INDEX TO APPENDICES

Appendix A

Henyard v. State, unpublished opinion, Florida Supreme Court, September 10, 2008

H

Henyard v. State
Fla.,2008.
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.
Richard **HENYARD**, Appellant,
v.
STATE of Florida, Appellee.
Richard **Henyard**, Appellant,
v.
State of Florida, Appellee.
Richard **Henyard**, Petitioner,
v.
Walter A. McNeil, etc., Respondent.
Nos. SC08-222, SC08-1544 & SC08-1653

Sept. 10, 2008.

Background: After affirmance of murder convictions and death sentence for defendant who was 18 years old at the time of his crimes, 689 So.2d 239, affirmance of denial of postconviction relief and denial of habeas relief, 883 So.2d 753, denial of federal habeas relief, 2005 WL 1862694, and affirmance of denial of federal habeas relief, 459 F.3d 1217, defendant brought motion to vacate the death sentence, and thereafter, the Governor signed a death warrant. The Circuit Court, Lake County, Mark J. Hill, J., summarily denied relief. Defendant appealed.

Holding: The Supreme Court held that defendant did not show that allegedly newly-discovered evidence would change the result with respect to sentencing.

Affirmed.

[1] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
Denial of postconviction motion to vacate death sentence would be reviewed de novo, where postconviction trial court had summarily denied the motion without an evidentiary hearing, solely on the basis of the pleadings and by making a legal rather than a factual determination. West's F.S.A. RCrP Rule 3.851(f)(5)(B).

[2] Criminal Law 110 ⇐1536

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly Discovered Evidence. Most Cited Cases
To prevail on a postconviction motion for collateral relief, based on newly-discovered evidence, after death sentence has been imposed and affirmed on direct appeal, movant must meet two requirements: first, the evidence must not have been known to the trial court, the movant, or counsel at the time of trial, and it must appear that the movant or defense counsel could not have known of it by the use of diligence, and second, the newly-discovered evidence must be of such nature that it would probably produce an acquittal on retrial. West's F.S.A. RCrP Rule 3.851.

[3] Criminal Law 110 ⇐1536

110 Criminal Law
110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief
110k1536 k. Newly Discovered Evidence. Most Cited Cases
If the defendant is seeking to vacate a death sentence in his postconviction motion alleging newly-discovered evidence, the defendant must show that the newly-discovered evidence would probably yield a less severe sentence. West's F.S.A. RCrP Rule 3.851.

[4] Criminal Law 110 ⚖1668(9)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(9) k. Proceedings. Most Cited Cases
When determining whether an evidentiary hearing is required on a successive postconviction motion for collateral relief after death sentence has been imposed and affirmed on direct appeal, the postconviction trial court may look at the entire record. West's F.S.A. RCrP Rule 3.851(f)(5)(B).

[5] Criminal Law 110 ⚖1668(9)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(9) k. Proceedings. Most Cited Cases
Although evidentiary hearings are not automatic, with respect to successive postconviction motions for collateral relief after death sentence has been imposed and affirmed on direct appeal, postconviction trial courts are encouraged to liberally allow hearings on timely raised claims that commonly require factual determinations. West's F.S.A. RCrP Rule 3.851(f)(5)(B).

[6] Criminal Law 110 ⚖1042.7(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.7 Proceedings After Judgment
110k1042.7(2) k. Post-Conviction Relief. Most Cited Cases
Defendant could not raise for first time, on appeal from denial of postconviction motion to vacate death sentence based on newly-discovered evidence, a *Brady* claim relating to State's alleged failure to disclose a sealed transcript of an interview with a juvenile, which transcript allegedly would have led defendant to discover that another juvenile had referred to himself as a "killa," which reference allegedly established the other juvenile as the shooter of the two victims and thereby diminished defendant's culpability in the murders. West's F.S.A. RCrP Rule 3.851.

[7] Criminal Law 110 ⚖1536

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly Discovered Evidence. Most Cited Cases
Even if defendant, with due diligence, could not have earlier discovered that a juvenile had allegedly admitted to being the shooter, defendant did not establish probability of different outcome with the allegedly newly-discovered evidence, as element of postconviction claim to vacate death sentence based on newly-discovered evidence; at penalty phase of trial, State had not relied on defendant being the triggerman, and instead had relied on defendant's dominant role in the entire criminal episode and unrefuted evidence of his close proximity to the child victims at the time of their deaths. West's F.S.A. RCrP Rule 3.851.

[8] Criminal Law 110 ⚖419(5)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(5) k. Statements of Persons Not Available as Witnesses. Most Cited Cases
A declarant is "unavailable," for purposes of hearsay exception for declaration against interest, if the trial court sustains an assertion of a Fifth Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5; West's F.S.A. § 90.804(2)(c).

[9] Sentencing and Punishment 350H ⚖1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of Execution. Most Cited Cases
Florida's method of lethal injection does not constitute cruel and unusual punishment under the Eighth Amendment. U.S.C.A. Const.Amend. 8.

[10] Criminal Law 110 ⚖1668(9)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1666 Effect of Determination
110k1668 Successive Post-Conviction Proceedings
110k1668(9) k. Proceedings. Most Cited Cases
Ordinarily, a newly-discovered evidence claim, as basis for postconviction motion for collateral relief, based on newly-discovered evidence, after death sentence has been imposed and affirmed on direct appeal, cannot be summarily denied for not being raised in a prior motion, because the postconviction trial court should accept as true the defendant's allegations that he could not have known about the evidence at the time of trial by the use of due diligence and that he could not have obtained the evidence earlier by the exercise of due diligence. West's F.S.A. RCrP Rule 3.851.

[11] Criminal Law 110 ⚖1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
Because a postconviction trial court's decision whether to grant an evidentiary hearing, on a postconviction motion for collateral relief based on newly-discovered evidence after death sentence has been imposed and affirmed on direct appeal, is based on written materials before the postconviction trial court, its ruling is tantamount to a pure question of law, subject to de novo review. West's F.S.A. RCrP Rule 3.851(f)(5)(B).

[12] Criminal Law 110 ⚖1652

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1652 k. In General. Most Cited Cases
Postconviction trial court may provide an evidentiary hearing, on a postconviction motion to vacate death sentence, even if the Governor has signed a death warrant setting a date for execution. West's F.S.A. RCrP Rule 3.851(f)(5)(B).

Two Appeals from the Circuit Court in and for Lake County, Mark J. Hill, Judge-Case No. 93-159-CFA; And an Original Proceding-AllWrits.
Bill Jennings, Capital Collateral Regional Counsel, Mark S. Gruber, Maria Perinetti, and Daphney Branham, Assistant CCR Counsel, Middle Region, Tampa, Florida, for Appellant.
Bill McCollum, Attorney General, Tallahassee, Florida, and Stephen D. Ake, Assistant Attorney

General, Tampa, Florida, for Appellee.

PER CURIAM.

*1 This case is before the Court on appeal from orders denying motions to vacate sentences of death under Florida Rule of Criminal Procedure 3.851 and on the petition of **Henyard** invoking the Court's authority to issue all writs necessary to complete the exercise of its jurisdiction. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. Additionally, we have jurisdiction over the petition under article V, section 3(b)(7), Florida Constitution. We affirm the trial court's orders and deny **Henyard's** petition for all writs relief.

Facts and Procedural History

The facts of this case are set out in detail in our previous opinion. *See **Henyard** v. State,* 689 So.2d 239 (Fla.1996). In that opinion we noted that the trial record established that Richard **Henyard** (**Henyard**), at the age of eighteen, took a gun that belonged to a family friend and told others he was going to steal a car, kill the owner, and put the victim in the trunk so he could go see his father in South Florida. **Henyard** convinced a younger, fourteen-year-old friend, Alfonza Smalls, to help him rob someone. On January 30, 1993, **Henyard** and Smalls waited outside of a Winn-Dixie store in Eustis, Florida, when their victims, Mrs. Dorothy Lewis and her daughters, Jasmine, age three, and Jamilya, age seven, who were shopping at the Winn-Dixie, returned to their car. As the three left the store and returned to their car, Smalls approached Lewis with a gun and ordered her and her daughters into the back of the car. **Henyard** drove the car out of town.

> **Henyard** stopped the car at a deserted location where the two boys raped Lewis on the trunk of the car while her daughters remained in the back seat. Afterward, **Henyard** shot Lewis four times, wounding her in the leg, neck, mouth, and the middle of the forehead between her eyes. **Henyard** and Smalls rolled Lewis's unconscious body off to the side of the road and got back in the car. Jamilya and Jasmine were then driven to a separate location and taken from the car into a grassy area where they were each shot in the head and killed. Lewis survived and was able to make it to a nearby house where the police were called.

At trial, Richard **Henyard**, Jr. was convicted of three counts of armed kidnapping, one count of sexual battery with the use of a firearm, one count of attempted first-degree murder, one count of robbery with a firearm, and two counts of first-degree murder. After the penalty phase hearing, the jury recommended the death sentence for each of the murder counts by a vote of twelve to zero. The court found four aggravating factors, [n.1] three statutory mitigating factors, [n.2] and six nonstatutory mitigating factors. [n.3] The court found that the mitigating circumstances did not outweigh the aggravating circumstances and sentenced **Henyard** to death.

> [N.1.] The trial court found the following aggravating factors: (1) the defendant had been convicted of a prior violent felony; (2) the murder was committed in the course of a felony; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious or cruel.
>
> *2 [N.2.] The trial court found the following statutory mitigating factors: (1) **Henyard's** age of eighteen at the time of the crime; (2) evidence that **Henyard** was acting under an extreme emotional disturbance; and (3) **Henyard's** capacity to conform his conduct to the requirements of law was impaired.
>
> [N.3.] The trial court found the following nonstatutory mitigating circumstances: (1) the defendant functions at the emotional level of a thirteen-year-old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional

family; (4) the defendant can adjust to prison life; (5) the defendant could have received eight consecutive life sentences with a minimum mandatory of fifty years; and (6) **Henyard's** codefendant, Smalls, could not receive the death penalty as a matter of law.

This Court rejected all eleven [n.4] of **Henyard's** claims on direct appeal and affirmed his conviction and sentence.

[N.4.] The eleven claims were: (1) the trial court abused its discretion in failing to grant **Henyard's** motions for a change of venue; (2) the trial court erred when it (a) granted the State's challenge for cause of one prospective juror (who stated he could not, under any circumstances, recommend a death sentence for **Henyard** because of his youth), and (b) refused to excuse three prospective jurors **Henyard** challenged for cause; (3) the trial court erred in denying **Henyard's** motions to suppress his statement to the police because the interrogating officers failed to honor **Henyard's** request to cease questioning in violation of his right to remain silent under article I, section 9 of the Florida Constitution; (4) the trial court abused its discretion in admitting DNA evidence which was not supported by a proper predicate of reliability; (5) the trial court erred by (a) allowing the State, during voir dire, to tell prospective jurors that if the evidence of aggravators outweighed the evidence of mitigators then the jury's sentence recommendation must be for death as a matter of law, and (b) suggesting during closing argument that **Henyard** never admitted to raping Lewis when, in fact, he did confess to raping her in his third confession to police on the day after the murders; (6) the trial court erred in allowing a police officer to testify as to hearsay statements Lewis made to him when he came to her aid after the offense; (7) the trial court erred by giving the standard jury instructions on premeditated murder and reasonable doubt, and by failing to give the jury a special verdict form on the theory of guilt; (8) the trial court erred during the penalty phase by (a) instructing the jury on the avoid arrest aggravator, (b) expressly considering as an aggravator, and allowing the jury to hear, evidence of **Henyard's** prior juvenile adjudication for robbery with a weapon, and (c) allowing Lewis and Leroy Parker to testify at the penalty phase because their testimony did not tend to prove any statutory aggravating circumstance; (9) the trial court abused its discretion in denying **Henyard's** specially requested penalty-phase jury instruction on the heinous, atrocious or cruel aggravating circumstance, which instructed on "tortuous [sic] intent," and further erred by giving the standard heinous, atrocious or cruel instruction, which is unconstitutionally vague and overbroad; (10) the trial court erred by relying upon two aggravating circumstances-pecuniary gain and heinous, atrocious or cruel-as support for **Henyard's** death sentences because they were not proven beyond a reasonable doubt; and (11) the death penalty is not proportionally warranted in this case.

