## STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case:

This is a direct appeal of a final order rendered by the Hon. Robert E. Beach, Senior Circuit Judge, on December 17, 2003 (Vol. VII, R. 1263-1337, Vol. VIII, R. 1338-1496) denying Henry's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief in a capital case.

B. Jurisdiction:

This Court has jurisdiction to review the lower court order denying Henry's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief per the provisions of Article V, Section 3(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(a)(1)(A)(I), and Florida Rule of Criminal Procedure 3.850(g).

C. Course of the Proceedings:

On January 15, 1986, John R. Henry was indicted by a Hillsborough County, Florida grand jury and charged with the first-degree murder of Eugene Christian, the son of his wife, Suzanne Henry. (Vol. I, R. 29) The homicide occurred on December 22, 1985. Id. On April 11, 1987, John Henry was tried by jury and ultimately found guilty as charged. (Vol. I, R. 30) On April 15, 1987, after a penalty phase proceeding, he was sentenced

by the trial court, Hon. Donald C. Evans, Circuit Judge, to death. (Vol. I, R. 31-33) He appealed.

On January 3, 1991, Henry's judgment and death sentence were reversed and a new trial ordered. *Henry v. State*, 574 So. 2d 66 (Fla. 1991). On that same day, Henry's judgment of guilt and sentence of death for the murder of Eugene Christian's mother, Suzanne Henry, was also reversed by this Court and a new trial ordered.[1] *Henry v. State*, 574 So. 2d 73 (Fla. 1991).

On October 7, 1991, Henry was retried for the death of Suzanne Henry in the Pasco County case. He was found guilty and again sentenced to death. The judgment and sentence were affirmed by this Court. *Henry v. State*, 649 So. 2d 1366 (Fla. 1994). On August 24-31, 1992, Henry was retried for the murder of Eugene Christian. He was found guilty as charged and sentenced to death by Hon. Susan Bucklew, Circuit Judge. Henry appealed and raised five claims: (1) The trial court erred by denying his motion to remove the state attorney and appoint a special prosecutor since an investigator from the public defender's office that represented Henry later went to work for the state attorney's office during the retrial; (2) the trial court erred in not suppressing

[1] John Henry killed Suzanne Henry earlier in the day in Pasco County, Florida, shortly before her son, Eugene, was killed in Hillsborough County. A more detailed explanation of these events is set out below.

Henry's confession that was allegedly tainted by a threat made by the investigating deputy; (3) the trial court erred in permitting testimony about the interrogation of Henry beyond a point in the course of the confession at which Henry indicated that he no longer wished to speak to law enforcement; (4) the trial court erred in not reading back the testimony of Dr. Robert Berland after being asked to do so by the jury during the retrial; and (5) there was prosecutorial misconduct (alleged badgering) in terms of the cross examination of certain of the state's expert witnesses. (Vol. III, R. 475-480) This Court rejected those arguments and affirmed the judgment and death sentence. *Henry v. State*, 649 So. 2d 1361 (Fla. 1994). Henry then sought a writ of certiorari in the Supreme Court of the United States, but that petition was denied. *Henry v. Florida*, 116 S.Ct. 101 (1995).

On March 28, 1997, Capital Collateral Regional Counsel-Middle, filed a shell motion to vacate the judgment and death sentence per the provisions of Florida Rule of Criminal Procedure 3.850. (Vol. I, R. 67) On April 27, 1999, CCRC-Middle filed a first amended motion to vacate judgments of conviction and sentences with special request for leave to amend. (Vol. I, R. 67-148) On September 24, 1999, the Hon. Cynthia Holloway, Circuit Judge, rendered an order summarily denying some of the claims raised by CCRC-Middle and

authorizing an evidentiary hearing regarding others. (Vol. I, R. 149-210, Vol. II, R. 211-386)

On January 30, 2001, CCRC-Middle moved to withdraw. (Vol. II, R. 387-389) On May 10, 2001, that motion was granted by Hon. Robert E. Beach, Senior Circuit Judge. (Vol. II, R. 394) On July 2, 2001, undersigned registry counsel was appointed along with Bjorn Brunvand, Esq., to represent Henry in his post conviction efforts. (Vol. II, R. 396)

On September 12, 2002, Henry filed a complete post conviction motion to vacate his judgment and death sentence. (Vol. III, R. 399-458) The complete post conviction motion contained some of the same claims filed by CCRC-Middle. On March 7, 2003, the state filed an answer to the defendant's complete post conviction motion to vacate judgment and sentence. (Vol. III, R. 461-609; Vol. IV, R. 610-667) On July 11, 2003, after a *Huff*[2] hearing, Judge Beach summarily denied some of the claims raised in the complete 3.850 motion (filed by the undersigned) and granted an evidentiary hearing regarding others. (Vol. V, R. 908-1023; Vol. VI, R. 1024-1121) In the interest of preserving this Court's labor, Henry notes that he is not appealing, except as noted below,[3] the claims that were summarily denied by Judges Holloway and Beach. On the contrary, as will be made

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

3 See footnote 11 below.

clear below, Henry is appealing the denial by Judges Holloway and Beach of certain claims raised both by CCRC-Middle and undersigned registry counsel – claims for which Henry was afforded an evidentiary hearing, with one exception as will be noted.

On October 17, 2003, Judge Beach presided over the evidentiary hearing. (Vol. VII, R. 1128-1262) On December 17, 2003, Judge Beach rendered an "Order Denying Claim IB of Defendant's First Amended Motion to Vacate Judgment of Conviction and Sentences with Special Request for Leave to Amend and Claim I (in part) of Defendant's Complete 3.850 Post Conviction Motion to Vacate Judgment and Death Sentence." (Vol. VII, R. 1263-1337, Vol. VIII, R. 1338-1496)

On January 2, 2004, Henry filed a timely notice of appeal to this Court. (Vol. VIII, R. 1497)

D. Standard of Appellate Review Generally:

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Henry's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief is entitled to plenary, *de novo* review except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support same. *Johnson v. State*, 789 So. 2d 262

(Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). This standard will be referenced again in the argument section of the initial brief.

E. Statement of the Facts:

**The Basic Facts of the Case**

The basic facts regarding the deaths of Suzanne Henry and Eugene Christian are found in this Court's opinion in *Henry v. State*, 574 So. 2d 66-68 (Fla. 1991).

> 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.
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> 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," and asked about Eugene Christian. Henry denied knowing his whereabouts.
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> Henry was taken to the Pasco County Sheriff's office in Dade City for questioning. He was placed in a conference room, the dimensions of which were approximately ten by twenty feet. One wrist was handcuffed to a chair, but he was not otherwise restrained, and he was allowed to smoke cigarettes and drink coffee. Wilber had known Henry for a number of years, so it was decided that he would question him.

While Wilber went to get coffee, however, McNulty attempted to talk to Henry, "to establish rapport." McNulty said he understood Henry had "done some time before," to which Henry replied, "I am not saying nothing to you. Besides, you ain't read me nothing yet." McNulty reminded Henry that Wilber had read him his rights at the motel, and then asked where Eugene Christian was. After a few moments, Wilber came back with coffee, and McNulty left. On several occasions, McNulty reentered the room to observe and participate in the questioning. McNulty never related Henry's statement to Wilber because he took it to mean that Henry simply did not wish to talk to him (McNulty).

Upon reentering with the coffee, Wilber read Henry his Miranda rights, and Henry agreed to talk. Wilber and Henry talked over the course of more than three hours. However, Wilber was out of the room on one occasion for perhaps as much as an hour and a half. Even then Henry did not confess. 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 the 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 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 to buy the boy a

snack and later for him to buy some cocaine, before heading back towards 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 a while 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.

