case of trying to take the wind out of your opponent's sails by preemptively admitting extremely prejudicial evidence and thereby softening the blow." Chandler v. State, 702 So. 2d 186, 195 (Fla. 1997). Upon rejecting the claim of ineffective assistance of counsel, this Court further explained

that "although trial counsel's strategy may seem questionable at first blush, . . .trial counsel gave a well-founded explanation for why he thought his strategy for dealing with the Williams Rule evidence was appropriate." Recognizing that Chandler was going to testify and wanted to testify, trial counsel said that it was critical that Chandler's credibility be preserved, but he testified that in his opinion, pitting Chandler's credibility against the rape victim, Blair's, would have been "suicidal to his chances of winning the murder case." Trial counsel thought the best way to preserve Chandler's credibility was to have him assert his Fifth Amendment rights with regard to questions about the alleged sexual battery, which trial counsel felt would help his credibility relating to the murder. In light of trial counsel's detailed explanation of his strategy and his views of why he did not want the jury to hear Chandler's version of the alleged sexual battery, coupled with the testimony that Chandler gave at the evidentiary hearing, this Court agreed that trial counsel's performance was not ineffective. Thus, this Court concluded that while trial counsel's handling of this issue may have

differed from collateral counsel, trial counsel's strategic decisions under these circumstances do not amount to ineffective assistance of counsel. Chandler v. State, 848 So. 2d 1031, 1041-1043 (Fla. 2003).

Similarly, in Gilliam supra, Gilliam claimed that defense counsel was ineffective in revealing to the jury Gilliam's 1969 conviction for rape in Texas. Counsel raised the issue of the rape in opening statements and Gilliam later testified that his prior rape conviction arose from consensual sex with a fifteen-year-old girl named Vida Lester. During the state's cross-examination, Gilliam denied that he violently raped Lester. Having opened the door to rebuttal evidence, the state was permitted to produce a witness that refuted Gilliam's version of the events. This Court held that counsel made a reasonable strategic decision to reveal the 1969 rape based upon his understanding of the facts surrounding the rape, facts that have now been challenged by the state and that no ineffective assistance of counsel has been established. Id. at 772-774.

Trial counsel's strategic decision in Mann v.

State, 770 So. 2d 1158, 1161-1162 (Fla. 2000), is also analogous to the instant case. Mann's counsel presented evidence that Mann was a pedophile. Mann later asserted that counsel was aware of the stigma attached to pedophilia and that no reasonable attorney would offer pedophilia in mitigation in a case with a child victim and no physical indication of sexual assault. The circuit court found that defense counsel's decision to introduce pedophilia as a mitigator was a tactical and strategic decision based on counsel's testimony that they spent a lot of time discussing whether or not it was a good idea or a bad idea; what were the pros and what were the cons. Even though this evidence was not otherwise admissible, the defense team made the decision to do it. They thought that it was necessary and felt it would be helpful to put in the only mental mitigation available. This Court held that since the record demonstrated that defense counsel considered other ways in which mental mitigation could have been presented and made a tactical decision to present evidence of Mann's pedophilia, and since "strategic decisions do not constitute ineffective assistance if alternative courses of

action have been considered and rejected," defense counsel's decision to introduce evidence of Mann's pedophilia was strategic and not "outside the broad range of reasonably competent performance under prevailing professional standards." Id. at 1161-1162.

Trial counsel, in the instant case, recognized there were pros and cons in adopting the strategy to be completely candid with the jury. Nevertheless, recognizing the fact that a jury had already found Henry guilty on this evidence, the tactic was adopted in the hope that at the very least they could save Henry from getting another death recommendation. That current counsel would not have chosen this tactic does render the decision unreasonable. Chandler supra.

Henry's reliance upon Ridenour v. State, 707 So. 2d 1183 (Fla. 2d DCA 1998); Collins v. State, 855 So. 2d 1160 (Fla. 1st DCA 2003) to support his claim of error and Wright v. State, 446 So. 2d 208 (Fla. 3rd DCA 1984), is misplaced. In Ridenour, counsel was found ineffective for directing his client to admit that he had been convicted of a prior felony even though adjudication had been withheld because

counsel was under the mistaken belief that it still qualified as a prior conviction. Because the evidence of guilt was a close question that hinged on the defendant's credibility regarding the claim of self defense, the district court found that counsel's deficient performance prejudiced the defendant. Similarly, in Wright, where the trial hinged on a close question of self defense, the court found counsel ineffective for mistakenly thinking that evidence of misdemeanors was admissible against the defendant and, therefore, bringing them out to the jury.