3** ***Henyard *v. State,* 883 So.2d 753, 756-57 (Fla.2004). Smalls escaped the risk of the death penalty because of his young age. 689 So.2d at 254. After we affirmed his convictions, **Henyard** then filed a postconviction motion raising nine claims.FN1The trial court denied relief and **Henyard** appealed to this Court. We affirmed the trial court's denial and denied **Henyard's** petition for habeas corpus. 883 So.2d at 766.The federal courts have also denied his claims. *See* ***Henyard*** *v. Crosby,* No. 504CV6210C10GRJ, 2005 WL 1862694, 2005 U.S. Dist. LEXIS 45525 (M.D.Fla. Aug.2, 2005), *aff'd sub nom.* ***Henyard*** *v. McDonough,* 459 F.3d 1217 (11th Cir.2006); *cert. denied,*--- U.S. ----, 127 S.Ct. 1818, 167 L.Ed.2d 328 (2007).

On July 9, 2008, Governor Charlie Crist signed a death warrant, setting **Henyard's** execution for 6 p.m., September 23, 2008. Prior to the signing of

the death warrant, on October 18, 2007, **Henyard** had filed a motion to vacate sentence in the trial court. **Henyard's** motion raised four claims: (1) newly discovered evidence proves Florida's method of lethal injection violates the Eighth Amendment, (2) section 27.702, Florida Statutes is unconstitutional, (3) section 945.10, Florida Statutes is unconstitutional, (4) Florida's death penalty scheme is unreliable and violates the Eighth Amendment based on a September 17, 2006, report of the American Bar Association. On January 8, 2008, the trial court issued on order summarily denying each of **Henyard's** claims. Additionally, during the pendency of the appeal from that order, **Henyard** filed a motion to relinquish jurisdiction. We denied **Henyard's** motion, but provided that **Henyard** could file a successive postconviction motion to vacate with the circuit court. On August 4, 2008, **Henyard** filed a successive motion to vacate sentence and for stay of execution raising three claims: (1) newly discovered evidence renders **Henyard's** death sentence unconstitutionally reliable, (2) **Henyard's** cumulative mental and emotional deficits establish a constitutional bar to his execution, and (3) **Henyard's** mental illness at the time of the offense renders his death sentence and execution unconstitutional. On August 14, 2008, the circuit court issued an order summarily denying each of the claims without an evidentiary hearing. We now consider both appeals as well as a petition for all writs relief filed by **Henyard** in this Court.

Analysis

We first address **Henyard's** claim that newly discovered evidence renders his death sentence unreliable. We agree with the trial court that **Henyard** has been unable to demonstrate prejudice, even if the claim is not procedurally barred and the proffered new evidence were admissible at trial. We next address **Henyard's** claim that section 27.702, Florida Statutes, is unconstitutional as construed in our decision in *Diaz v. State,* 945 So.2d 1136 (Fla.2006). We find **Henyard** provides no basis for this Court to reconsider our holding in *Diaz.*Finally, we address and reject **Henyard's** other claims.

Newly Discovered Evidence

***4 Henyard** raises a claim of newly discovered evidence based on an affidavit by Jason **Nawara**. While in custody in 1993, **Nawara** was allegedly housed with **Henyard's** fourteen-year-old codefendant, Alfonza Smalls. During this time **Nawara** claims to have overheard Smalls refer to himself as a "killa." **Henyard** contends this new evidence establishes Smalls as the shooter of the two Lewis children and diminishes his culpability in the murders of the two children; and further asserts he could not have discovered **Nawara's** testimony earlier because his name was contained in a transcript of an interview of another juvenile, Jimmy Kennedy, and that all the records relating to the juveniles were sealed. Having only recently discovered this transcript, **Henyard's** counsel alleges he contacted **Nawara** and received the affidavit that forms the basis of his claim. However, even if we accept **Henyard's** allegations as true, we find that the record affirmatively refutes **Henyard's** claim of reduced culpability and the claim does not meet the prejudice requirement under *Jones v. State,* 591 So.2d 911, 915 (Fla.1991).

[1] The denial of this claim is reviewed *de novo. See Van Poyck v. State,* 961 So.2d 220, 224 (Fla.2007) ("Because the trial court denied Van Poyck's motion solely on the basis of the pleadings, making a legal rather than a factual determination, this Court evaluates each of these matters de novo."(citing *State v. Coney,* 845 So.2d 120, 137 (Fla.2003))).

[2][3][4][5] To prevail on a claim of newly discovered evidence, **Henyard** must meet two requirements: First, the evidence must not have been known to the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered

evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones,* 591 So.2d at 916. When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the court may look at the entire record. "If the motion, files and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing."Fla. R.Crim. P. 3.851(f)(5)(B). Although evidentiary hearings are not automatic, courts are encouraged to liberally allow hearings on timely raised claims that commonly require factual determinations. *See Amend. to Fla. Rule of Crim. Pro. 3.851,* 797 So.2d 1213, 1219 (Fla.2001).

[6][7][8] Although it is unclear from the record whether **Henyard** can meet the due diligence requirement under the first prong of *Jones,*[FN2] we address the second prong requiring a showing of a probability of a different outcome, i.e., in this case a life sentence rather than death. Initially, we note this claim faces a number of hurdles including a potential procedural bar and a serious question of admissibility of the new evidence. Regardless, even if those hurdles could be overcome, we agree with the trial court that **Henyard** is not able to demonstrate prejudice. At trial, the State did not rely on **Henyard** being the triggerman, but rather relied on his dominant role in the entire criminal episode and unrefuted evidence of his close proximity to the child victims at the time of their deaths. The record affirmatively supports the State's position that regardless of whether Smalls or **Henyard** pulled the trigger, **Henyard's** substantial culpability as outlined by the trial court in great detail and as reflected in our opinion affirming his death sentence establishes the death penalty as a proportionate sentence for his actions. Even if **Nawara's** hearsay testimony was somehow deemed admissible at trial,[FN3] we conclude **Nawara's** statement does not cast doubt on **Henyard's** culpability or death sentence for the murders. **Henyard** planned the carjacking. ***Henyard,*** 689 So.2d at 242. **Henyard** raped and shot Dorothy Lewis. *Id.* at 243.The unrebutted evidence established that **Henyard** was in immediate proximity when Jasmine and Jamilya Lewis were shot. *Id.* As noted by the trial court in its order, the overwhelming evidence of **Henyard's** dominant role makes his current assertion that he was a "relatively minor participant" both unbelievable and without credibility. Our explanation in **Henyard's** direct appeal of Smalls' comparative life sentence also becomes relevant:

> ***5** Like **Henyard**, Alfonza Smalls was tried on the same charges and convicted, but he was not subject to the death penalty because his age of fourteen at the time of the offense prevented him from receiving the death penalty as a matter of law. Rather, Smalls received the maximum sentence possible for his crimes-eight consecutive life sentences, with a fifty-year mandatory minimum for the two first-degree murder convictions.
>
> In *Allen v. State,* 636 So.2d 494, 497 (Fla.1994), we held that the death penalty is either cruel or unusual punishment under article I, section 17 of the Florida Constitution if imposed upon a person who is under the age of sixteen when committing the crime. That is, when a defendant is under the age of sixteen, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances as a matter of law.
>
> In this context, then, Smalls' less severe sentence is irrelevant to **Henyard's** proportionality review because, pursuant to Allen, the aggravation and mitigation in their cases are per se incomparable. Under the law, death was never a valid punishment option for Smalls, and **Henyard's** death sentences are not disproportionate to the sentence received by his codefendant. *Cf. Larzelere v. State,* 676 So.2d 394 (Fla.1996) (holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death

sentence because codefendant was exonerated from culpability as a matter of law).

***Henyard** v. State,* 689 So.2d 239, 254-55 (Fla.1996).

Hence, considering the totality of evidence and even if Smalls was determined to be the triggerman, the death penalty would not be a disproportionate sentence for **Henyard**. *See Cardona v. State,* 641 So.2d 361 (Fla.1994); *Larzelere v. State,* 676 So.2d 394 (Fla.1996) (holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death sentence because codefendant was exonerated from culpability as a matter of law); *Cave v. State,* 476 So.2d 180 (Fla.1985), *cert. denied,*476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986) (death sentence proportionate where co-perpetrators abducted, raped, and killed victim and defendant was not actual killer). Accordingly, it is not probable that this evidence, if true, would have resulted in a less severe penalty.[FN4]

Based on the foregoing factual analysis, we conclude the trial court did not err in summarily denying relief. *See Hodges v. State,* 885 So.2d 338, 355 (Fla.2004) ("A defendant is not entitled to an evidentiary hearing if the postconviction motion is legally insufficient on its face.") (citing *Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000)); *Tompkins v. State,* 980 So.2d 451, 458-59 (Fla.2007) (where this Court held that an affidavit contradicting part of the trial testimony, but not providing credible new evidence that another person may have committed the murder, was insufficient to require an evidentiary hearing) (citing *Swafford v. State,* 679 So.2d 736, 739 (Fla.1996)), *cert. denied,*--- U.S. ----, 128 S.Ct. 895, 169 L.Ed.2d 747 (2008); *Diaz,* 945 So.2d at 1145-46 (this Court affirmed sentence where claim of newly discovered evidence was affidavit of a trial witness who stated he had not heard Diaz say he shot the victim as he testified at trial, but had inferred it from his hand motions).

Section 27.702, Florida Statutes

***6 Henyard** next argues that section 27.702, Florida Statutes, as interpreted in *State ex rel. Butterworth v. Kenny,* 714 So.2d 404 (Fla.1998), unconstitutionally limits a capital defendant's right to counsel.[FN5] We find there is no basis to challenge our opinion in *Diaz,* rejecting a similar claim. In *Diaz,* the condemned prisoner filed a petition under the Court's all writs authority claiming that section 27.702 was facially unconstitutional because this Court had held that Capital Collateral Regional Counsel (CCRC) attorneys cannot file section 1983 civil rights damages actions in federal court. 945 So.2d at 1154. This Court found the claim to be without merit, stating that Diaz had misinterpreted the Supreme Court's decision in *Hill v. McDonough,* 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), as prohibiting challenges to lethal injection procedures in all but section 1983 actions. 945 So.2d at 1154.

> In *Hill,* the defendant filed a federal action under section 1983 to challenge the lethal injection procedure as cruel and unusual punishment. The federal district court and the Eleventh Circuit Court of Appeals both denied Hill's claim, holding that his section 1983 claim was the functional equivalent of a habeas petition. Because Hill had sought federal habeas relief earlier, his section 1983 action was deemed successive and thus procedurally barred.*Hill,* 126 S.Ct. at 2097. However, the United States Supreme Court reversed and held that a challenge to the constitutionality of the lethal injection procedure did not have to be brought in a habeas petition, but could proceed under section 1983. *Id.* at 2098.However, contrary to Diaz's assertions here, the United States Supreme Court did not hold that a constitutional challenge to lethal injection procedures could not be brought under a habeas petition.