**The Defense Offered by Henry's Counsel During the Guilt/Innocence Phase of the Capital Trial**

During the guilt/innocence phase of the trial, Henry's defense counsel attempted to establish a voluntary intoxication defense. (Vol. VII, R. 1267-1269) That attempt included, among other things, first presenting testimony from several lay witnesses and Henry himself to the effect that Henry had been ingesting cocaine shortly before he killed Eugene Christian. (Vol. VII, R. 1278) Defense counsel then presented testimony of three mental health experts, Doctors Daniel Sprehe, Walter Afield and Robert Berland, essentially to the effect that, due to Henry's ingestion of crack cocaine before the homicide, he was not able to form the specific intent to commit first-degree murder. (Vol. VII, R. 1273-1278)

**The Testimony presented during the 3.850 Evidentiary Hearing**

William Mosman, Ph.D., J.D., is a psychologist licensed by the Florida Department of Professional Regulation as of 1990. (Vol. VII, R. 1133, 1134) He specializes in forensic psychology and works in the area of neuro-psychology and developmental psychology. (Vol. VII, R. 1134) He obtained his undergraduate degree in psychology over a period of about six years and attended various universities in the State of Nebraska before obtaining his Ph.D. in 1972 from the University of Nebraska. During this time he trained and did research at the Veterans Administration Hospital in Salt Lake City, Utah. (Vol. VII, R. 1134-6) He was admitted as a member of the Florida Bar in 1993. (Vol. VII, R. 1134)

Dr. Mosman did a postdoctoral internship with the California Department of Corrections to become licensed in that state around 1974. (Vol. VII, R. 1136) He practiced psychology in California for about 18 years in the Department of Corrections and the Board of Prison Terms and Parole. Id. During this time, Dr. Mosman worked with various sheriffs' offices and police agencies conducting psychological evaluations and managing certain programs for these agencies. Id. He was the director of the testing and assessment programs at Atascadero State Hospital, a large forensic hospital, for about 18 months. Id. He had performed over 600 evaluations for the State of Florida prior to testifying in this proceeding and had been allowed to testify as an expert forensic psychologist in various Florida courts. (Vol. VII, R. 1137, 1138)

Judge Beach, without objection from the state, authorized Dr. Mosman to give expert opinion evidence regarding the defendant. (Vol. VII, R. 1138)

Dr. Mosman testified that registry counsel had asked him to examine the trial record to determine whether a viable voluntary intoxication defense existed in this case at the time of trial and, if so, whether defense counsel adequately researched and presented that defense at Henry's retrial. (Vol. VII, R. 1140) Dr. Mosman studied the Hillsborough County Sheriff's Office arrest reports, the FDLE arrest reports, the Hillsborough County booking records, Henry's Florida Department of Corrections medical records, Henry's records from the Pasco County case (the Suzanne Henry homicide), photographs of the crime scenes, the retrial transcript, and the testimony of Doctors James Fessler, Walter Afield, Daniel Sprehe, and Robert Berland, among others. (Vol. VII, R. 1141-1143) Many of the reports studied contained information to the effect that John Henry had consumed significant amounts of crack cocaine shortly before he killed Eugene Christian. For example, in Dr. Sprehe's report of February 17, 1987, he (Dr. Sprehe) noted that ". . . he had been smoking crack cocaine on Sunday morning, 12/22/85." (Vol. V, R. 1002-1004) Dr. Sprehe added: "He smoked some more cocaine in the bushes then he decided to kill Eugene." (Vol. V, R. 1003) Dr. Berland reported that Henry drove ". . . around in the car with the child victim repeatedly purchasing and smoking crack cocaine. He described a pattern of worsening psychotic symptoms which included visual and auditory hallucinations. In particular, he reported believing that flashing lights began following him as he was driving home following this period of driving and drug abuse." (Vol. VI. R. 1056)[4]

[4] These quotes from Doctors Sprehe and Berland do not come from Dr. Mosman's

Dr. Mosman determined that none of the doctors really focused on the issue of voluntary intoxication and missed key indicators that should have been considered. (Vol. VII, R. 1143, 1144) While the experts discussed the effects of crack cocaine generally, according to Dr. Mosman, the doctors never produced a detailed "diagnostic workup" on Henry that their profession demands. Dr. Mosman stated in this regard:

> . . . (t)he question I would ask is did you or did you not do a formal diagnostic workup, yes or no, and then explain. And that would have truncated all this listing of small range schizophrenia, which has never been a diagnosis in, you know, these issues. It would have forced the issue of what is this individual like. That was never brought out, never.

(Vol. VII, R. 1174)

According to Dr. Mosman, the doctors should have testified as to the "actual symptoms and effects of cocaine on the mind, upon thinking, upon analysis, and it wasn't done." Id. Dr. Mosman went on to state that only Dr. Berland got close to recognizing the problem and even he acknowledged giving an outdated test related to Henry's I.Q. that further masked the issue. (Vol. VII, R. 1144, 1148) Dr. Mosman emphasized that Henry's actual mental age at the time of the Eugene Christian homicide was that of about a 10 or 11 year old child. (Vol. VII, R. 1147) The question of intoxication therefore was: What effect would cocaine ingestion have upon a person with that low of an I.Q. and mental age? Id. According to Dr. Mosman, Henry's mental age ". . . is a significant issue as related to specific intent to understand, form judgments, identify alternatives, weigh and balance to seek consequences and everything." Id. Dr. Mosman advised that at the time of the homicide, Henry had the mental capacity of a "preadolescent" and, had defense counsel recognized and demonstrated this, the jury would have known that ". . . they did not have an adult man mentally sitting in that chair." (Vol. VII, R. 1149) Dr. Mosman was then asked:

> Q. Okay. What – you've read in the record, for example there was testimony from a Mr. Giles and a Ms. Tumme (phonetic) and even Mr. Henry himself that he had ingested cocaine prior to the homicide that we're dealing with in this case. What effect do you think that ingestion of cocaine would have had upon him in terms of his ability to form the specific intent to commit first degree murder?

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testimony, but from the reports or testimony of the doctors themselves.

> A. You have two questions really. What my answer would be is that it would not be reasonable or even clinically, you know, reasonable for him to expect that he could perform the mental operations, the cognitive thought patterns -- can list them for you if you want -- the judgment that would have to be exercised by reasonably identifying alternatives, various courses of action, pick and choose the consequences, understand all the things that he was trying to deal with there and then independently, without impairment, pick and choose the alternate that he did. That would be, and I think the data supports that in the records, but what I said and prefaced that with, as I understand the situation because, once again, the situation was not presented to the jury, and I'm not just talking about the IQ of 71, the preadolescence stuff, the information, as I said earlier, that was presented to them about cocaine was erroneous and was out dated by many years and was not accurate.

(Vol. VII, R. 1150, 1151)

Dr. Mosman specifically faulted defense counsel for asking Dr. Fessler only two questions about the effects of cocaine: Did it affect memory loss and did it leave a grandiose feeling. (Vol. VII, R. 1153, 1154) Dr. Mosman stated that Dr. Fessler should have been asked about all of the effects of cocaine use and especially as they relate to this defendant and the impairment of the ability to form the specific intent to commit first-degree murder. (Vol. VII, R. 1156, 1157) Had defense counsel done so, the side effects of an overwhelming sense of hopelessness, anxiety, paranoid delusions, increased aggression, increased violence, and impulse control problems would have been referenced. (Vol. VII, R. 1155) All of these effects obviously support a voluntary intoxication defense. Dr. Mosman added: "... if you add that on to a ten year old, you've got more than a problem on your hands mentally." (Vol. VII, R. 1156)

After reviewing the testimony of Dr. Afield, Dr. Mosman noted that trial counsel failed to have Dr. Afield fully articulate the basis for his general findings regarding Henry's mental state as it affected the voluntary intoxication defense. (Vol. VII, R. 1158-1161) As to Dr. Sprehe, Dr. Mosman testified that he did not spend enough time examining Mr. Henry and working with defense counsel in order to provide detailed information to support the voluntary intoxication defense. (Vol. VII, R. 1161-1163)

Dr. Mosman concluded direct examination by noting that Henry suffered prejudice as a result of his counsel's failure to fully develop the voluntary intoxication defense. Dr. Mosman stated that the information presented to the jury was incomplete and in some cases erroneous, thus the jury did not get the full impact and strength of this defense. (Vol. VII, R. 1163-1165)

On cross-examination, Dr. Mosman acknowledged that defense counsel attempted to establish a voluntary intoxication defense -- that is, that there was expert testimony presented to the effect that Henry was not able to form the specific intent to commit first degree murder due to the use of cocaine shortly before killing Eugene Christian. (Vol. VII, R. 1165-1167) There was also lay witness testimony, including the testimony of Mr. Henry himself, presented to the effect that Henry had been buying and smoking cocaine before the Christian homicide. (Vol. VII, R. 1169, 1172) Dr. Mosman pointed out, however, that the experts did not fully describe the effects of cocaine use upon Henry in particular and on the date in question. (Vol. VII, R. 1168) Dr. Mosman also reported that Dr. Montgomery's testimony was mistaken regarding the long term effects that the use of cocaine would have upon this defendant. (Vol. VII, R. 1170, 1171)

The state called Henry's defense counsel, Hon. William Fuente.[5] (Vol. VIII, R. 1360) Having been a former prosecutor and defense counsel, Judge Fuente was an experienced criminal trial lawyer at the time he represented the defendant. He tried between 10 and 15 capital cases. (Vol. VII, R. 1266)

Judge Fuente testified that he tried the Henry case with the assistance of attorney Dwight Wells. (Vol. VIII, R. 1364) He said that Mr. Henry was cooperative and candid with him and had given him the names of witnesses who could corroborate his (Henry's) testimony. (Vol. VIII, R. 1366) Judge Fuente found the case to be very difficult, since Henry had been convicted of murder previously and had confessed to killing Suzanne Henry. (Vol. VIII, R. 1367) He remembered that there was other evidence, though he couldn't recall it with any specificity. (Vol. VIII, R. 1368) He remembered that Henry was convicted of a crime in one county, that Henry and the child drove into another county and spent several hours together, that the car got stuck, that Henry thought he saw lights, and that the offense for which Judge Fuente was representing him took place in a wooded area after dark. (Vol.