In the instant case, however, counsel knew the state could not introduce evidence concerning the murder of Patricia Roddy until the penalty phase.[7] The decision to present the evidence was not hinged upon a misunderstanding of the law as it was in Ridenour. It was with full knowledge of the potential consequences that the defense team, including Henry, made the decision to be completely candid with the jury concerning his past record. As this Court made clear in Mann, Chandler, and

[7] As previously noted, this Court had already ruled that the evidence concerning Suzanne Henry's murder at the hands of John Henry was admissible.

Gilliam, strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected. Moreover, as this is a well recognized tactic, it cannot be said that counsel's performance was deficient. Compare, Mann, Chandler, and Gilliam.

Moreover, as the lower court found, Henry has simply failed to establish prejudice. To establish prejudice under the test set forth in Strickland, Henry "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Although he argues that defense counsel admitted that the introduction of the evidence prejudiced the defendant, the "prejudice" that counsel was referring to clearly does not rise to the level necessary to establish prejudice under Strickland.

Further, although postconviction counsel urges that there was a very strong voluntary intoxication defense which may have gotten Henry convicted of second-degree murder if the jury had not known that he had committed another murder, the fact is the jury did know he was convicted of another murder

because the state had already introduced evidence that just prior to killing young Eugene, John Henry had stabbed Eugene's mother to death. (RTT 6/401-03, 7/434-36, 451, 459, 565-66) Moreover, the facts are that on this same evidence,[8] and presenting this same defense, a prior jury had rejected the voluntary intoxication/mental impairment defense[9] and found Henry guilty of first-degree murder. (TR 7/1177) In fact, the same doctors who testified at the retrial in support of the voluntary intoxication defense, also testified at the first trial to the identical conclusions. (TR 5/703-733, 746-784, 6/849-943) In light of the foregoing, Henry's argument that his voluntary intoxication defense was so strong that there was a strong likelihood of success is unavailing. Thus, unlike the close case in Ridenour, given the overwhelming evidence of Henry's guilt for the first-degree murder of Eugene Christian, Henry has not met his burden to establish

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[8] The facts were so identical, that this Court relied upon its prior recitation of the facts upon affirming Henry's second conviction. See Henry v. State, 574 So. 2d 66, 67-68 (Fla. 1991) as adopted by this Court in Henry v. State, 649 So. 2d 1361, 1363 n.1 (Fla. 1994).

[9] At the first trial, defense counsel Stone argued that a combination of cocaine intoxication and mental deficits precluded Henry from forming the requisite specific intent. (TR 7/1079, 1088-94, 1110).

prejudice.

Similarly, in Collins, supra, the district court reversed a summary denial and remanded for an evidentiary hearing where, despite the fact that no one could identify the defendant, defense counsel asked a detective on cross-examination if he thought the defendant was the person in the video from the surveillance camera shots of the robbery at issue. The Court did not find it to be ineffective assistance but rather remanded for evidentiary development. Specifically, the court stated:

Taking appellant's allegations as true, we cannot simply assume a reasonable set of circumstances under which a defense attorney would ask a police detective whether the person shown committing a crime on a surveillance tape was the defendant, when such testimony was not elicited by the State and neither of the victims was able to identify the defendant as the perpetrator. The trial court was similarly unable to articulate such circumstances. Perhaps trial counsel believed that the detective would answer that he could not identify Collins as the man shown on the tape. Nothing in the record attachments, however, supports a conclusion that such belief arose from discovery or actual knowledge of counsel. Moreover, we cannot ascertain that counsel impeached the detective upon

receiving an unexpected answer. Because the trial court did not attach a transcript of the cross-examination of the detective, we cannot determine whether counsel's question, in context, fell within the objective standard of reasonableness.

* * *

Additionally, the sum of the record attachments will not support the trial court's finding that evidence regarding identity was "overwhelming" and, therefore, appellant was not prejudiced. The trial court pointed to the detective's testimony on direct examination to support its finding of no prejudice. The detective said he had viewed the video and the gunman was a male. He further testified that the owner of a car linked to the robbery saw the video and after that viewing, the detective obtained a warrant for appellant's arrest. This testimony, we conclude, falls short of overwhelming evidence of identity. Whatever inference the jury could have drawn from that testimony was surely bolstered by the positive identification preferred during the defense cross-examination. The trial court's record attachments are insufficient to negate any reasonable probability of a different outcome. See Strickland, 466 U.S. at 694; Cherry, 781 So. 2d at 1048.

Collins v. State, 855 So. 2d 1160 (Fla. 1st DCA

2003)

Conversely, in the instant case, the record not only shows the basis of counsel's reasoning with regard to taking the course that he did, but, as previously stated, the record also refutes any claim that there exists reasonable probability that, but for counsel's "unprofessional" errors, the result of the proceeding would have been different.