Diaz, 945 So.2d at 1154. Subsequently, in *In re Schwab,* 506 F.3d 1369 (11th Cir.2007), the Eleventh Circuit dismissed Schwab's petition as moot, stating:

> Even if [a claim challenging the constitutional-

> ity of Florida's lethal injection protocols] were properly cognizable in an initial federal habeas petition, instead of in a 42 U.S.C. § 1983 proceeding, see generally *Hill v. McDonough,* 547 U.S. 573, 126 S.Ct. 2096, 2099, 165 L.Ed.2d 44 (2006); *Nelson v. Campbell,* 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004), *Rutherford v. McDonough,* 466 F.3d 970, 973 (11th Cir.2006) (observing that pre-Nelson circuit law requiring challenges to lethal injection procedures to be brought in a § 2254 proceeding is "no longer valid in light of the Supreme Court's Hill decision"), this claim cannot serve as a proper basis for a second or successive habeas petition. It cannot because it neither relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, 28 U.S.C. § 2244(b)(2)(A), nor involves facts relating to guilt or innocence, see 28 U.S.C. § 2244(b)(2)(B)(ii).

*7 506 F.2d at 1370. We conclude that *In re Schwab* does not undermine or call into question this Court's decision in *Diaz.*Accordingly, even if this Court ignores **Henyard's** procedural bar, this matter has been previously resolved by *Diaz* contrary to **Henyard's** assertion. Accordingly, **Henyard's** argument is without merit.[FN6]

Florida's Method of Lethal Injection

[9] **Henyard** also alleges that Florida's method of lethal injection as implemented by the August 2007 protocols is unconstitutional under the Eighth Amendment. **Henyard** argues that although we have previously rejected this claim in *Lightbourne v. McCollum,* 969 So.2d 326 (Fla.2007), *cert. denied,*--- U.S. ----, 128 S.Ct. 2485, 171 L.Ed.2d 777 (2008), and *Schwab v. State,* 969 So.2d 318 (Fla.2007), *cert. denied,*--- U.S. ----, 128 S.Ct. 2486, 171 L.Ed.2d 777 (2008), we should revisit our decision based on the United States Supreme Court's ruling in *Baze v. Rees,* --- U.S. ----, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). We decline to do so.

In *Lightbourne,* this Court found in respect to the August 2007 protocols "that Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections."969 So.2d at 353;*see also Schwab v. State,* 969 So.2d 318, 325 (Fla.2007), *cert. denied,*--- U.S. ----, 128 S.Ct. 2486, 171 L.Ed.2d 777 (2008). As this Court stated in *Schwab,*"Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne*... we reject the conclusion that lethal injection as applied in Florida is unconstitutional." 969 So.2d at 325. *See also Griffin v. State,* No. SC06-1055, 2008 WL 2415856 (Fla. Jun.2, 2008); *Woodel v. State,* 985 So.2d 524, 534 (Fla.2008); *Lebron v. State,* 982 So.2d 649, 666 (Fla.2008). In essence, we concluded in *Lightbourne* that no matter what test is utilized, Florida's procedure is constitutional.

Henyard presents the same argument previously denied by this Court in *Lightbourne* and *Schwab.* **Henyard** attempts to get around this by asserting the United States Supreme Court's decision in *Baze* sheds new light on this Court's decisions because the standard to review Eighth Amendment challenges was changed. A review of the Supreme Court's plurality opinion demonstrates otherwise.

In *Baze,* the Supreme Court addressed whether Kentucky's lethal injection protocol was unconstitutional under the Eighth Amendment. 128 S.Ct. at 1526. The Court affirmed the Kentucky Supreme Court's decision, holding that Kentucky's protocol did not constitute cruel and unusual punishment. *Id.* This holding is the only portion of the opinion upon which the majority of the Court agreed.[FN7] The standard to be applied resulted in the splintered opinion of the Court.

The plurality opinion, in which Chief Justice Roberts and Justices Kennedy and Alito joined, concluded the appropriate standard was one of "substantial risk of harm." *Id.* at 1531.The plurality

explicitly rejected the "unnecessary risk" standard **Henyard** suggests. *Id.* Justices Thomas and Scalia concurred in judgment, stating that a method of execution violates the Eighth Amendment "if it is deliberately designed to inflict pain."128 S.Ct. at 1556 (Thomas, J. concurring in the judgment). Justices Breyer, Ginsburg, and Souter agreed that "the degree of risk, magnitude of pain, and availability of alternatives must be considered."128 S. Ct at 1563 (Breyer, J., concurring in the judgment); 128 S. Ct at 1568 (Ginsburg, J., dissenting).

***8** We have previously concluded in *Lightbourne* and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze.*Furthermore, we have specifically rejected the argument that Florida's current lethal injection protocol carries "a substantial, foreseeable, or unnecessary risk of pain."*Lightbourne,* 969 So.2d at 353. Accordingly, we reject **Henyard's** argument.

Section 945.10, Florida Statutes

Next, **Henyard** alleges section 945.10, Florida Statutes, which exempts the disclosure of the identity of an executioner from public records, is unconstitutional. We previously found section 945.10 facially constitutional and decline to recede from our decision now. *See Bryan v. State,* 753 So.2d 1244, 1250 (Fla.2000); *see also Provenzano v. State,* 761 So.2d 1097 (Fla.2000). We also note **Henyard's** claim is procedurally barred for failure to raise it in prior proceedings.

Mental Health Claims

Henyard next seeks an extension of *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), to mental impairment that is not mental retardation. **Henyard** argues that his particular impairments have produced a disability that is identical to mental retardation in its disabling features. We find this claim procedurally barred and for the reasons stated below, we also find it does not constitute a valid newly discovered evidence claim.

Henyard asserts this claim is not procedurally barred because it is based on newly discovered evidence of research regarding emotional development. **Henyard** previously raised a similar claim using the same evidence.[FN8] Despite **Henyard's** assertions, we conclude this claim is procedurally barred. *See Hill v. State,* 921 So.2d 579, 584 (Fla.2006); *Mills v. State,* 684 So.2d 801, 804-05 (Fla.1996). We have rejected similar claims relating to an extension of *Atkins. See, e.g., Diaz,* 945 So.2d at 1151 (rejecting a claim that ABA Resolution 122A supports the proposition that personality disorders are akin to being mentally retarded); *Connor v. State,* 979 So.2d 852, 867 (Fla.2007) (holding that mental conditions that are not insanity or mental retardation are not constitutional bars to execution (citing *Diaz,* 945 So.2d at 1151)). Although **Henyard** does not use the ABA report as newly discovered evidence, the information contained in the research he cites is similar, making his claim analogous to those rejected previously by this Court. *See Morton v. State,* Nos. SC06-2091 & SC07-1201, 2008 WL 3926851 (Fla. Aug.28, 2008) ("We have already rejected this claim ... as procedurally barred."). This Court also noted in *Morton* that emotional development research has been available for decades and therefore does not qualify as newly discovered evidence. *Id.*

Henyard additionally asserts that his mental condition at the time of the offense bars the death penalty under *Atkins* and *Roper.*The trial court summarily denied the claim, stating the claim was "virtually indistinguishable" from the second claim, and "[l]ike the new evaluation presented in *Hill,*... this Court does not find that the self-serving evaluation based upon interviews with the defendant offers any truly new evidence."The trial court also noted that the claim was without merit. We agree.

***9** [10] As noted above, **Henyard** asserts his claim is not procedurally barred because of newly discovered evidence. The new evidence asserted is an

evaluation conducted by psychologist Dr. Janice Stevenson. Ordinarily, a newly discovered evidence claim cannot be summarily denied for not being raised in a prior motion because, as this Court explained in *Rutherford v. State,* 940 So.2d 1112, 1120 (Fla.2006), the Court should accept as true the defendant's allegations that he "could not have known about the evidence at the time of trial by the use of due diligence ... and that he could not have obtained the evidence earlier by the exercise of due diligence."However, in this case, **Henyard** did not allege that his "mental illness" could not have been discovered earlier. Even if he had made such an allegation, the record reveals that **Henyard** raised similar issues at trial and in his original postconviction motion as well as on appeal to this Court. At trial, the court considered **Henyard's** mental health as part of mitigation and gave it very little weight. During postconviction, the trial court rejected **Henyard's** request to extend *Roper.*We approved this rejection. 929 So.2d at 1054.Thus, this claim is now procedurally barred.[FN9]

Evidentiary Hearings

Finally, **Henyard** argues that we have established a "disturbing trend" of denying evidentiary hearings in successive motions when there is a signed death warrant in violation of the due process clause. This claim was not raised in **Henyard's** motion to vacate and was not addressed by the trial court in its order. Accordingly, this claim is not properly raised for review by this Court. *See Riechmann v. State,* 966 So.2d 298, 307 (Fla.2007), *petition for cert. filed,*No. 07-11617 (U.S. Feb. 27, 2008); *Kokal v. State,* 901 So.2d 766, 779 (Fla.2005); *Owen v. Crosby,* 854 So.2d 182, 187 (Fla.2003); *Thompson v. State,* 796 So.2d 511, 514 n. 5 (Fla.2001); *Shere v. State,* 742 So.2d 215, 219 n. 9 (Fla.1999); *Doyle v. State,* 526 So.2d 909, 911 (Fla.1988). In addition, even if not procedurally barred, this claim is without merit.

[11][12] This Court has provided that "[c]laims in successive motions may be denied without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *White v. State,* 964 So.2d 1278, 1284 (Fla.2007) (quoting Fla. R.Crim. P. 3.851(f)(5)(B)). Because a court's decision whether to grant an evidentiary hearing on a rule 3 .851 motion is based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. *See State v. Coney,* 845 So.2d 120, 137 (Fla.2003). The right to an evidentiary hearing is guided by Florida Rule of Criminal Procedure 3.851(f)(5)(b), which states, in relevant part, "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Nothing in this rule has been interpreted by this Court to deny an evidentiary hearing to condemned prisoners once a death warrant has been signed by the Governor. *See Tompkins v. State,* 894 So.2d 857 (Fla.2005) (remanding with orders to allow Tompkins time to refile where he was denied review because of a procedural oversight while under an active death warrant). Indeed, we have carefully considered, and rejected, in this appeal, each of **Henyard's** claims to an entitlement to an evidentiary hearing.

Conclusion

***10** For the reasons discussed above, we affirm the lower court's denial of **Henyard's** motion for postconviction relief and we also deny his petition for all writs jurisdiction.

It is so ordered.

QUINCE, C.J., WELLS, ANSTEAD, PARIENTE, LEWIS and CANADY, JJ., concur.
BELL, J., did not participate.
NO MOTION FOR REHEARING WILL BE ALLOWED.

FN1. The nine claims **Henyard** raised were:

(1) ineffective assistance of counsel dur-

ing penalty phase because trial counsel failed to adequately investigate and prepare mitigating evidence and to adequately challenge the State's case; (2) trial counsel was ineffective for failing to interview the jurors about any changes in their penalty phase voting; (3) trial counsel was ineffective for failing to ask jurors various questions; (4) the jury instructions violated *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (5) the Florida death penalty statute is unconstitutional on its face and as applied; (6) electrocution is unconstitutional; (7) entitlement to relief because of "cumulative error;" (8) the death sentence rests on an unconstitutionally automatic aggravating circumstance; (9) the death sentence is unconstitutional because **Henyard** has the intellectual capacity of a thirteen-year-old child.

Henyard, 883 So.2d at 757 n. 5.

FN2. We reject **Henyard's** assertion that there may have been a violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), because of the State's failure to disclose the Kennedy transcript. This claim was not raised below and is therefore not properly raised for review by this Court.

FN3. We also considered whether **Nawara's** testimony would have been admissible at trial. **Henyard** alleges that the testimony would fall under the statement against interest exception to hearsay.

One of the exceptions to the hearsay rule is the declaration against interest. *Baker v. State,* 336 So.2d 364 (Fla.1976). It has long been established that an out-of-court declaration may be admitted into evidence, even for the truth of the matter asserted, if two requirements are met. First, the out-of-court declarant must be unavailable to testify. Second, the out-of-court declaration must be contrary to the "interests" of the declarant.