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[5] Judge Fuente is now a Circuit Judge in the 13th Judicial Circuit of Florida. To avoid confusion, we refer to him in this brief as "defense counsel" or "Judge Fuente."

VIII, R. 1368) He confirmed that Henry had been convicted of and served time for the murder of a previous wife and had been released about two years before he murdered Suzanne Henry. (Vol. VIII, R. 1368, 1369) Judge Fuente identified the State's Exhibit 1 as a group of his motions to suppress Henry's confession to law enforcement, based on Fourth and Fifth Amendment claims. (Vol. VIII, R. 1369) He testified that after the motions were denied, he believed that it was inevitable that Henry would be convicted of the murder of Eugene Christian. (Vol. VIII, R. 1370) His decision to have Henry testify and acknowledge his prior convictions was made late in the course of preparation. Id. He based this decision on the evidence the state had against Henry and on the fact that Henry already had two murder convictions at that point. (Vol. VIII, R. 1371) Judge Fuente believed the best they could hope for was conviction on a lesser included offense, and they had two possible defenses: either insanity or voluntary intoxication, ultimately choosing the latter. (Vol. VIII, R. 1371) He decided against the insanity defense because one or two of the doctors "flip-flopped," finding at first that Henry was insane and then that he was not. (Vol. VIII, R. 1371) He also did not think the jury would believe that Henry was insane at the time of the homicide. (Vol. VIII, R. 1372)

Defense counsel believed that had the jury not learned of the other two homicides until the penalty phase, they would have then been more inclined to recommend the death penalty. (Vol. VIII, R. 1372, 1373) He didn't remember if the trial court determined that the facts of the Suzanne Henry murder were inextricably intertwined with those of the Eugene Christian murder. (Vol. VIII, R. 1373)

Judge Fuente based his voluntary intoxication defense on statements Henry made to law enforcement, noting that other witnesses corroborated that defense. (Vol. VIII, R. 1373-4) He thought that before he became involved with the case, Dr. Sprehe had opined that Henry was insane. He also thought that Dr. Sprehe had changed his mind between the first conviction and the second trial, concluding that Henry was sane. (Vol. VIII, R. 1374, 1375) Judge Fuente read from the trial transcript where Dr. Sprehe said, "My opinion, at least with reasonable medical probability, is that he did have an impairment of his ability to form a specific intent because of his use of cocaine." (Vol. VIII, R. 1376) He read further that Dr. Sprehe determined that Henry was under the influence of cocaine intoxication and that he had an impairment of his ability to form specific intent because of the cocaine. (Vol. VIII, R. 1378) Defense counsel then read from a letter from Dr. Sprehe to Judge Evans that stated that Henry probably lacked the capacity for specific intent to commit murder on Eugene and certainly

lacked the capacity for premeditation if he was under the influence of crack cocaine. (Vol. VIII, R. 1379, 1380)

Reading from another transcript, Judge Fuente noted that Dr. Afield testified that Henry's ability to form a specific intent to commit first degree murder was "seriously compromised, if he even had the ability at all. I don't think he had the ability. I think he was -- I think he was burned out on drugs, craziness, and alcohol, I don't think he could form the intent at that time at all." (Vol. VIII, R. 1381) In that transcript, Dr. Afield testified that Henry suffered from "chronic paranoia and drug and alcohol abuse, severe." (Vol. VIII, R. 1382)

Judge Fuente then read from the trial transcript a portion of Dr. Berland's trial testimony. (Vol. VIII, R. 1383) In that transcript, Dr. Berland stated that Henry appeared to have a "long-standing psychotic disturbance" that may have been caused in part by brain damage and an inherited disorder. (Vol. VIII, R. 1384) Further in the transcript, Dr. Berland opined that Henry could not form the specific intent to commit this first-degree murder, because he was in an "acute psychotic state." (Vol. VIII, R. 1385, 1386)

Judge Fuente confirmed that Henry testified that he had used cocaine before he killed Suzanne Henry. (Vol. VIII, R. 1386) He added that Henry agreed with his decision to pursue a voluntary intoxication defense. (Vol. VIII, R. 1387) He recalled discussing the decision to disclose the other two murders at the trial with Henry and his co-counsel, Mr. Wells. (Vol. VIII, R. 1389) In this regard, Judge Fuente stated that he always dictated memoranda regarding developments in a case, although he could not find one pertaining to that conversation. Id. He said that the jury would be more likely to recommend the death sentence if they didn't find out about Henry's two other homicide convictions until the sentencing phase. (Vol. VIII, R. 1388) He said that the prosecutor was taken aback when he called Henry to the stand. Id.

Judge Fuente read from the sentencing order that the trial judge did not put much weight on the fact that Henry was under extreme mental and emotional disturbance when he killed Eugene (Vol. VIII, R. 1391, 1392); it put some weight on the mitigator that Henry's capacity to appreciate the criminality of his conduct was substantially impaired. Id. He read the other mitigators presented and the court's consideration of each. (Vol. VIII, R. 1392-1393)

Judge Fuente was asked on cross-examination about his decision to bring out on direct examination during the guilt/innocence phase of the trial the fact that Henry had murdered his first wife, Patricia Roddy. (Vol. VIII,

R. 1394, 1395) Henry's trial testimony in this regard is noted in part at Vol. VIII, R. 1442, where his own defense counsel asked:

> Q. And the reason you went to prison in 1976, Mr. Henry, was because you pled no contest to a second-degree murder charge; is that correct?
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> A. Yes, sir.
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> Q. And in 1976 the conviction you went to prison on the second-degree murder charge, involved a stabbing death of a lady by the last name of Roddy; is that correct?
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> A. Yes, sir.
>
> Q. And I think you told us you served seven and a half years; is that right?
>
> A. Yes sir.

As to his reasons for bringing out this information, Judge Fuente testified:

> Q. Oh, so I thought your testimony was you felt that he was going to be convicted of first degree murder anyway, more than likely?
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> A. That's true. We felt it was highly likely he would be convicted of first degree murder. Our defense was not [sic] acquit him. Our defense was trying to have him found guilty of second degree murder.

(Vol. VIII, R. 1396)

Defense counsel indicated that he was aware that under Florida law, if he had not opened the door to the details of the Roddy murder, the state could not have done so on cross-examination. (Vol. VIII, R. 1398-1399)

Counsel again acknowledged that Doctors Sprehe, Afield, and Berland provided testimony to the effect that Henry had a valid voluntary intoxication defense. (Vol. VIII, R. 1399, 1400) Defense counsel was then asked:

> Q. Okay. Well, don't you think you did great harm then to your case during the guilt phase where you got three doctors, that's three to one, for voluntary intoxication, it's three to one, and if you had kept the jury from knowing that he had committed murder before of a wife and you got the reasonable doubt standard that the state has to establish, don't you think it was ineffectiveness to kind of push this thing over the edge in terms of a conviction of first degree murder by telling this jury that he had murdered, committed murder before?
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> A. Well, if you're asking me whether I was ineffective, that's not for me to judge and decide. All I can say to you is that was a calculated decision on our part and the reason for that was -- rather, the upfront thinking for that was, in the event he was convicted of first degree murder, the jury would already know this. That was our thinking, that was our assessment, that was our plan. Whether that was ineffective or was not ineffective is not for me to judge. I can only tell you what we did and why we did it.