Henry also argues that counsel was ineffective for letting Henry tell the jury about the sentence he served for the Roddy murder and the death sentence imposed for the murder of Suzanne Henry. Judge Fuente explained that the plan was to be up-front and completely candid, then if they returned a verdict of first-degree murder, there would be no surprise, nothing more aggravating for them to consider.

The lower court also rejected this claim of error, stating:

When asked why he would want the jury to know that Defendant only served half the sentence, and how he thought it would help Defendant with the jury, Judge Fuente testified as follows:

Well, my answer to that question now is it wouldn't serve any purpose at all. I can't tell you why I did that, other than just in the interest of being completely candid. I know that he got out of prison a certain time and committed these new offenses within a matter of a year or two thereafter.

(See October 17, 2003 Transcript, page 119, attached).

After reviewing this portion of claim IB, the testimony, evidence and arguments presented at the October 17, 2003 evidentiary hearing, the court file, and the record, the Court finds that Judge Fuente made a tactical, strategic decision to elicit testimony from Defendant that he had only served half of the fifteen year prison sentence in an effort to be candid with the jury and gain credibility with the jury. The Court further finds that even if this Court finds that Judge Fuente's tactical decision to disclose to the jury the fact that Defendant only served half of his fifteen year prison sentence exhibited bad judgment, Defendant is not entitled to post conviction relief.

(PCR 7/1281)

Similarly, with regard to admitting that he had already received one death sentence, the lower court rejected the claim explaining:

With respect to the testimony elicited regarding the fact that Defendant already received a death sentence for killing Suzanne Henry, at the October 17, 2003 evidentiary hearing, the following transpired on cross-examination:

HARRISON: Now, let me ask you this, sir. You also brought out to the jury in the guilt phase that he had been -- I don't question the fact of the Suzanne Henry homicide, I know the Court has ruled that this was inextricably related to the Eugene Christian homicide, that is the fact of the case, but why in the world did you have to tell the jury, to bring it out through Mr. Henry, that he had already been sentenced to death for killing Suzanne?

FUENTE: Well, the thinking there was that would hopefully help them to accept the involuntary intoxication defense since they would have known that he had already been sentenced to death for another case.

HARRISON: Telling the jury that he had been sentenced to death for killing Suzanne would strengthen your voluntary intoxication defense?

FUENTE: It would -- it would hopefully persuade this jury to not sentence him to death for this homicide because of this defense in this case.

HARRISON: Well, how are those two situations related, that is, how is the fact that he had been sentenced to death for Suzanne's murder, how would that enhance your voluntary intoxication defense?

FUENTE: Hopefully, this jury would not be as disposed or as inclined to recommend death had -- if they already knew he had been sentenced to death for homicide where there was no evidence that he was intoxicated at the time he killed her. The evidence was that he was intoxicated at the time he committed the second homicide.

(See October 17, 2003 Transcript, pages 113 - 115, attached).

After reviewing this portion of claim I, the testimony, evidence and arguments presented at the October 17, 2003 evidentiary hearing, the court file, and the record, the Court finds that Judge Fuente made a tactical, strategic decision to elicit testimony from Defendant that he had already received a death sentence for the murder of Suzanne Henry in an attempt to get the jury to accept the voluntary intoxication defense presented in this case. The Court further finds that even if this Court finds that Judge Fuente's tactical decision to disclose to the jury the fact that Defendant had already received a death sentence for the murder of Suzanne Henry exhibited bad judgment, Defendant is not entitled to post conviction relief.

(PCR 7/1289-90)

Again, as the lower court found these to be tactical strategic decisions, Henry is not entitled to relief. Henry is entitled to a fair trial and not a perfect one. Hall v. State, 420 So. 2d 872, 874 (Fla. 1982)("Almost any attorney, including the one who conducted the trial, can look at a prior trial and point to things which could have been done differently; hindsight makes all of us better advocates. A defendant is assured of a fair trial, not a perfect one.") Given the overwhelming evidence against Henry and the fact that one jury had already found him guilty on these facts, Henry cannot establish that confidence in the outcome of the proceedings is undermined. Relief was properly denied.

CONCLUSION

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

Respectfully submitted,

CHARLES J. CRIST, JR.

ATTORNEY GENERAL

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CANDANCE M. SABELLA

Assistant Attorney General

Chief of Capital Appeals

Florida Bar No. 0445071

Concourse Center 4

3507 East Frontage Road, Suite 200

Tampa, Florida 33607-7013

Telephone: (813) 287-7910

Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Baya Harrison, Esq., 738 Silver Lake Road, Post Office Drawer 1219, Monticello, Florida 32345-1219 and Sharon Vollrath, Assistant State Attorney, 700 East Twiggs Street, 6th Floor, Tampa, Florida 33602, this _____ day of November, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

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COUNSEL FOR APPELLEE