Brinson v. State, 382 So.2d 322, 324 (Fla. 2d DCA 1979).*Brinson* has since been superseded by statute. Section 90.804(2)(c), Florida Statutes (1997), modified the ruling in *Baker* by requiring outside corroborating circumstances indicating the truthfulness of the statement.*Brinson,* 382 So.2d at 325 n. 1. A declarant is unavailable if the trial court sustains an assertion of a Fifth Amendment privilege. *Id.* (citing *People v. Brown,* 26 N.Y.2d 88, 308 N.Y.S.2d 825, 257 N.E.2d 16 (N.Y.1970)). Here, **Henyard** does not allege the testimony is corroborated, nor does he allege that the testimony can be corroborated. *See, e.g., Perry v. State,* 675 So.2d 976 (Fla. 4th DCA 1996) (hearsay admissible when corroborating evidence that codefendant was the shooter established).

FN4. **Henyard** additionally argues that the newly discovered evidence might have resulted in a less severe penalty because the jury vacillated in recommending the death penalty. However, unlike in the case relied upon by **Henyard** where the jury's recommendation was seven to five, **Henyard's** jury unanimously recommended the death penalty.

FN5. In addition to his postconviction pleadings, **Henyard** filed a petition to invoke this Court's all writs jurisdiction on September 2, 2008. Because we address this claim as part of **Henyard's** appeal, we decline to exercise our all writs jurisdiction and deny the petition.

FN6. Alternatively, **Henyard** argues that

this Court's decision in *State v. Kilgore,* 976 So.2d 1066 (Fla.2007), *petition for cert. filed,*No. 07-11177 (U.S. May 28, 2008), requires a re-reading of section 27.702 to allow CCRC to file federal petitions under section 1983. However, this claim is also meritless. While *Kilgore* does appear to suggest a right to prosecute collateral attacks to a sentence of death, it explicitly precludes CCRC from acting as counsel in such cases. 976 So.2d at 1070 ("CCRC is not authorized to represent a death-sentenced individual in a collateral postconviction proceeding attacking the validity of a prior violent felony conviction that was used as an aggravator in support of a sentence of death."). Nowhere does *Kilgore* suggest a per se right to counsel as **Henyard** argues. Accordingly, we also reject this portion of **Henyard's** claim.

FN7.*See Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (stating that when the Court issues a decision where no rationale receives the vote of five justices, the holding of the Court is the "position taken by those members who concurred in the judgments on the narrowest of grounds.") (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Courts have interpreted *Marks* differently to allow for either the narrowest holding in a particular case or the narrowest application of the standard applied to reach that holding, but it does not appear that any court would adopt **Henyard's** interpretation of *Baze.Cf. United States v. Johnson,* 467 F.3d 56, 60-65 (1st Cir.2006) (discussing the application of *Marks* by federal courts to the Supreme Court's plurality decision in *Rapanos v. United States,* 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006)), *cert. denied,*--- U.S. ----, 128 S.Ct. 375, 169 L.Ed.2d 260 (2007).

FN8. **Henyard** previously raised a similar claim requesting this Court to extend the United States Supreme Court's ruling in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). ***Henyard*** *v. State,* 929 So.2d 1052 (Fla.2006). The evidence he presents now to support the *Atkins* claim is the same as that raised to support his *Roper* claim.

FN9. Dr. Stevenson's evaluation states that **Henyard** demonstrated and confirmed the presence of behaviors consistent with persons diagnosed with post-traumatic stress disorder and dependent personality disorder with dissociative features. She noted **Henyard** experienced a difficult childhood that included instances of sexual abuse and neglect. It appears these assessments are the same as those considered and rejected by the trial court during the penalty phase of **Henyard's** trial. *See generally, State v.* ***Henyard,*** No. 93-159-CF-A-MH (Fla. 5th Cir. August 19, 1994); ***Henyard,*** 689 So.2d at 244. The claim of sexual molestation reported by Dr. Stevenson was raised and rejected in the initial postconviction proceeding. ***Henyard,*** 883 So.2d at 761-63. Accordingly, even if this claim is not procedurally barred, **Henyard** fails to show this is newly discovered evidence that could not have been discovered by counsel previously. *See generally Hill,* 921 So.2d at 584.

Fla.,2008.
Henyard v. State
--- So.2d ----, 2008 WL 4148992 (Fla.)

END OF DOCUMENT

Appendix B
Order on Defendant's Successive Motion to Vacate Sentence and for Stay of Execution, unpublished order, August 14, 2008

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,

PLAINTIFF,

V.

RICHARD HENYARD,

DEFENDANT.

_____/

CASE NO.: 93-159-CF
DEATH PENALTY CASE
ACTIVE DEATH WARRANT

ORDER ON DEFENDANT'S SUCCESSIVE MOTION TO VACATE SENTENCE AND FOR STAY OF EXECUTION

This matter came on for hearing on August 8, 2008, on the Defendant's, Richard Henyard, Motion to Vacate Sentence and for Stay of Execution filed pursuant to Fla. R. Crim. P., 3.851(e)(2), and specifically authorized by the Florida Supreme Court's order dated July 10, 2008, which denied the Defendant's request to relinquish jurisdiction[1] to the trial court, but

[1]The matters raised in what this court and the State in their Response to Motion to Vacate Sentence refer to as Claim IV, were pending before the Florida Supreme Court at the time Governor Crist signed the Defendant's death warrant. It is not clear that the Court intended for this court to reconsider the issues that had previously been argued and were on appeal. However, to the extent the Defendant and State have re-argued the issues, this court has reconsidered its rulings in the Order dated January 8, 2008. This court is cognizant that it may not have jurisdiction to reconsider the prior rulings, but under the shortened time frame does so and respectfully requests the Florida Supreme Court determine the propriety of such action.

authorized the filing and consideration of any successive post conviction motion. Present at the hearing were Mark S. Gruber, Esq., Assistant CCRC, Daphney E. Branham, Esq., Assistant CCRC, on behalf of the Defendant, and Stephen D. Ake, Esq., Assistant Attorney General, and William Gross, Esq., Assistant State Attorney. The Defendant waived his presence at the hearing.

PROCEDURAL HISTORY

The Defendant in his Motion to Vacate, and the State in its Response to Motion to Vacate accurately and adequately set forth the procedural history of the case. The defense counsel explicitly stated that the Motion to Vacate was directed at the sentence imposed in the case, not the judgment of guilt. There being no infirmities in the pleadings before the court, and no argument to the contrary, the court now considers the three claims set forth in the Defendant's motion, and re-addresses a fourth claim encompassing several arguments regarding Florida's lethal injection.

Because this court is relying in part on the facts of the murders, those facts are set forth herein. The facts have been recited in this court's sentencing order and Henyard v. State, 689 So. 2d 239, 242-45, (Fla. 1996).

In January, 1993, the Defendant, eighteen year old Richard Henyard, stayed with a family friend. It was from this residence that the Defendant stole a gun. On Friday, January 29, Henyard

first showed the gun to one acquaintance, and later boasted to another, while showing her the gun, that he had a plan to go to a night club in Orlando and then drive to see his father in South Florida. He fiendishly boasted that in order to make this trip, he would steal a car, kill the owner, and put the victim in the trunk.

In the last week of January, Henyard vainly attempted to recruit as a minion to his plan one William Pew. Pew saw Henyard with Henyard's fourteen year old friend, Alphonsa Smalls, and the gun, and listened while Henyard described his plan to rob a car from someone at the hospital or the Winn Dixie.

On January 30, at around 10 p.m., Dorothy Lewis and her two little girls, Jamilya, age 7, and Jasmine, age 3, had finished grocery shopping and were walking toward their car. At the car, Alphonsa Smalls, came from behind, pulled the gun from his waistband and ordered the family into the backseat of the car. He called to Henyard, "This is the one, come on." Henyard, who had been sitting some ways away obliged his friend by coming to the car, obtaining the keys, and driving the Lewis car out of town.

The Lewis girls were crying and upset. Smalls repeatedly demanded that Ms. Lewis "shut the girls up." As Henyard drove further out of town, Ms. Lewis beseeched Jesus for help. In a

chilling foreshadowing of the events to come that night, Henyard snarled, "this ain't Jesus, this is Satan."

Henyard eventually stopped the car and ordered Ms. Lewis to get out. With her babies in the backseat, Ms. Lewis was raped on the trunk of the car, first by Henyard and then by Smalls. The gun was lying on the trunk of the car and Ms. Lewis tried to reach for it at one point. Smalls grabbed the gun. After the rapes, Henyard commanded Ms. Lewis to sit on the ground near the edge of the road. Her hesitation resulted in Henyard shooting her in the leg. Henyard then shot her at close range in the neck, the mouth and the in the middle of the forehead between her eyes. Unconscious and bloody, her body was rolled to the side of the road. Miraculously, for there is no better word to describe it, Ms. Lewis survived and when she regained consciousness several hours later, dragged herself to a house for help. As Henyard foretold, this night was truly hell on earth for Ms. Lewis.

Meanwhile, Henyard and Smalls continued on their nightmarish joy ride with the children in the backseat. The little girls were crying and calling for their mommy. Henyard pulled the car over. Jamilya got out of the car on her own, but the three year old was lifted out of the backseat by Henyard. The pleading, sobbing sisters were taken a short distance from the car and executed, each with a single bullet to the head. Henyard and

Smalls threw the lifeless bodies of Jasmine and Jamilya over a nearby fence into the underbrush.

The jaunt continued to the home of one of Smalls' friends, Bryant Smith. Henyard ghoulishly boasted about the rape, showed the gun to Smith, and said he had to "burn the bitch" because she tried to go for his gun. Just prior to midnight, and with blood on his hands, Henyard returned Smalls' to his house.

The forensic evidence showed that Henyard had "high speed" or "high velocity" blood splatters on his jacket. The blood matched Jamilya Lewis' blood. The splatter pattern established that Henyard was less than four (4) feet from Jamilya when she was shot. Smalls' clothing did not exhibit the "high speed" blood splatters that were on Henyard's clothing, though Smalls' clothes had "splashed" or "dropped blood" on them consistent with dragging a body.

Henyard admitted that he helped abduct Ms. Lewis and her children, raped and repeatedly shot Ms. Lewis, and was present when the children were killed. Henyard has continuously denied he shot the girls.

CLAIM I

The Defendant alleges his sentence of death is constitutionally unreliable based upon newly discovered evidence. Both the Defendant and the State agree the legal standard this court must employ in analyzing a claim of newly discovered

evidence is a two-prong analysis set forth in Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Firstly, the evidence must be determined not to have been known to the trial court, the party, or counsel at the time of trial, and that it could not have been known by the use of due diligence. Id. Secondly, the newly discovered evidence must be of such a nature that it would, in the case of a defendant seeking to vacate a death sentence, probably result in a life sentence. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

The alleged newly discovered evidence the Defendant proffers is based upon an affidavit of Jason Nawara. In 1993, Mr. Nawara, then fourteen years old, shared a cell at the Lake County Jail with another fourteen year old, Alphonsa Smalls. In his affidavit, Mr. Nawara relays he could testify that Mr. Smalls stated on a few occasions, "I'm a killa, you just a car thief," and "I've killed before and I'll kill again." Mr. Nawara goes on to indicate he believed Mr. Smalls to be dead serious when he made the statements.

The defense argues that these statements, if considered with Mr. Henyard's continued denial of being the trigger man in the murders of the little girls, would probably lead to a life sentence. This reasoning used by the defense is structured like a house of cards.

At the hearing on the motion, the defense counsel indicates that the finding of this "newly discovered evidence" was a somewhat serendipitous event. The defense has a transcript (not entered into evidence) of a jailhouse interview conducted by Assistant State Attorney William Gross with a Mr. Kennedy[2]. Mr. Gross was the prosecutor in the instant case. In this interview with a defendant unrelated to the crimes herein, Mr. Kennedy related to Mr. Gross that Alphonsa Smalls said, "We killed them." The transcript led to the name of Jason Nawara, Smalls' juvenile cell mate, which led to Mr. Nawara's affidavit.