(Vol. VIII, R. 1400, 1401)

Judge Fuente had Henry admit to the jury that he had been convicted of the first-degree murder of Suzanne Henry and sentenced to death. (Vol. VIII, R. 1404, 1405)

## SUMMARY OF THE ARGUMENT

The trial court erred in not finding that defense counsel was constitutionally ineffective during the guilt/innocence phase of the trial for having Henry testify on direct examination that he had been convicted of the murder of a former wife, Patricia Roddy, for which he served 7½ years in prison. Defense counsel was also ineffective for having Henry testify that he had been convicted of murdering Suzanne Henry, for which he had been sentenced to death. None of this evidence would have been known to the jury but for defense counsel's ineffectiveness.[6]

Under Florida law, had defense counsel not done this, the jury would not have been advised during the guilt/innocence phase of the trial and via cross-examination that Henry had stabbed Roddy to death in much the same manner that he killed Eugene Christian. In fact, the jury would not have been advised of the Roddy homicide at all. Nor would the jury have been told that Henry was already sentenced to death for the homicide of Suzanne Henry. All of this damaging evidence came out because defense counsel opened the door for the prosecutor to exploit it, including using it in his very effective closing argument during the guilt/innocence phase.

The trial court's determination that Henry consented to this "strategy" was insufficient to justify it under the high standards for effective assistance of counsel in capital cases as set forth in Florida and federal law. This is especially true given Henry's disturbed mental condition. Counsel's actions, including "tactical" decisions, must be ". . . reasonable considering all the

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[6] Had defense counsel not inquired about the Roddy homicide on direct examination, all the prosecutor could have asked Henry on cross-examination was whether he had been convicted of a felony. Sec. 90.610(1), Fla. Stat. So long as Henry answered in the affirmative, further inquiry would have had to cease. The jury would learn the facts of the Suzanne Henry homicide since they were intertwined with the Eugene Christian homicide. But they would not have learned that he had been convicted of first-degree murder for that crime and sentenced to death.

circumstances." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The strategy itself was seriously flawed and had no basis in the reasonable defense of a mentally deficient person facing such a serious charge.

Henry suffered serious prejudice as a result of his lawyer's ineffectiveness, and it was error for the trial court to find that no prejudice had been proven. No less than three doctors (Sprehe, Afield and Berland) found and testified that Henry could not form the specific intent to commit first-degree murder. Thus, Henry had a viable voluntary intoxication defense to the state's charge that he acted with premeditation. However, the prosecutor was able to seriously weaken and cast doubt upon the legitimacy of that defense during cross-examination by going into the details of the Roddy homicide which involved a stabbing when Henry was not using crack cocaine but still acting in a manner similar to the stabbing of Eugene Christian. The prosecutor was also able to use the Roddy case testimony to provide a false motive (witness elimination) for the killing of Eugene. Thus, Henry was denied counsel who had a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

More prejudice was suffered by Henry when, by the actions of his own lawyer, the jury learned that Henry had been convicted of first-degree murder for killing Suzanne Henry, and was sentenced to death for that crime. The only logical inference a juror would draw from these facts was that any sentence other than death would effectively afford Henry a free pass for killing Eugene. Thus, it was necessary, based on that inference, to convict Henry of premeditated murder as charged and recommend that he be sentenced to death.

This extremely damaging evidence, otherwise inadmissible, surely denied Henry a fair trial, detrimentally affected the outcome of the proceedings and wreaked havoc upon an otherwise strong voluntary intoxication defense.

## ARGUMENT

**Point I**: The trial court erred in not finding defense counsel to be ineffective during the guilt/innocence phase of the trial. Defense counsel was ineffective for having Henry admit on direct examination that he had murdered his first wife, Patricia Roddy, by stabbing her to death and that he had served only 7½ years in prison for that crime, and that he had been convicted as charged and sentenced to death for the murder of his second

wife, Suzanne Henry. This opened the door for the prosecutor to present testimony regarding inadmissible details of these prior offenses.[7]

## Standard of Appellate Review Regarding Ineffective Assistance of Counsel

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Henry's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support the same. *Johnson v. State*, 789 So. 2d. 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). As this Court stated in *Nixon v. State, 857 So. 2d 172*, 175, f. 7 (Fla. 2003):

> Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *McLin v. State*, 827 So. 2d 948, 954 n. 4 (Fla. 2002) (quoting *Blanco v. State*, 702 So. 2d 1250, 1252 [Fla. 1997]).

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[7] The essence of this ineffective claim was set out in part in Claim IB of Henry's First Amended Motion to Vacate Judgment of Conviction and Sentence filed by CCRC-Middle. (Vol. I, R. 75, 80, 81) Judge Holloway granted an evidentiary hearing on this claim. (Vol. III, R. 492-494) The claim was expanded upon by undersigned registry counsel in the Complete Motion to Vacate Judgment and Death Sentence. (Vol. III, R. 417-426) Judge Beach granted an evidentiary hearing on the claim as well with one exception as noted below. (Vol. V, R. 916-923)

In order to sustain a claim of ineffective assistance of counsel in a criminal case, ". . . the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

**Argument Regarding Ineffective Assistance of Counsel**

In determining that Henry's 3.850 motion should be denied, Judge Beach did not make a specific ruling regarding the alleged ineffectiveness of Henry's trial counsel. Instead, the court determined that it was not necessary to make such a ruling since Henry failed to prove prejudice. (Vol. VIII, R. 1281) The Court acknowledged, however, that Section 90.610(1), Florida Statutes would have prevented the state from raising the issue of Henry's prior record if defense counsel had not opened the door to that subject. (Vol. VII, R. 1269) Judge Beach also noted that defense counsel admitted that ". . the disclosure of the Roddy murder prejudiced the defendant . . ." Id. Judge Beach added that "even if this Court finds that Judge Fuente's tactical decision exhibited bad judgment, Defendant is not entitled to post conviction relief," citing *Gonzalez v. State*, 579 So. 2d 145 (Fla. 3d DCA 1991).[8] According to Judge Beach, this is because "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." (Citation by the trial court to the evidentiary hearing record omitted.) (Vol. VII, R. 1280, 1281) Judge Beach added later in his Order:

> Consequently, Defendant has failed to meet the second prong of *Strickland*[9] in that he has failed to prove how Judge Fuente's alleged improper actions of opening the door for the state to cross-examine Defendant regarding his prior convictions resulted in prejudice when it had already been decided prior to trial, in a joint decision by Judge Fuente, co-counsel Mr. Wells, and Defendant, that they were going to disclose the Roddy murder to the jury during the guilt phase. Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component," citing *Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989).[10]

(Vol. VIII, R. 1281) We shall demonstrate that the trial court erred in this ruling. In both *Kennedy* and *Gonzalez*, this Court found that the actions of

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8 *Gonzalez v. State* involved the introduction of "collateral evidence," but the opinion does not identify what the collateral evidence was.

9 *Strickland v. Washington*, 466 U.S. 668 (1984).

10 The facts of the *Kennedy* case are not similar to those of the case at bar.

the respective defense counsel did not adversely affect the outcome of the cases. Henry's counsel's actions, however, clearly caused detrimental harm to Henry's voluntary intoxication defense. The law does not permit serious acts of ineffective assistance of counsel to go unredressed simply because they were based upon a so-called "tactical" decision with the consent of the client. A tactical or strategic decision is no excuse for ineffective representation where the tactic is not a reasonable one and causes severe damage to the case of the defendant.