Assuming that the defense has met its burden of showing the evidence was unknown at the time of trial and could not have been known with the use of due diligence under the first prong of Jones, Mr. Henyard has not demonstrated that he could succeed on the second prong. The defense argues that the newly discovered evidence coupled with Henyard's denial would have been enough to establish the statutory mitigator found at Section 921.141(d), Florida Statutes, "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was **relatively minor**." Emphasis added.

---

[2]Although the defense counsel bantered Brady and Giglio claims might be appropriate, both the State and Defense reviewed the transcript during a brief recess in the hearing. The defense did not ask for leave to amend their pleadings, and this court is confident that if the defense had a good faith basis for pleading such a claim, they would have done so.

To begin with, even if this court were to find the evidence is newly discovered, it would have to be admissible at the penalty phase proceedings. The hearsay statements offered by Mr. Nawara do not indicate whom Mr. Smalls is admitting he killed. The defense indicated the statements would be admissible under the hearsay exception commonly referred to as statement against interest. To be admissible under section 90.804, Fla. Stat., the declarant must be unavailable, and when the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused, the statement is inadmissible unless corroborating circumstances show the trustworthiness of the statement. Herein, the statements were made by a fourteen year old boy in jail facing a charge of murder. The forensic evidence at the trial tended to show Henyard was the killer. The defense even alleged in its instant motion that Smalls had made another statement that he raped a white woman. In fact, Ms. Lewis is African American. The Defense has not demonstrated that the statements would be admissible.

However, if the court found the statements were newly discovered, and that the statements would be admissible, and for purposes of this analysis accepts that Mr. Nawara's testimony would mirror his affidavit, the court would then have to find that Henyard's participation in the capital felonies was "relatively minor." It is this last card that brings the house

tumbling down. Mr. Henyard took the gun. Mr. Henyard hatched the diabolical plan. Mr. Henyard bragged about his intentions days before the event. Mr. Henyard chose the location to carry out his malignant plan. Mr. Henyard drove the car with the abducted family. Mr. Henyard was the first to rape Ms. Lewis. Mr. Henyard shot Ms. Lewis repeatedly, leaving her for dead. Mr. Henyard continued to drive the car and then pulled over and lifted the three year old out of the car. Mr. Henyard was four feet from the victims when bullets entered their bodies. In no reasonable interpretation of the phrase could Mr. Henyard ever be considered a "relatively minor participant" in these capital felonies.

The State cites a number of cases at pages twelve and thirteen of their response that generally hold newly discovered evidence showing the defendant was not the triggerman does not meet the Jones standard to demonstrate the defendant would have probably been given a life sentence. In many of the cases cited, the trial court summarily denied the defendant's claim without granting an evidentiary hearing. Likewise, this court denies the Defendant's request for an evidentiary hearing on his newly discovered evidence and summarily denies Claim I as the Defendant has failed to show the newly discovered evidence would probably produce a life sentence.

CLAIM II

Even by the defense counsel's own admissions, claims II and III of the Defendant's motion are intricately intertwined. Claim II alleges Mr. Henyard's cumulative mental and emotional deficits establish a constitutional bar to his execution. The Defendant relies upon Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 53 L.Ed. 335 (2002)(holding that the Eighth Amendment prohibition against cruel and unusual punishment bars execution for individuals who are mentally retarded). The defense attempts to get past the hurdle that this claim is procedurally barred by arguing alternatively that progress and evolving standards in interpreting data in the mental health profession is new evidence, and the new interpretation of Mr. Henyard's data would indicate his impairment produces a disability that is functionally equivalent to mental retardation in its disabling features. They also argue that to the extent the claim was raised in prior post conviction proceedings held in 2005, (three years after Atkins was decided)this claim is different because it is aimed at establishing a bar to the death sentence, not at establishing ineffective assistance of counsel. The defense alleges in the motion, "[a]llowing Mr. Henyard to proceed on an *Atkins* claim based on brain impairment and mental deficiency rather that (sic) significantly sub average IQ is consistent with current research." However, this is not the law in Florida.

The State argues that Mr. Henyard's "emotional retardation" claim is procedurally barred as it was not raised at the time of trial and it is not based on newly discovered evidence. Indeed, this court heard extensive testimony during the penalty phase and specifically found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, (§921.141(6)(g)) and that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, (§921.141(6)(b),(f)). This court also found Henyard's emotional age at the time of the offense to be that of a thirteen or fourteen year old and that Henyard had a dysfunctional upbringing. Both findings were considered non-statutory mitigating circumstances. Dr. Toomer testified that Henyard has an IQ of 85 (DAR V20:2310). Later, at a post conviction evidentiary hearing Dr. Bauer testified the defendant's IQ was 88. (PCR V6:1075).

The defendant did raise a claim similar to the instant claim in his first successive post conviction motion, asserting that his death sentence was unconstitutional because he had a mental age of a thirteen year old. Herein, the defendant is asking this court to extend the holding in Atkins, whereas in the first successive post conviction motion sought to extend the holding in Roper v. Simmons, 543 U.S. 551 (2005)(holding that the Eighth Amendment precludes the imposition of the death penalty on

juvenile offenders under the age of eighteen). In the post conviction motion, Henyard argued despite his chronological age of eighteen and a half at the time of the offenses, his emotional and mental age was that of the thirteen year old and the court should determine Roper to apply to him. This court summarily denied the claim and the Florida Supreme Court affirmed the decision. See, Henyard v. State, 929 So. 2d 1052 (Fla. 2006).

The State argues that the defendant's Claim II is merely a variation of a claim previously rejected, and should be procedurally barred on that ground. The State further argues, even if the claim were not barred, it is without merit. The court has considered the authority cited in the State's response including Diaz v. State, 945 So. 2d 1136 (Fla. 2006). In Diaz, the Florida Supreme Court asserted that neither the Florida Supreme Court nor the U.S. Supreme Court has recognized mental illness as a per se bar to execution, but that mental illness may be considered as either a statutory or non-statutory mitigating circumstance. Diaz at 1151. As outlined above, this court heard, considered, weighed and found two statutory mitigating circumstances based upon the defendant's mental health, and also found additional non-statutory mitigating circumstances.

The defense has failed to establish that there is any new evidence regarding Claim II, and has failed to show why this claim was not timely raised. As set forth in Hill v. State:

> In addition, the trial court correctly determined that this claim is also procedurally barred under rule 3.851(e)(2)(B). As stated in its December 23, 2005 order, "the *Atkins* decision was rendered in 2002, and [Hill] has provided no reason as to why he could not have raised this claim in his successive motion filed in 2003." The psychological evaluation Hill primarily relies upon to establish the claim was conducted in 1989. Hill does not claim that this study was not available to him at an earlier time, nor is there any indication that this evaluation was inadequate. While Hill does allege a December 15, 2005 psychological evaluation to support his claim, this evaluation provides **no truly new evidence** to support Hill's claim. This newest evaluation declares that Hill has "mild mental retardation"; however, it finds Hill's IQ to be sixteen points above the level required to establish mental retardation in Florida. Such a finding does not exempt a defendant from execution.

Hill v. State, 921 So. 2d 579, 584 (Fla. 2006)(emphasis added).

This court finds Claim II of the Defendant's motion is procedurally barred under Florida Rules of Criminal Procedure 3.203 and 3.851. Additionally, to the extent this claim is merely a variation of a claim previously raised, it is procedurally barred. See, Mills v. State, 684 So. 2d 801 (Fla. 1996). Finally, even if the claim were not procedurally barred, the claim is without merit based upon the current state of the law in Florida. See generally, Connor v. State, 979 So. 2d 852 (Fla. 2007)("To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position."); Kearse v. State, 969 so. 2d 976 (Fla.

2007)(rejecting claim of eighteen year old defendant that his low level of intellectual functioning and emotional impairments render him ineligible for execution under Atkins and Roper); Diaz v. State, 945 So. 2d 1136 (Fla. 2006) (there is currently no per se "mental illness" bar to execution).

CLAIM III

Claim III of the defendant's motion is virtually indistinguishable from Claim II with the exception of offering to the court as "new evidence" a mental health evaluation of the defendant conducted by Dr. Janice Stevenson, Ph.D., which was based upon six hours of interviews with the defendant on July 24, 2008. The defense relies again on Atkins and Roper. Like the new evaluation presented in Hill, supra, this court does not find that the self-serving evaluation based upon interviews with the defendant offers any truly new evidence. For the reasons cited in Claim II, this court finds that the claim is procedurally barred and could have and should have been raised timely. The court also finds the claim was previously litigated in the defendant's prior post conviction motion. Finally, the court finds that even if not procedurally barred, the claim lacks merit as this court declines to extend the holding in Atkins and Roper.

CLAIM IV - LETHAL INJECTION CLAIMS

Following the Governor's signing of Mr. Henyard's death

warrant, the Florida Supreme Court issued its order on Thursday, July 10, 2008. The order indicated "Appellant's Motion to Relinquish Jurisdiction to the Trial Court in light of *Baze v. Rees* is hereby denied; however, in light of the scheduled execution of appellant on September 23, 2008, the trial court has jurisdiction to consider any successive motion for post conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851." Both the State and the Defense have filed their respective appellate briefs with this Court. The briefs address the issues raised on appeal from this court's order dated January 8, 2008 which summarily denied the defendant's lethal injection claims. The appeal was pending at the time the death warrant was signed.

The defendant herein presents again three of the original four claims he raised in his October 16, 2007 post conviction motion. They are as follows: 1) newly discovered evidence shows that Florida's lethal injection method of execution violates the Eighth Amendment; 2) Florida Statute 945.10 (2006) as implemented by the protocols which conceal the identity of the participants in an execution is unconstitutional; and 3) Florida Statute 27.702, as interpreted by the Florida Supreme Court in Diaz v. State, 945 So. 2d 1136 (Fla. 2006) prohibiting CCRC from filing a 42 U.S.C §1983 federal rights suit challenging lethal injection, is unconstitutional. As to the second claim, no new argument or

evidence was presented and the court again denies this portion of the defendant's claim as set forth in paragraph 8 of the its Order on Defendant's Successive Motion to Vacate Judgments of Sentence entered January 8, 2008.

Of the remaining two issues, the defense asserts that the Florida Supreme Court's reaffirmation of an inherent cruelty standard in Lightbourne v. McCullum, 969 So. 2d 326 (Fla. 2007) and Schwab v. State, 969 So. 2d 318 (Fla. 2007), cases that this court expressly relied upon in originally denying the defendant's claim, is now in conflict with the plurality opinion in Baze. The State argues herein and in its Answer Brief of Appellee that the Baze decision is of no moment to the Florida Supreme Court's prior holdings and was addressed by the Florida Supreme Court in Lightbourne. "Alternatively, even if the Court did review this claim under a "foreseeable risk" standard as Lightbourne proposes or "an unnecessary" risk as the Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation." Lightbourne at 352.

The Court agrees with the State. The Baze decision does not undermine the rationale of prior Florida Supreme Court holdings, and this Court continues to rely upon its previous ruling and the authority cited therein. This Court further supplements the

authority initially cited, Lightbourne and Schwab, with the post Baze cases cited in the State's response at page 22.

The final issue raised by the defendant based upon Florida Statutes section 27.02 and updated by the defendant's citation to In re: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (11 Cir. 2007) and McNair v. Allen, 515 F.3d 1168 (11 Cir. 2008). The defense argues its belief that the only proper federal review would be to bring a §1983 claim which Florida Statutes section 27.02 prohibits CCRC from filing on behalf of the defendant. Whether or not the federal court will hear a successive habeas petition or a §1983 as the appropriate vehicle for the defendant to challenge Florida's method of execution[3] is a red-herring to this Court's consideration of whether or not his challenge to the constitutionality of Florida Statutes section 27.02 is time barred. This Court continues to rely on State ex rel. Butterworth v. Kenny, 714 so. 2d 404 (Fla. 1998) in its finding the §27.02 claim is procedurally barred. Further, even if the claim is not procedurally barred, the Court relies upon its previous determination that the claim is without merit based upon Diaz v. State, 945 So. 2d 1136 (Fla. 2006).

[3]Based upon the defendant's own reasoning a federal civil rights claim would only be timely if there had been a new or substantially changed execution protocol within two years of bringing the action. The Lightbourne court did not find that the August 1, 2007, protocols were a "significant and material" change.

Based upon the foregoing it is hereby

ORDERED AND ADJUDGED

1. The Defendant's request for an evidentiary hearing on Claim I, Claim II and Claim III of his successive post conviction motion is denied.
2. For the reasons set forth in this order, Claims I, II, and III of the Defendant's Motion to Vacate Sentence and for Stay of Execution are denied.
3. As to Claim IV, the lethal injection claims, this Court reaffirms its prior rulings with the supplementation as set forth herein.

The defendant has a right to appeal this order. The Clerk of Court is directed to electronically transmit a copy of this order to the Supreme Court of Florida and to the attorneys of record.

Done and ordered in chambers at Tavares, Lake County, Florida this 14th day of August, 2008.

Mark J. Hill
Circuit Court Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission **and** by

U.S. Mail this 14 day of August, 2008 to the following:

Mark S. Gruber, Esq.
Assistant Capital Collateral Regional Counsel
Middle Region
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
gruber@ccmr.state.fl.us
pholmes@ccmr.state.fl.us

William Gross
Assistant State Attorney
PO Box 7800
Tavares, FL 32778
wgross@jud5.flcourts.org
kbruens@jud5.flcourts.org
bking@jud5.flcourts.org

Stephen D. Ake
Assistant Attorney General
Office of the Attorney General
3507 E. Frontage Road
Suite 200
Tampa, FL 33607-7013
Stephen.ake@myfloridalegal.com

Supreme Court of Florida
warrant@flcourts.org

Deputy Clerk

Appendix C
Henyard v. McDonough, 127 S.Ct. 1818, 167 L.Ed. 2d 328 (2007).

H

Henyard v. McDonough
U.S.,2007

Richard HENYARD, petitioner,
v.
James R. McDONOUGH, Secretary, Florida Department of Corrections, et al.
No. 06-8706.

March 19, 2007.

Case below, 459 F.3d 1217.

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

U.S.,2007
Henyard v. McDonough
127 S.Ct. 1818, 167 L.Ed.2d 328, 75 USLW 3497

END OF DOCUMENT

Appendix D
Henyard v. State, 929 So. 2d 1052 (Fla. 2006).

C
Henyard v. State
Fla. 2006.
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')

Supreme Court of Florida.
Richard Henyard
v.
State
NO. SC05-1337

April 11, 2006

Disposition: Aff.

Fla. 2006.
Henyard v. State
929 So.2d 1052 (Table)

END OF DOCUMENT

Supreme Court of Florida

TUESDAY, APRIL 11, 2006

CASE NO.: SC05-1337
Lower Tribunal No.: 93-159-CF

RICHARD HENYARD vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

This cause is before this Court on Henyard's appeal of the denial of a successive motion for postconviction relief. We have considered the issues raised, and affirm the trial court's denial of postconviction relief. See Hill v. State, 2006 WL 91302 (Fla. Jan. 17, 2006).

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

tc
Served:

WILLIAM GROSS
MARK S. GRUBER
STEPHEN D. AKE
HON. JAMES C. WATKINS, CLERK
HON. MARK J. HILL, JUDGE

Appendix E
Henyard v. Crosby, 2005 WL 1862694 (M.D. Fla. 2005).

H

Henyard v. Crosby
M.D.Fla.,2005.
Only the Westlaw citation is currently available.
United States District Court,M.D. Florida.
Richard HENYARD, Petitioner,
v.
James V. CROSBY, Jr., Secretary, Florida Department of Corrections, and Charlie Crist, Attorney General, State of Florida, Respondents.
No. 504CV621OC10GRJ.

Aug. 2, 2005.

Mark S. Gruber, Capital Collateral Regional Counsel Middle Region, Tampa, FL, for Petitioner.
Stephen D. Ake, Office of the Attorney General, Tampa, FL, for Respondents.

OPINION

HODGES, J.
*1 This is a capital habeas proceeding brought pursuant to 28 USC § 2254 by a Florida inmate who has been sentenced to death.[FN1]

FN1. The offenses of conviction and the trial in state court occurred in Lake County, Florida, within this district and this division. The State concedes that the Petition was timely filed and that all of the claims were exhausted or were determined to be procedurally barred.

The issues have been fully briefed and the case is ready for decision. No evidentiary hearing is necessary because the record is fully developed and the claims of the Petition raise issues of law, not issues of fact. All of the claims lack merit and the Petition will be denied.

Facts and Procedural History

On Saturday, January 30, 1993, the Petitioner, then 18 years of age, aided and abetted by Alfonza Smalls, then 14 years of age, carjacked Dorothy Lewis and her daughters, three year old Jasmine and seven year old Jamilya. The carjacking occurred late at night in the parking lot of a Winn-Dixie grocery store in Eustis, Florida.

After driving to a remote location, both of the perpetrators raped Ms. Lewis on the trunk of her automobile after which she was shot three times and left for dead.[FN2] Her daughters were then driven to another location where the Petitioner shot and killed both of them.[FN3]

FN2. Ms. Lewis miraculously survived and testified at the Petitioner's trial.

FN3. A more detailed statement of the facts may be found in *Henyard v. State*, 689 So.2d 239 (Fla.1997).

Henyard and Smalls were quickly apprehended and indicted. The indictment, returned on February 16, 1993, consisted of eight counts charging the Defendants with kidnapping while armed, sexual battery while armed, attempted first degree murder (of Ms. Lewis), robbery while armed (against Ms. Lewis), and two counts of first degree murder (of Jasmine and Jamilya).[FN4]

FN4. The defendants were severed for trial and Henyard was tried first.

The case was tried on May 23 through June 3, 1994. The Petitioner, who did not testify, was convicted of all counts in which he was named including the two first degree murder counts involving the killing of the two minor children. After the penalty phase the jury recommended the death sentence for the Petitioner by a vote of 12 to 0. The trial judge then imposed a sentence of death, finding four aggravating factors: (1) that the Petitioner had been convicted of a prior violent felony; (2) that the murders had been committed in the course of com-

mitting another, violent felony; (3) that the offense was committed for pecuniary gain; and (4) the murders were especially heinous, atrocious or cruel.

The conviction and sentence were affirmed on direct appeal. *Henyard v. State*, 689 So.2d 239 (Fla.1996). A writ of certiorari was denied by the Supreme Court of the United States. *Henyard v. Florida*, 522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997). A timely motion for postconviction relief was filed in the state trial court under Florida Rule of Criminal Procedure 3.850. The trial court held an evidentiary hearing and ultimately denied the motion. An appeal, in conjunction with an original petition for habeas corpus, was then filed in the Supreme Court of Florida which denied all relief on May 27, 2004.*Henyard v. State*, 883 So.2d 753 (Fla.2004). No petition for certiorari was filed in the Supreme Court of the United States.

Petitioner's timely motion under 28 USC § 2254 was then filed in this court on December 20, 2004. All of the claims presented in the motion have been exhausted in the state courts.

Standard of Review

***2** Under 28 USC § 2254(d) and (e) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this court's review of the state court's factual findings must be highly deferential. Such findings are presumed to be correct unless rebutted by clear and convincing evidence. Similarly, the state courts' resolutions of issues of law-including constitutional issues-must be accepted unless they are found to be "contrary to" clearly established precedent of the Supreme Court of the United States or involved an "unreasonable application" of such precedent. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Indeed, it is not enough that the federal courts believe that the state court was wrong; it must be demonstrated that the state court decision was "objectively unreasonable." *Id.Breedlove v. Moore*, 279 F.3d 952 (11th Cir.2002).

The Claims of the Petition

The Petitioner's petition presents ten claims of constitutional deprivation. Each claim will be considered in turn.

CLAIM ONE

THE TRIAL COURT'S DENIAL OF A CHANGE OF VENUE VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Petitioner argues in his first claim that his constitutional rights were violated when the state trial court denied his motion for a change of venue. On February 3, 1994, Petitioner filed a motion for change of venue based on pretrial publicity. (Ex. A1 at 162-76). After hearing argument from counsel, the trial court denied the motion. (Ex. A22 at 2581-99). Petitioner renewed his motion during voir dire at trial, and the trial court again denied it. (Ex. A14 at 1009).

Petitioner raised the issue on direct appeal to the Florida Supreme Court. (Ex. A33 at 27-31). In denying this claim, the Florida Supreme Court stated:

In *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla.1977), we adopted the test set forth in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), and *Kelley v. State*, 212 So.2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue:

Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Id. 344 So.2d at 1278 (quoting *Kelley*, 212 So.2d at 28).*SeealsoPietri v. State*, 644 So.2d 1347 (Fla.1994), *cert.denied*,515 S.Ct. 2588, 132 L.Ed.2d 836 (1995). In *Manning v. State*, 378 So.2d 274 (Fla.1980), we further explained:

An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of ... showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.

*3 *Id.* at 276 (citation omitted). Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury.

During the actual voir dire here, each prospective juror was questioned thoroughly and individually about his or her exposure to the pretrial publicity surrounding the case. While the jurors had all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. Further, the record demonstrates that the members of Henyard's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, we find that on the record before us, the trial court did not abuse its discretion in denying Henyard's motions for a change of venue.

Henyard, 689 So.2d at 245-46.

The standard governing change of venue issues is derived from the Fourteenth Amendment's due process clause which safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, 'indifferent' jurors."*Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir.1985) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)), *cert.denied*,476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986). The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant a defendant's motion for a change of venue, *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), or a continuance, *Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). At issue is the fundamental fairness of the defendant's trial, *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). There are two standards that guide analysis of this question, the "actual prejudice" standard and the "presumed prejudice" standard.

Actual prejudice occurs when the "prejudice actually enters the jury box and affects the jurors."Presumably, Petitioner does not rely upon a showing of actual prejudice because his argument centers around the trial court's order denying his request for a change of venue prior to trial and renewed during jury selection. And, in any event, Petitioner has not identified any instances of "actual prejudice." Rather, his argument involves alleged prejudice that is "presumed" from pretrial publicity.

In order to establish "presumed prejudice," a defendant must show "first that pretrial publicity was sufficiently prejudicial and inflammatory and second that the prejudicial pretrial publicity saturated the community where the trial was being held."*Spivey v. Head*, 207 F.3d 1263, 1270 (11th Cir.2000). Presumed prejudice is rarely applicable, and is reserved for an extreme situation. *Coleman*, 778 F.2d at 1490. In fact, the Eleventh Circuit has noted that only a very few cases have granted relief under this standard.*Id.*

*4 The Petitioner argued in state court, and reargues here, that the state trial court erred in denying his request for a change of venue due to the prejudicial nature of the pretrial publicity which allegedly saturated the community.[FN5] The voir dire proceedings in this case consumed almost 1,000 pages of transcript and included an extensive individual voir dire about the pretrial publicity. (Exs. A9-A14 at 16-1004). The jurors who were selected to serve all agreed that any pretrial publicity would not bias them or interfere with their ability to follow the trial court's instructions. None of the seated jurors had more than slight knowledge of the case, and there is nothing in the trial record to suggest that the case was decided based on anything other than the evidence introduced by the State, which was, to say the least, overwhelming.

FN5. The Petitioner's characterization of Lake County as "rural" (Petition, page 9) is somewhat misleading. The county was, at the time of Petitioner's trial, a rapidly growing amalgamation of several communities north of the Orlando metropolitan area.