The case of *Ridenour v. State*, 768 So. 2d 480 (Fla. 2d DCA 2000) provides applicable case law pertaining to ineffective assistance of counsel. Ridenour was convicted of four counts of aggravated battery and sentenced to fifteen years in prison. On direct appeal, the district court of appeal affirmed. *Ridenour v. State*, 707 So. 2d 1183 (Fla. 2d DCA 1998). The convictions were based on evidence that Ridenour stabbed the four victims. According to *Ridenour*, he acted in self-defense. The Court stated in this regard:

> The convictions were based on evidence that Mr. Ridenour stabbed the four victims. According to Mr. Ridenour's testimony, he acted in self-defense. The state's evidence and defense evidence conflicted on the details of the incident. Thus, credibility of the witnesses was a critical factor for the jury. During cross-examination, the State elicited from Mr. Ridenour

> the fact that he had been previously convicted of a felony and argued this fact in closing. Mr. Ridenour admitted to this previous conviction based on the express advice of his attorney. But according to the evidence at the post conviction hearing, Mr. Ridenour did not have a prior felony conviction because adjudication had been withheld. The evidence further showed that Mr. Ridenour and his family told defense counsel about the withhold, but defense counsel nevertheless advised that he had to admit to a prior conviction if he was asked. Based on these facts, Mr. Ridenour alleged that defense counsel rendered ineffective assistance by allowing the State to improperly impeach his testimony with a nonexistent prior conviction. The trial court denied relief, finding no prejudice.
>
> To obtain relief on a claim of ineffective assistance of counsel, a defendant must allege error and prejudice. See *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). It is ineffective assistance to allow a defendant to be improperly impeached with inadmissible evidence of prior convictions. See *Wright v. State*, 446 So. 2d 208, 209 (Fla. 3d DCA 1984) (granting post conviction relief when defense counsel elicited testimony that defendant had been previously convicted of five crimes when the convictions were only misdemeanors that did not involve dishonesty or false statement and thus were inadmissible). A defendant cannot be impeached with a "prior conviction" when adjudication was withheld. See *Barber v. State*, 413 So. 2d 482, 484 (Fla. 2d DCA 1982). Thus, we conclude, as did the trial court below, that defense counsel erred in this matter.

*Ridenour v. State, supra*, 768 So. 2d at 481.

The parallels between the arguments in *Ridenour* and the present case are striking. As shown in the statement of the facts in the case at bar, defense counsel elicited from Henry on direct examination during the guilt/innocence phase of the trial the extremely prejudicial fact that Henry

had murdered his first wife, Patricia Roddy, by stabbing her to death, and that he only served 7½ years in prison for that crime. (Vol. VIII, R. 1394, 1395) Defense counsel and Henry had the following dialogue on direct examination:

> Q. And you have been in prison before, have you not?
>
> A. Yes, I have.
>
> Q. On how many occasions?
>
> A. Twice.
>
> Q. And was the first one prison sentence that you began serving in 1976 or '77?
>
> A. '76.
>
> Q. And how long did you serve in prison at that time?
>
> A. I served seven and a half years, on a fifteen-year sentence.
>
> Q. And the reason you went to prison in 1976, Mr. Henry, was because you pled no contest to a second degree murder charge, involved a stabbing death of a lady by the last name of Roddy; is that correct?
>
> A. Yes, sir.
>
> Q. And I think you told us you served seven and a half years; is that right?
>
> A. Yes sir.

(Vol. III, R. 493, Vol. VIII, R. 1442) Defense counsel then solicited Henry's acknowledgement that he had been sentenced to death for the

murder of Suzanne Henry. (Vol. VIII, R. 1241) He asked Henry in this regard:

> Q. And with respect to the matter involving Suzanne Henry, you have been found guilty of that homicide, have you not?
>
> A. Yes, sir.
>
> Q. And you have been sentenced?
>
> A. Yes, sir. I am serving time for it now.
>
> Q. I'm sorry.
>
> A. Yes, sir. I am serving time for it now.
>
> Q. And you have been sentenced to death by electrocution; is that correct?
>
> A. Yes sir.

(Vol. III, R. 420, ROA, Vol. VIII, R. 587, emphasis added.) When asked why he would let the jury know that Henry had already been sentenced to death for killing Suzanne, the defense counsel gave the following testimony:

> Q. 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?
>
> A. 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.
>
> Q. Telling the jury that he had been sentenced to death for killing Suzanne would strengthen your voluntary intoxication defense?

> A. 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.

(Vol. VII, R. 1240-1242, emphasis added.) Defense counsel's basis for the tactical decision to elicit this testimony is unreasonable and illogical, to put it mildly. First, counsel states that advising the jury about these matters during the guilt/innocence phase would ". . . hopefully help them to accept the voluntary intoxication defense since they would have known that he had already been sentenced to death for another case." (Vol. VII, R. 1240) Defense counsel presented no credible explanation of why a juror, fully informed of the details of the Patricia Roddy and Suzanne Henry homicides and the fact that Henry had served 7½ years for the former and been sentenced to death for the latter, would become more favorably disposed to a voluntary intoxication defense.[11] As will be demonstrated below, defense counsel's "strategic" decision, rather than increasing the viability of Henry's voluntary intoxication defense, severely damaged it.

Once defense counsel elicited the testimony regarding Patricia Roddy and Suzanne Henry referenced above, the door lay wide open for the state to explore the details and sentences imposed regarding these previous cases. *Leonard v. State*, 386 So. 2d 51 (Fla. 2D DCA 1980). Had defense counsel not elicited this testimony, the jury would not have learned of these facts; facts that adversely impacted Henry's defense enormously during the critical guilt/innocence phase of the Eugene Christian trial. Section 90.610(1),

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[11] It should be noted that the trial court summarily denied Henry's claim regarding the introduction of evidence related to the Suzanne Henry homicide because this Court decided in *Henry v. State*, 649 So. 2d 1361, 1365 (Fla. 1994) that the facts of the two cases were "inextricably intertwined." (Vol. V, R. 922, 923) While this is true regarding the events that took place in the two homicides -- that would not include the fact that Henry was convicted as charged and sentenced to death for killing Suzanne. There could not possibly be any valid reason for defense counsel to have laid that very damaging piece of information before the jury during the guilt/innocence phase of the trial. That was not an act of counsel acting adversarial to the state -- the act inadvertently made the state's case against his client stronger. We are appealing that summary denial of this claim.

Florida Statutes strictly limits the information about a defendant's prior record that the jury can be privy to by providing in part:

> A party may attack the credibility of any witness, including the accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement . . .

Defense counsel argued that he was aware of the implications of his actions. (Vol. VIII, R. 1396-1399) His reason for opening Henry to cross examination, as indicated above, seems to have been based on his belief that if Henry were convicted of first degree murder, and if the jurors found out about the two prior convictions only during the penalty phase of the trial, they would hold it against Henry and be more likely to impose the death penalty. (Vol. VIII, R. 1389, 1400, 1401) Judge Fuente said in this regard:

> 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.

(Vol. VIII, R. 1269, quoting from the 3.850 evidentiary hearing transcript.)

As in *Ridenour*, eliciting this damning and otherwise inadmissible evidence constituted grave ineffective assistance of counsel. It is hard to imagine anything more egregious than for defense counsel to unilaterally solicit extremely prejudicial evidence against his own client. In *Strickland v. Washington*, 446 U.S. at 685, the Court stated that: "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (Emphasis added.) Defense counsel's actions were not adversarial to the prosecution; on the contrary, they were undeniably in aid of the prosecution. They made Henry appear to be malicious and cruel and allowed the prosecutor to portray Henry's actions in the Eugene Christian homicide as premeditated. Defense counsel had an obligation to advocate for the defendant not against him and to use his skills

to shield him from evidence such as the details of the Roddy homicide that were utterly irrelevant to the Eugene Christian case – not to expose the jury to that irrelevant and damaging evidence. Henry had a right to be tried solely for the homicide of Eugene Christian during the guilt/innocence phase, rather than effectively retried for the killing of Patricia Roddy. He had a right to keep from the jury the fact that he had served a relatively short period of time for the Roddy offense despite the seriousness of that crime. And he certainly had a right to keep from the jury the fact that he was already on death row.

Defense counsel's supposed tactical reason for eliciting this evidence was unreasonable and in conflict with his basic obligation to zealously defend the client during the guilt/innocence phase. The assertion that the jurors might be upset with him -- and therefore might have been more inclined to vote for death during the penalty phase if he did not bring out the details of the prior offenses -- is speculative and illogical. By focusing on the sentencing phase rather than the guilt/innocence phase, defense counsel overlooked the fact that a verdict of a lesser-included offense obtained during the guilt/innocence would have automatically kept his client off death row, at least for the Eugene Christian homicide. Providing the jury with additional evidence of Henry's criminal history was an almost certain recipe for a first-degree murder conviction in that case -- and a death sentence.