The state trial court found no legal reason to grant the Petitioner's motion for a change of venue and the Florida Supreme Court was not "objectively unreasonable" when it found that the trial court acted within its discretion in denying the motion. After reviewing the direct appeal record, the Florida Supreme Court made factual findings that each prospective juror was questioned extensively about the pretrial publicity and, although each of the selected jurors had read or heard something about the case, "each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision."*Henyard,* 689 So.2d at 246. Petitioner has failed to proffer any evidence to rebut this factual finding.

Furthermore, in denying Petitioner's claim on direct appeal, the Florida Supreme Court correctly utilized the applicable law as established by the United States Supreme Court in *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).FN6 In *Murphy,* the Court noted that the constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors, but qualified jurors need not be totally ignorant of the facts and issues involved. 421 U.S. at 799-800, 95 S.Ct. at 2036.

FN6. Petitioner's assertion that "[t]he Florida courts' disposition of this issue was contrary to and an unreasonable application of federal constitutional law as determined by the United States Supreme Court in *Rideau,Sheppard v. Maxwell,* and other authority cited herein," is without merit. Petition for Writ of Habeas Corpus at 9. These cases pre-date the Court's decision in *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), cited by the Florida Supreme Court in *Henyard.*Petitioner has failed to carry his burden of demonstrating that the state courts' disposition was contrary to and an unreasonable application of federal constitutional law.

The state court's legal ruling on Petitioner's claim was not "contrary to" clearly established federal law as determined by the United States Supreme Court, nor did it involve an "unreasonable application" of such law. 28 USC § 2254(d)(1). Petitioner has failed to establish any grounds for federal habeas relief on this issue. Claim One is without merit and is DENIED.

CLAIM TWO

PETITIONER WAS DENIED RIGHTS SECURED BY THE FOURTH AND FOURTEENTH AMENDMENTS DUE TO THE FAILURE OF THE TRIAL COURT TO SUPPRESS HIS STATEMENTS.

On Sunday, January 31, 1993, the day after the murders, the Petitioner voluntarily went to the Eu-

stis Police Department to provide information about the crimes. While there he made a statement that his trial counsel later moved to suppress. The motion was overruled and the statement was admitted at Petitioner's trial. The admission of the statement was one of the Petitioner's principal claims of error on his direct appeal.[FN7] *Henyard,* 689 So.2d at 246-248.

> FN7. The Petitioner actually made several incriminating statements at different times, but only the first was offered and admitted in evidence at trial.

*5 During his interview session with the investigating officers, Petitioner asked on one occasion: "Can I go home soon, man?" and "How long am I gonna have to stay here?"On another occasion he stated: "Take me to my aunt's house."The Petitioner argues that these questions and statements were sufficient to convey a desire to terminate the interrogation and that, by continuing the interview, the investigating officers violated the rule of *Miranda.*

The Supreme Court of Florida thoroughly reviewed the issue and, citing *Moore v. Dugger,* 856 F.2d 129 (11th Cir.1988), and *Delap v. Dugger,* 890 F.2d 285 (11th Cir.1989), *cert.denied,*496 U.S. 929, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990), held that there was no violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Both *Moore* and *Delap,* Eleventh Circuit decisions, dealt with similar factual situations involving suspects who asked how much longer the interrogation would last or when the subject might go home. The Court of Appeals concluded in both instances that there was no violation of *Miranda.*Those decisions clearly support the result reached by the Florida Supreme Court in this case, and the Petitioner cites no precedent of the Supreme Court of the United States suggesting that suppression was required. Moreover, the Florida Supreme Court also decided as an alternative basis of its holding, that admission of the statement, if erroneous, was nevertheless harmless beyond a reasonable doubt. *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Even if one could conclude on this record that the Supreme Court of Florida was wrong in its interpretation and application of the law, no one could persuasively argue that the Court's decision on this point was "objectively unreasonable." Claim Two is without merit and is Denied.

CLAIM THREE

PETITIONER WAS DENIED DUE PROCESS BECAUSE OF THE CUMULATIVE EFFECT OF ERRONEOUS TRIAL RULINGS, PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *Improper Prosecutorial Comments in voir dire.*

During jury selection the prosecutor made the statement that "if the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death."

On direct appeal, after citing *Gregg v. Georgia,* 428 U.S. 153, 203, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976) for the proposition that a jury is free to dispense mercy and is not required to recommend death even if the aggravating factors outweigh the mitigating evidence, the Florida Supreme Court said:

In this case, we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law. But, contrary to Henyard's assertions, we do not find that he was prejudiced by this error. Initially, we note the comments occurred on only three occasions during an extensive jury selection process. Moreover, the misstatement was not repeated by the trial court when instructing the jury prior to their penalty phase deliberations. In fact, the jury was advised that the statements of the prosecutor and

defense lawyer were not to be treated as the law or the evidence upon which a decision was to be based. Further, Henyard does not contend that the jury was improperly instructed before making an advisory sentence recommendation in the penalty phase of his trial. In this context, we find the prosecutor's isolated misstatements during jury selection to be harmless error. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

***6** *Henyard*, 689 So.2d at 250.

The Petitioner does not dispute the soundness of the Florida court's decision on this claim and, in particular, does not attempt to demonstrate how the court's decision was "contrary to" or constituted an "unreasonable application" of Supreme Court precedent. Rather, he argues, that the harmless error became harmful when considered in conjunction with other trial court "errors" that do not, standing alone, warrant any relief.

B. *Failure of the Trial Court to Grant Certain Challenges for Cause.*

The Petitioner complains that the trial court should have excused three of the potential jurors for cause. However, Petitioner's counsel used peremptory challenges to excuse those potential jurors and, on request, was granted an additional peremptory challenge which was used to strike another juror. No specific request was made for additional peremptory challenges, and this omission effected a procedural bar of the present claim under Florida law. *SeeHill v. State*, 477 So.2d 553, 556 (Fla.1985), and *Trotter v. State*, 576 So.2d 691, 693 (Fla.1990).

On Petitioner's direct appeal the Supreme Court of Florida expressly held that this claim of error had not been preserved and was procedurally barred. For that reason the claim is also procedurally barred in this Court and the Petitioner does not contend otherwise. Rather, he argues again that, taken together with other defaulted claims or harmless errors, he should be entitled to relief.

C. *Erroneous Admission of DNA Evidence.*

During Petitioner's trial the Court admitted over objection the testimony of a serologist employed by the Florida Department of Law Enforcement concerning the results of DNA testing performed on blood stains found on Petitioner's clothing. On direct appeal the Supreme Court of Florida reviewed this issue at length-treating the question exclusively as a state law evidentiary problem-and held that the trial court did not abuse its discretion in admitting the results of the DNA analysis. *Henyard*, 689 So.2d at 248-249.

The State responds to this claim by correctly pointing out that federal courts do not sit to review state evidentiary rulings. *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir.1983). Such an issue reaches a constitutional level only when the admission of the disputed evidence was error *and* rendered the trial fundamentally unfair. Here there was no error at all, much less one rendering the Petitioner's trial fundamentally unfair. *Id.*

D. *Prosecutorial Comments in Closing Arguments.*

This issue was presented on the Petitioner's direct appeal and was decided adversely to Petitioner's position by the Supreme Court of Florida:

Next, Henyard contends that the prosecutor made a false statement during his closing argument. The complained-of argument is as follows:

And then they [defense counsel] will tell you he was cooperative when he went to the police. He eventually told them what happened and he told them that he didn't kill the girls. And my first thought in that regard is, does it matter how many times you tell a lie for it to become the truth? Because I say it nineteen times or nineteen thousand times, does it make it so? And we all know it doesn't. You have to look at everything that is going on and see in that same story he is telling them, I never raped anybody.

*7 Henyard contends that the prosecutor's argument was improper because the prosecutor characterized the defendant as a liar by intimating that Henyard never admitted to the rape when, in fact, he did admit that he raped Ms. Lewis in this final statement made to police. We disagree. As previously noted, *seesupra* note 7, Henyard made three confessions at the Eustis Police Department on the day following the murder of the Lewis girls, but only his first statement was admitted against him at trial. In this first statement Henyard confessed that he abducted Ms. Lewis and her children and drove them to a deserted area where he shot Ms. Lewis in the leg and head, but denied that he raped Ms. Lewis or killed her daughters. In his last statement, Henyard finally confessed that he did rape Ms. Lewis, but continued to deny that he killed her daughters.

When the prosecutor's closing argument is read in its entirety and fairly considered, it is clear that the prosecutor was referring to Henyard's lack of candor and failure to be completely forthcoming about his involvement in the offense when he *initially* confessed, and was not making a bad faith argument which implied that Henyard *never* confessed to the sexual battery of Ms. Lewis. In essence, the prosecutor argued to the jury that because the state had offered evidence at trial which clearly contradicted and discredited Henyard's initial assertion that he did not rape Ms. Lewis, the jury should not believe Henyard's further assertions that he also did not kill Jasmine and Jamilya Lewis. We find that the prosecutor's argument was a legitimate comment on the truthfulness, or lack thereof, of Henyard's claim of innocence, and contrary to Henyard's assertion, was not improper.

Henyard, 689 So.2d at 280-281 (Fla.1996).

The disposition of this claim by the Supreme Court of Florida was imminently reasonable and correct. Petitioner's argument to the contrary is meritless.

In summary, then, two of the four "errors" asserted by the Petitioner in this claim were not errors at all. Another, (the challenges for cause) may or may not have constituted error but was procedurally defaulted; and the fourth (the prosecutor's statement during *voirdire*) was clearly harmless as the Florida Supreme Court determined. The Petitioner tacitly concedes that, standing alone, none of these assertions warrants any relief; and, even when taken together, there is no semblance of an argument that the state courts' rulings were contrary to or constituted an unreasonable application of any clearly established Supreme Court precedent. Claim Three is without merit and is Denied.

CLAIM FOUR

THE AGGRAVATING CIRCUMSTANCE OF PREVIOUS CONVICTION OF A VIOLENT FELONY VIOLATED THE EIGHTH AMENDMENT UNDER *JOHNSON V. MISSISSIPPI.*

In this claim the Petitioner contends that a constitutional error occurred under *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), when the trial court admitted into evidence, during the penalty phase of his trial, Petitioner's prior juvenile adjudication for armed robbery. The evidence was admitted in support of one of the statutory aggravators under Florida law-a prior conviction of a felony involving the use or threat of violence to the person.

*8 Prior to Petitioner's appeal, the Supreme Court of Florida had held in *Merck v. State*, 664 So.2d 939 (Fla.1995), that a juvenile adjudication could not be treated as a criminal "conviction" under Florida statutory law, and could not, therefore, be received in evidence as an aggravator in a capital case. The Florida high court applied its decision in *Merck* to Petitioner's case and concluded that it was error to admit Petitioner's juvenile adjudication during the penalty phase of his trial. The Court also found, however, that the error was harmless due to the presence of six other contemporaneous violent felony convictions supporting the aggravating circumstance involved.

In *Johnson,supra,* the prior conviction relied upon as an aggravator had been reversed on appeal. The United States Supreme Court held, under those circumstances, that the petitioner was entitled to post-conviction relief especially where the state court had expressly declined to engage in a harmless error analysis.

The state in this case argues that *Johnson* is clearly distinguishable on two grounds. First, the prior state court conviction in *Johnson* had been vacated and ceased to exist. Here, by contrast in Petitioner's case, the juvenile adjudication remains valid and represents a conclusive judicial finding that the Petitioner had engaged in the underlying criminal behavior-an armed robbery. The fact that the juvenile adjudication does not constitute a "conviction" under Florida law is just that, a matter of state law having no federal constitutional implications. Juvenile adjudications are used every day in the federal courts as sentencing enhancers even though the state in which the adjudication occurred does not treat juvenile judgments as "convictions" under state law. *See,e.g.,United States v. Acosta,* 287 F.3d 1034 (11th Cir.2002); *United States v. Owens,* 15 F.3d 995 (11th Cir.1994); *United States v. Burge,* 407 F.3d 1183 (11th Cir.2005).