*Collins v. State*, 855 So. 2d 1160 (Fla. 1st DCA 2003), provides guidance for determining ineffective assistance of counsel. In *Collins*, the appellant faced the charge of robbery of a gas station with a deadly weapon. During cross-examination, defense counsel elicited testimony from a detective to the effect that Collins had been identified as the robber on a surveillance video. The detective had not provided this testimony on direct examination. In reversing the summary denial of this claim by the trial court, the district court of appeal stated in part:

> In his rule 3.850 motion, he alleged that neither of the two clerks working at the gas station was able to identify him as the robber. He further alleged that only the back of the robber's head was shown in the gas station surveillance video. The error appellant complains of occurred during counsel's cross-examination of the arresting officer, a Jacksonville detective. According to the sworn motion, the detective did not identify the robber on direct examination, and little other evidence had been brought out to identify appellant as the robber.

Nevertheless, trial counsel allegedly asked the detective whether he could identify the man in the surveillance video. At that point, the detective apparently responded that Collins was the man.

A facially sufficient claim of ineffective assistance of counsel must include allegations of fact showing deficient performance on the part of trial counsel and prejudice resulting from that deficient performance. (Citations omitted.) Counsel's performance is deficient if it falls below "'an objective standard of reasonableness' based on 'prevailing professional norms.'" Id. (quoting *Strickland*, 466 U.S. at 688) Summary denial of an ineffective assistance of counsel claim raised in a rule 3.850 motion should be affirmed if the motion fails to state a facially sufficient claim or if the sworn allegations are conclusively refuted by the record. See *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Allegations not refuted by the record must be accepted as true. See id. If the claims are facially sufficient and not conclusively refuted by the record, the cause must be remanded for the trial court to either hold an evidentiary hearing or attach record portions conclusively refuting the appellant's allegations. See, e.g., *Griner v. State*, 774 So. 2d 793, 794 (Fla. 1st DCA 2000).

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.

*Collins v. State*, 855 So. 2d 1160, 1162, 1163, emphasis added.

By the same token, there are no reasonable set of circumstances that could possibly justify defense counsel's actions in the case at bar. The evidence that defense counsel put before the jury was undeniably inadmissible. Had the prosecutor attempted to elicit this detailed prior record testimony, a mistrial and other sanctions would have undoubtedly been in order. Furthermore, defense counsel's actions effectively destroyed Henry's right to a separate and distinct phase of his jury trial specifically designed by the Legislature to determine guilt or innocence under Section 782.04(1)(a), Florida Statutes, the first-degree murder statute. This statute and Sections 782.04(1)(b) ("In all proceedings under this section [referring to Section 782.04(1)(a)] the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment") and 921.141, Florida Statutes (the penalty phase statute), make it absolutely clear that the guilt/innocence phase of a capital trial is to be a separate proceeding with its own set of much tighter rules of evidence, distinct from the less-stringent rules that govern the penalty phase of the trial.

*Wright v. State*, 446 So. 2d 208 (Fla. 3rd DCA 1984), provides additional precedent for determining ineffective assistance of counsel as a result of counsel presenting inadmissible evidence of a prior criminal record. In *Wright*, the defendant appealed his conviction of manslaughter and possession of a firearm in the commission of a felony. During the appeal, defense counsel elicited from the defendant the following testimony:

> Q. Have you ever been convicted of a crime?
> A. Yes.
> Q. How many times?
> A. Five times.

*Wright*, supra, 446 So. 2d at 209. The Court found the defense counsel's introduction of testimony from the defendant regarding his prior criminal record created extreme prejudice and constituted grounds for a finding of ineffective assistance of counsel. The Court ruled specifically:

> While a deliberate preemption of the prosecutor's projected cross-examination concerning the defendant's prior convictions is ordinarily a well-justified tactical decision, this was decidedly not the case here. This is because, as counsel belatedly discovered and revealed after the jury had retired, all

> of Wright's five convictions were for misdemeanors which did not involve dishonesty or a false statement and were thus totally inadmissible for impeachment purposes or otherwise.
>
> ****
>
> We conclude that defense counsel's action in placing this evidence before the jury established her ineffectiveness and entitles Wright to relief under the controlling authority of *Knight v. State*, 394 So.2d 997 (Fla. 1981). *Hopkins v. State*, 413 So.2d 443 (Fla. 3d DCA 1983). It is first plain that the specifically identified "overt act" of introducing the plainly harmful testimony was "a serious and substantial deficiency measurably below that of competent counsel," *Knight*, 394 So.2d at 1001, who are presumed and required to know of **t**he provisions of the Florida Statutes on a vital issue like this. *Chapman v. State*, 442 So.2d 1024, 1026 (Fla. 5th DCA 1983), and cases cited; *Hopkins v. State*, supra.
>
> Furthermore, considering (a) the extremely prejudicial nature of this type of evidence, *Roman v. State*, 438 So.2d 487 (Fla. 3d DCA 1983); *Cummings v. State*, supra; *Vazquez v. State*, 405 So.2d 177 (Fla. 3d DCA 1981), approved in part, quashed in part, 419 So.2d 1088 (Fla. 1982); (b) the strong and effective emphasis placed upon it by the state attorney in attacking the defendant's credibility in final argument; and (c) the closeness of the self-defense question, we conclude that "there is a likelihood that the deficient conduct affected the outcome of the court proceedings." *Knight*, 394 So.2d at 1001.

*Wright*, supra, 446 So. 2d at 219, 210. *Wright* is important because it makes clear just how extremely prejudicial and “plainly harmful” it is for defense counsel to allow the jury to learn of the nature and extent of his or her client’s prior criminal record. Id.

The record reveals that there may well have been a reason other than "strategy" for defense counsel's very questionable actions. It appears, as reflected in the record of the 3.850 evidentiary hearing, that defense counsel was resigned to the inevitability of a first-degree murder verdict being returned by the jury. In this regard, defense counsel admitted that it was his opinion (and the opinion of his co-counsel, Mr. Wells) that ". . . a conviction was highly likely." (Vol. VIII, R. 1395) When pressed to be more specific on this issue, the following is reported:

> Q. Oh, I thought your testimony was you felt that he was going to be convicted of <u>first-degree murder</u> anyway, more than likely?
>
> A. <u>That's true. We felt it was highly likely he would be convicted of first degree murder</u>. Our defense was not to acquit him. Our defense was trying to have him found guilty of second-degree murder.

(Vol. VIII, R. 1396, emphasis added.)

Resignation to a fate over which one still has control should never be an excuse for failing to defend a client zealously during all phases of a capital case. Defense counsel's premature focus on the penalty phase of the trial and his willingness to put highly prejudicial evidence before the jury during the guilt/innocence phase, thereby negligently sabotaging an otherwise strong voluntary intoxication defense, severely damaged his chances of achieving the goal of a second-degree murder conviction. His client paid a heavy price for it.

**Point II**: By opening Henry's prior convictions to the jury's scrutiny, Henry's counsel subjected the defense to prejudice that rendered the proceeding and outcome of the case unreliable. Furthermore, the defendant's voluntary intoxication defense was so strong that there is a

reasonable likelihood that, but for the actions of the defense counsel, the outcome of the case would have been different.

## Standard of Appellate Review Regarding Prejudice

As noted above, this is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Henry's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support the same. *Johnson v. State*, 789 So. 2d. 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). The standard for establishing prejudice, as set forth in *Strickland v. Washington*, 466 U.S. 668, 694 (1984) is whether the deficient performance or errors " . . . were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

## Argument Regarding Prejudice

Henry suffered prejudice in a number of ways, each of which severely undermined his defense to the charge of first-degree murder.

First, by allowing Henry to testify about his prior criminal record, defense counsel permitted the prosecutor to use Henry's testimony regarding the Roddy homicide to establish for the jury Henry's alleged history of bad character and propensity to commit extreme acts of violence against women. The prosecutor took full advantage of the opportunity to emphasize the parallels between Henry's past actions and the crime for which he was then on trial.[12] Thus, the prosecutor elicited the following from Henry on cross-examination:

> Q. Mr. Henry, in response to Mr. Fuente's questions, you have already admitted to the jury that with Eugene Christian's death, your total number of people that you have killed at your hand now numbers three; is that correct?

---

[12] The prosecutor first made sure that he was free to go into the details of the Roddy and Suzanne Henry cases by getting a ruling from the trial court to that effect. He stated: ". . . Mr. Fuente at this point has opened the door to all three murders in terms of my cross-examination." (Vol. VIII, R. 1443) Defense counsel responded: "No question." Id. The trial court then ruled "You can ask about each and every one of them." (Vol. VIII, R. 1444)

A. Yes, sir.

Q. And the circumstances by which Patricia Roddy was killed at your hand was that she was stabbed repeatedly in the chest and neck area, was she not?

A. I was told that, yes sir.

Q. You don't have a recollection of having done that?

A. The incident, yes sir.

Q. That is where you stabbed her. Wasn't it in the throat and in the chest?

A. That is what I were told, sir.

Q. You did that repeatedly didn't you? There were numerous stab wounds in her chest and neck area, weren't there?

A. That is what I were told, sir.

Q. There were repeated stab wounds to her arms where she fended you off from this attack, wasn't there?

A. I heard that, yes, sir.

Q. As a matter of fact, you had one gash in her arm so bad it almost cut her hand off; isn't that true?

A. I don't know, sir.

Q. Do you remember how many times you stabbed Patricia Roddy before you killed her?

A. No, sir.

Q. Patricia Roddy's murder occurred in the automobile that you and she were in didn't it?

A. Yes, sir.

Q. And you and she were not the only people in that car in 1975, were you?

A. Yes, we was.

Q. There wasn't some children in the back seat of that car, Mr. Henry?

A. No, sir.

Q. You are sure about that?

A. I am positive.

Q. Do you have any children?

A. Yes sir, I have two daughters.

Q. How old are they?

A. They are nineteen and twenty.

Q. Do you have any children by Patricia Roddy?

A. That is who I am speaking of.

Q. You weren't married to her but you had children by her?

A. We were married.

Q. You were married to her?

A. Yes, sir.

Q. You had some children by her?

A. Yes, sir.

Q. They weren't in the back seat?

A. No, sir.

Q. Now, how old were you when you killed Patricia Roddy?

A. Twenty-four years old.

Q. Twenty-four years old?

A. Twenty-four, twenty-four.

Q. Now, after Patricia Roddy's death, you were arrested shortly after that, weren't you?

A. Yes, sir.

Q. And as coincidence would have it, it was Detective Wilber who arrested you for the murder of Patricia Roddy, wasn't it?

A. Yes sir.

Q. And since the time you were arrested for her murder, you remained in the Pasco County Jail until you were ultimately sentenced, weren't you?

A. You mean, concerning Patricia?

Q. Patricia Roddy; right.

A. Yes, sir.

Q. Now, in that 1975 murder, you were not under the influence of cocaine when you killed Patricia Roddy, were you?

A. I was under the influence of alcohol.

Q. Alcohol?

A. Yes, sir.

Q. The disposition in the case is that you received a fifteen-year sentence; isn't that right?

A. Yes, sir.

Q. And you were released in 1983 from that fifteen-year sentence?

A. Yes, sir.

Q. You remember what month it was that you were released?

A. Sure. January the 3rd of ’83.

Q. And when was it in 1983 that you met Suzanne Henry?

A. It was either the last part of March or sometime in April of ’83.

Q. Shortly after your release from prison?

A. Yes, sir.

Q. You began a relationship with her which I think you testified resulted in a marriage in I think you said October or November of ’83?

A. November.

Q. November of 1983?

A. Yes, sir.

Q. And she had already had Eugene Christian at the time that you met her?

A. Yes, sir.

(Vol. VII, R. 1444-1448, emphasis added.)

Had defense counsel not allowed Henry to testify, the details of the Roddy homicide would not have been admissible and would not have played a role in the jury’s deliberations during the guilt/innocence phase of the trial. See Section 90.404(2)(a), Florida Statutes, which prohibits so-called “similar fact” evidence from being introduced in order “. . . solely to prove bad character or propensity.” The jury would not have been informed that Roddy suffered multiple stab wounds to the chest and neck, that the prosecutor claimed that Henry almost severed Roddy’s hand during the episode, that there may have been children in the car when he killed her, and that Henry met Suzanne Henry shortly after he served only 7½ years in prison before being released.

Secondly, and equally as prejudicial, the evidence from the Roddy homicide allowed the prosecutor to present the jury with a sinister, malicious motive for Henry's murder of Eugene Christian and, therefore, a basis for a premeditated, first-degree murder conviction that would not otherwise have been available. In his closing argument, the prosecutor emphasized that Henry had been to prison for the Roddy homicide and did not want to go back. Thus, according to the prosecutor, Henry had to eliminate Eugene Christian as a witness to the Suzanne Henry homicide. The prosecutor argued specifically in this regard:

> Mr. Fuente told you that the murder of Patricia Roddy and the murder of Suzanne Henry are not a part of that case. This is not true. They are a part of this case. They are a part of this case because it is the motive, it is the reason, that Eugene Christian is dead. **Because John Henry had the taste of prison as a result of killing Patricia Roddy**. And he served his time for that and got out. And then, when Suzanne Henry was murdered at his hand, he realized that going back to prison or perhaps worse would be his fate. And those two circumstances together, the **first murder and the second murder**, produced the motive for the killing of Eugene Christian. **They are part of this case**.[13]

(Vol. III, R. 489, quoting from court order, Vol. VIII, R. 1287, emphasis added.) The prejudice created by defense counsel in this case was overwhelming. According to the majority of experts who testified at trial, the alleged motive raised by the prosecutor was not even factual, further destroying the position of the defendant. By virtually all accounts, Henry was a seriously mentally disturbed individual whose conduct was

[13] Due to the amount of detail regarding the Roddy case that the prosecutor elicited, as well as his clever use of the details of that crime to establish a false motive for Henry to commit premeditated murder when he killed Eugene, the Roddy case became an improper feature of the Eugene Christian case.

substantially impaired by his abuse of cocaine when he killed both Suzanne Henry and Eugene Christian. Malice and witness elimination were not the motives behind his actions in either of those cases. But for the ineffective assistance rendered by defense counsel, the prosecutor would not have been able to present this untruthful theory of Henry's motive to the jury.

Finally, the introduction of the Roddy evidence seriously weakened Henry's voluntary intoxication defense, since, as stated above, the prosecutor was able to elicit from Henry the fact that he was not smoking crack cocaine at the time that he committed this previous homicide. (Vol. VII, R. 1444-1448) Furthermore, had defense counsel not opened the door for all of the otherwise inadmissible evidence described above, the jury would have been presented, at worst, with a situation in which Henry killed two people, Suzanne Henry and Eugene Christian, within a short span of time and essentially in one criminal episode while he was under the influence of crack cocaine. Under those circumstances, the use of cocaine would at least to some degree mitigate against the supposedly premeditated aspect of the case as argued by the prosecutor. But the Roddy evidence strongly suggested that cocaine had little or nothing to do with Henry's criminal acts -- and that he would have committed them whether or not he was abusing cocaine. The

same is true of the fact that Henry had been convicted of first-degree murder and sentenced to death for the Suzanne Henry crime. There are but two conclusions that the jury could have reached regarding Suzanne's death. One: the judge and jury must have thought very little of a voluntary intoxication defense in that episode. And two: if Henry were not convicted of first-degree murder and sentenced to death for killing Eugene, then any other judgment and sentence would be the same as if he had been acquitted.

We expect the state to respond to our prejudice argument by claiming that Henry really did not have a viable defense to the first degree murder charge since there was no doubt that Eugene Christian died as a result of multiple stab wounds inflicted by the defendant. Thus, according to the state, the ineffective conduct described above was harmless because it would not have made any difference in the outcome of the proceedings. The state will be wrong if it makes this argument based upon the analysis for determining prejudice as set forth in *Ridenour, supra,* 768 So. 2d 480 (Fla. 2d DCA 2000). There, the Court said at page 481:

> To meet the prejudice prong, a defendant must show that, but for the error, there is a reasonable probability that the outcome would have been different. See *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. As in Wright, we consider the **extremely prejudicial nature of this type of evidence and the closeness of the self-defense question**. In light of the

> credibility contest between the defendant and the victims, we must conclude that Mr. Ridenour met his burden of showing a reasonable probability that the outcome would have been different. Therefore, we reverse on this issue.

Thus, the Court must consider two questions in determining ineffective assistance of counsel. First, did defense counsel negligently/intentionally allow evidence before the jury that was "extremely prejudicial?" Second, if so, did this extremely prejudicial evidence impact a case that was otherwise "close" in terms of a viable defense to the crime charged that may have produced another outcome?[14]

We have already documented in detail the extremely prejudicial nature of the evidence that would never have been before the jury but for defense counsel's ineffectiveness. We can add that whether Henry would have been convicted as charged would have been a close call for the jury due to the strength of the voluntary intoxication defense. Based upon the trial court's own findings during the evidentiary hearing, that defense was very strong. The strength of the voluntary intoxication defense is demonstrated by the following testimony that was presented during the trial by Doctors Sprehe, Afield, and Berland as quoted by the trial court in its order denying the 3.850 motion.

Dr. Sprehe was questioned about Henry's ability to form the specific intent to commit first-degree murder and gave the following response:

> Q: Based upon your assessment of his mental status, and based upon your assessment of the information available to you, and also your interview with him, were you able to reach an opinion or conclusion, Doctor Sprehe, with respect to Mr. John Henry's ability to formulate specific intent in December of 1985?
>
> A: Yes.

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[14] In other words, as stated in *Collins v. State*, 855 So. 2d 1160, 1163, (Fla. 1st DCA 2003), if Henry had no defense to the charge of first degree murder, and if that charge were supported by "overwhelming" evidence, then defense counsel's error would be considered harmless for there would have been no probability that the outcome would be different but for said error.

> Q: And what is that?
>
> A: My opinion, at least with reasonable medical probability, is that he did have an impairment of his ability to form specific intent because of his use of cocaine.
>
> Q: With respect to Mr. Henry and his mental status when you saw him and your assessment of his mental state as it existed back in 1985, were you able to come up with any psychiatric diagnosis of him?
>
> A: Well, that at the time of the actual crime, that he was in a state of cocaine intoxication. As to any psychiatric diagnosis prior to that, as the day started, you might say, I didn't really have a good picture that he was in any kind of psychotic psychiatric state.

(Vol. VII, R. 1273, 1274) Dr. Afield was asked essentially the same question and gave a similar assessment of Henry's ability to from specific intent to commit first-degree murder:

> Q: Were you able to reach a conclusion or form an opinion, within bounds of reasonable psychiatric certainty, as to whether or not back when this happened in December of 1985 Mr. Henry was able to form a specific intent to commit first-degree murder or whether that ability was compromised?
>
> A: Well, yes, I have an opinion. I think that his ability was seriously compromised, if he even had the ability at all. I don't think he had the ability. I think he was, I think he was burned out on drugs. Craziness. And alcohol. I don't think he could form the intent at that time at all.

Vol. VII, R. 1275) Dr. Afield added this testimony about the effects of Henry's substance addiction on his underlying mental ability:

Q: Were you able to make an assessment as to whether or not he was addicted to substance?

A: Yes, I think he had a very serious and severe drug and alcohol addiction.

Q: Did he present that way from a psychiatric perspective?

A: Historically, yes, and in the mental status examination, again, he had been in the jail for some time. But he still had, he just, he still just appeared quite deteriorated and his thinking was very concrete, still not with it. I think that is a combination of drug's probably paranoia.

Q: Did you diagnosis him as having, did you give him some psychiatric medical diagnosis?

A: Yes. Chronic paranoia and drug and alcohol abuse, severe.

(Vol. VII, R. 1275, 1276) Dr. Berland testified to Henry's mental impairment in a similar vein:

Q: Considering his test results, your diagnostic interview, your independent interviews, did you reach any conclusions regarding his mental status?

A: Yes, I did.

Q: What were they?

A: He appeared to have, and some of that was based on evidence that I got from lay witnesses, but he appeared to have a longstanding psychotic disturbance, which appeared to have become more significant in his late teens and early twenties. Some aspects of his symptoms suggested the kind of psychosis that you get from brain damage. Other aspects suggested the kind that you get from inherited disorder. There is a positive family history of mental illness and hospitalization, so both

> factors appear to be at work in this case. He looks like he is some combination of the two.

(Vol. VII, R. 1276) Dr. Berland substantiated Dr. Afield's testimony regarding the effects of substance abuse on Henry's mental illness:

> Q: How do you believe, Doctor, let me just rephrase that. Is there some connection between his cocaine addiction and abuse and his mental health problems?
>
> A: I believe there is, from the evidence that I have, as is typical with people who are mentally ill, they are more likely to get involved in drugs or alcohol abuse as a form of self-medication. Unfortunately, the drugs or alcohol will then in most cases – I really have yet to see the exception – will inflame the symptoms they are having. Unfortunately, the drugs or alcohol will then in most cases – I have yet to see the exception – will inflame the symptoms they are having. Unfortunately that doesn't cause them to stop using the drugs. They tend to use them more. It's a back and forth kind of interaction where one leads to the other, the other causes more of the former and so forth.

(Vol. VII, R. 1276, 1277) Finally, Dr. Berland confirmed the testimony of Dr. Sprehe and Dr. Afield by concluding that Henry lacked the ability to form specific intent to commit first-degree murder:

> Q: Doctor Berland, based upon that interview, the testing that you did, the various tests that you did, did you reach any conclusions with respect to Mr. Henry's ability to formulate what we have discussed earlier, specific intent?
>
> A: Yes, I did.
>
> Q: What conclusions did you reach with respect to that question?

> A: Well, it's my opinion that while he could obviously think of the act and apparently, at least, from his later report, thought about the act, that his state of mind at the time he did it was so contaminated by his mental illness, which was inflamed by his – he was in an acute psychotic state, and his report to me was that it was a byproduct of cocaine use, whether it was cocaine use or not he appears to be a very unsophisticated person who gave a very accurate description of what people go through who are in an acute psychotic state that particularly may involve inflammatory effects of drugs, and that his actions were substantially a byproduct of that mental illness. Therefore, it was my opinion that he could not rationally and deliberately, in a rational and deliberative way, form the specific intent to commit this act.

(Vol. VII, R. 1277).

The record is clear that these three qualified doctors provided the jury with a strong case for the voluntary intoxication defense. It was certainly sufficient to make the question of whether Henry would be convicted of first or second degree murder a "close" one. This is especially true given the fact that, at the time of trial, the voluntary intoxication defense was clearly recognized as a part of Florida law. *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984), established the admissibility of a voluntary intoxication defense. In *Gurganus*, this Court considered the proffered testimony of two mental health experts who were not prepared to state that the defendant was insane at the time of the commission of his capital offense. They would testify, however, that due to Gurganus' mental condition and use of drugs and

alcohol prior to the homicide, he suffered from a "depraved mind" in the context of the definition of second-degree murder set forth in Section 782.04(2), Florida Statutes. Id. at 819, 820. This Court held that the trial court was correct in not allowing the testimony for that purpose because:

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

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

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

regarding his state of mind at the time of the offense based on such hypothetical facts were proper. (Citation omitted.)

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

****

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

Id. at 822, 823, emphasis added.

Given the strength of Henry's voluntary intoxication defense and the legal acceptability of that defense as established by *Gurganus*, it is very reasonable to believe that defense counsel could have secured a second-degree rather than a first-degree murder conviction. It also very reasonable to believe that defense counsel's actions, by providing the prosecutor with a history of propensity, a motive, and a rebuttal to the voluntary intoxication defense, sabotaged his client's otherwise very strong defense and destroyed the reliability of the proceeding and the outcome of the case.

## CONCLUSION

For the reasons set forth above, the Court is requested to reverse the final order of the lower tribunal rendered December 17, 2003, determine that Henry was denied constitutionally effective assistance of counsel during the guilt/innocence phase of his state court trial, vacate his judgment of conviction of first-degree murder and death sentence, order a new state court trial for him, remand the cause to the lower tribunal requiring that Henry's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief be granted, and grant Henry such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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Baya Harrison, III, Esq.
P.O. Box 1219
736 Silver Lake Rd.
Monticello, FL 32345
Tel: 850/997-8469
FX: 850/997-8468
Email: bayalaw@aol.com

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been provided Sharon Vollrath, Esq., Office of the State Attorney, 13th Judicial Circuit of Florida, the Hillsborough County Courthouse Annex, Tower, 800 East Kennedy Blvd., Tampa, FL 33602, and Candance Sabella Esq., Chief of Capital Appeals, Office of the Attorney General of Florida, 3507 East Frontage Rd. Suite 200, Tampa, Florida 33607, this 13th day of August, 2004, by U. S. mail delivery.

## CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant was prepared using a Times New Roman font not proportionally spaced in compliance with the rules of this Court. The brief has been placed on a floppy disk and submitted to the Clerk as required by said rules.

_____

Baya Harrison, III