Secondly, the Supreme Court of Florida determined, unlike the Mississippi court in *Johnson,* that jury exposure to the Petitioner's prior juvenile adjudication was harmless error.

Nevertheless, we reject Henyard's claim that the trial court's improper consideration of Henyard's prior juvenile adjudication as a violent felony entitles him to a new sentencing hearing. Unlike the violent felony adjudications at issue in *Merck,* the testimony concerning Henyard's juvenile adjudication was modest and served to minimize his role in the prior offense. Moreover, the record reflects without dispute the presence of six other contemporaneous felony convictions of Henyard to support the prior violent felony aggravator for each death sentence even absent Henyard's juvenile adjudication for robbery with a weapon. Accordingly, we find the trial court's improper admission into evidence and consideration of Henyard's juvenile adjudication for robbery with a weapon to be harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d at 1129.

***9** *Henyard,* 689 So.2d at 252.

Johnson is easily distinguishable, and the Petitioner has not otherwise shown that the decision of the Supreme Court of Florida was contrary to, or constituted an unreasonable application of, governing Supreme Court precedent. Claim Four is without merit and is Denied.

CLAIM FIVE

CONSIDERATION OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDERS WERE COMMITTED FOR THE PURPOSE OF AVOIDING ARREST VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court, in instructing the jury concerning the statutory aggravating circumstances it might consider, included the factor that the murders had been committed for the purpose of avoiding arrest. There was no objection to this instruction. The court itself, in its subsequent sentencing order did not mention or rely upon that factor as an aggravating circumstance.

On direct appeal to the Supreme Court of Florida that court imposed a procedural bar and refused to consider the issue (denominated as Petitioner's point 8(a) on appeal) because it had not been preserved by appropriate objection in the trial court. *Henyard,* 689 So.2d at 244-245. The Court also noted, in any event, that if there was error on this point, it was harmless.*Id.*

The Petitioner has not demonstrated how the disposition of the matter by the Supreme Court of Florida was contrary to, or constituted an unreasonable application of, governing Supreme Court precedent. Claim Five is without merit and is Denied.

CLAIM SIX

EVIDENTIARY ERROR REGARDING ADMISSION OF BLOOD STAIN PATTERN ANALYSIS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS.

Despite the wording of this claim, the Petitioner does *not* argue that the admission of blood stain pattern evidence was error under the rules of evidence; rather, he argues that the state's expert who so testified was simply wrong-that another expert is now available who would offer contrary opinions.

The Supreme Court of Florida ruled that the testimony of the state's blood spatter analyst was properly admitted by the trial judge (*Hayward,* 689 So.2d at 253), and the Petitioner is unable to demonstrate that this ruling was contrary to or constituted an unreasonable application of governing precedent from the Supreme Court of the United States. Claim Six is without merit and is Denied.

CLAIM SEVEN

THE JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), following its earlier decisions in *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), the Supreme Court held that the Florida jury instruction as given in Espinosa's case concerning the heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague. However, the *Espinosa* instruction did not elaborate upon the terms of the statute; the key words were not defined or limited in scope. *SeeHall v. State,* 614 So.2d 473, 478 n. 5 (Fla.1993).

***10** As early as 1973, the Supreme Court of Florida was called upon in *State v. Dixon,* 283 So.2d 1 (Fla.1973), to respond to numerous questions certified to the court by the state's trial courts concerning the construction and constitutionality of Florida's death penalty act that had been adopted in the wake of *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Among the issues decided in *Dixon* was the meaning to be given to the "heinous, atrocious or cruel" aggravator. The court supplied a definition of those terms *and* limited the scope of the HAC aggravator to "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily tortuous to the victim."*Dixon,supra,* 283 So.2d at 9. As so construed and limited, the Florida HAC aggravator was specifically upheld against constitutional attack in *Proffitt v. Florida,* 428 U.S. 242, 255-256, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976). Also, the addition of the last sentence of the instruction in *Dixon* served to cure the flaw found to be unconstitutional in *Godfrey,Maynard* and *Shell.*

Notwithstanding the decisions in *Dixon* and *Proffitt,* the state's standard jury instructions were not amended to incorporate the *Dixon* limitation on the HAC aggravator until 1990. *Seeln re Standard Jury Instructions Criminal Cases No. 90-1,* 579 So.2d 75 (Fla.1990). As a result, in some capital cases tried in Florida before 1990, like *Espinosa,* the jury instruction concerning the HAC aggravator consisted of nothing more than a reading of the statute itself. *SeeHall v. State,supra.*By contrast, in this case (tried in 1994), the trial judge gave the full *Dixon-Proffitt* jury instruction.

The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoy-

ment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was conscienceless, pitiless or was unnecessarily tortuous to the victim.

The Petitioner has thus failed to demonstrate that the Florida Supreme Court disposed of this claim in a manner that was "contrary to" or involved an "unreasonable application" of Supreme Court precedent. Claim Seven is without merit and is Denied.

CLAIM EIGHT

TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S PENALTY PHASE CASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Under this claim the Petitioner presents a number of ineffective assistance of counsel contentions involving the penalty stage of his trial. These contentions were raised in Petitioner's post conviction motion for collateral relief. The trial court conducted an evidentiary hearing and entered an order stating findings and conclusions denying the claim in its entirety. On appeal, the Supreme Court of Florida issued an opinion stating its findings and conclusions, and affirmed the denial of any relief. *Henyard*, 883 So.2d 753 (Fla.2004).

(a). *Background*

***11** An examination of the petition discloses that the Petitioner has seven specific complaints about the performance of his trial counsel during the penalty phase of his trial: (1) his counsel failed to investigate and present evidence of Petitioner's deprived childhood; (2) his counsel should have presented testimony about Edith Ewing's corporal punishment or spanking of the Petitioner when he was 14 or 15 years old; (3) his counsel should have presented testimony about the Petitioner's desire not to be promoted in school, and his preference to remain with younger children; (4) his counsel should have presented testimony about Petitioner's childhood sexual abuse; (5) his counsel should have presented testimony about the Petitioner's abuse of alcohol; (6) his counsel should have presented testimony about the Petitioner's suicidal ideation; and (7) his counsel was deficient in preparing one of his witnesses, Dr. Jethro Toomer, a psychologist.

Before discussing each of these contentions about what Petitioner's trial counsel did *not* do at the penalty phase, it is appropriate to briefly review what counsel *did* present at that stage of the trial.

The defense called eight (8) witnesses during the penalty phase of Petitioner's trial. The first witness, Jeffery Pfister, was the Petitioner's lawyer during the proceeding that resulted in the Petitioner's juvenile adjudication for committing the offense of robbery with a weapon. The state had offered, and the court had received in evidence during the state's case addressing penalty, a copy of the judgment in the Petitioner's juvenile proceeding. (*See* Claim Four, *supra*). Mr. Pfister testified that the Petitioner performed the role of exterior lookout during the offense, and that the "weapon" used by the robber (Petitioner's accomplice) was nothing more than a broomstick. Such testimony, obviously, was properly offered to dilute the facial gravity of a conviction for robbery with a weapon.

The second witness called by Petitioner's counsel was also a lawyer qualified as an expert concerning the application of Florida's sentencing guidelines in criminal cases. He testified that the Petitioner, given the convictions already handed down by the jury, would spend his life in prison without parole. He also testified that Petitioner's accomplice, Alfonza Smalls, could not be given the death penalty because of his age (14 years old). This testimony served a dual purpose. First, it diffused any practical concern the jury might have about the Petitioner's future danger to society as a whole if his life was spared; and, second, it introduced a consideration of parity in sentencing as a justification for a sen-

tence of life rather than death.

The remaining six witnesses called by the defense consisted of Nyoka Wiley, Jacqueline Turner's daughter who was raised with the Petitioner; Edna McClendon, one of Petitioner's teachers; Richard Henyard, Sr., Petitioner's father; Jacqueline Turner, who actually cared for and raised the Petitioner during much of his life until age eleven; Hattie Mae Gamble, Petitioner's mother; and Dr. Jethro Toomer, a psychologist.

*12 Nyoka Wiley, a daughter of Jacqueline Turner, testified that she was raised with the Petitioner during the extended periods of time that he lived in Turner's home, and that his mother, Hattie Gamble, was never present and took no maternal interest in the Petitioner. Wiley also testified that the Petitioner wanted to go back to middle school "to be with people younger than him."(R. 2244).

Edna McClendon, one of the Petitioner's teachers in Pahokee, testified that neither of his parents ever came to the school-even to enroll him-but he was never a disciplinary problem. She also testified that the Petitioner would sometimes hyperventilate, apparently due to asthma.

Richard Henyard, Sr., Petitioner's father, testified that he was never married to Petitioner's mother, Hattie Gamble; that she had custody of the Petitioner in Lake County while he, the father, worked as a truck driver in Pahokee; that he saw the Petitioner only briefly on rare occasions-and not at all between the time the Petitioner was 7 or 8 until he became 11 years of age; that he then discovered that the Petitioner was living "out of doors" (R. 2260), meaning a homeless existence; and that he then took the Petitioner to Pahokee where he remained, with one or two interruptions, until he was approximately 15 1/2 years old. Even so, Henyard, Sr., had very little contact with the Petitioner and did not fill the role of a true father figure during those years because he, the father, worked up to 90 hours a week. (R. 2264-2265).

Jacqueline Turner testified that she was acquainted with Hattie Gamble, the Petitioner's mother; that Hattie drank heavily and smoked marijuana during her pregnancy with the Petitioner; that she, Turner, simply took the Petitioner into her care as an infant because his mother, Hattie, was unable and unfit to care for him; and that she kept the Petitioner from infancy until he was 3 years of age at which time he returned to his mother. While the Petitioner lived with his mother, Hattie, he was ridiculed by other children concerning his mother's lifestyle and her addiction to cocaine, and by age 11, the Petitioner was essentially on his own living on the streets. At that time, Turner, unable to control the Petitioner, called his father to come and get him.

Hattie Mae Gamble, the Petitioner's mother, testified that she drank to excess and used marijuana and cocaine during the time the Petitioner lived with her; that she made no inquiry about him after he left for his father's home in Pahokee at age 11; and that, in fact, she was in jail herself at the time the Petitioner committed the murders in question.

Dr. Jethro Toomer, a clinical psychologist, testified that he had examined and had administered several tests to the Petitioner on two occasions. He stated that the Petitioner has an IQ of 85, "below the average range of intellectual functioning;" that Petitioner has a thought disturbance that inclines him toward impulsive acts and drug dependency; that he is impaired both emotionally and psychologically, and functions at the level of a 13 year old child (R. 2340); that the Petitioner shows signs of both paranoia and schizophrenia, but is not psychotic; and that his impairment reduces his appreciation of the criminality of his conduct and his ability to conform his behavior to the requirements of the law. (R. 2349).

(b). *Discussion of the issues*

*13 1. *Not investigating and presenting evidence of Petitioner's deprived childhood.*This aspect of the claim borders on being frivolous. The unrebutted

testimony adduced by the Petitioner's counsel during the penalty phase at trial clearly painted a vivid picture of the Petitioner's deprived and horrendous childhood. Any additional witnesses who might have testified to the same effect would have been cumulative. Regardless of the alleged deficiency of counsel, therefore, the Petitioner cannot satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) concerning this aspect of his claim, and that is precisely the basis on which the Supreme Court of Florida resolved the issue.

[E]ven if we were to assume that Henyard's attorneys performed deficiently by failing to track down these four witnesses and present their testimony at the penalty phase, pursuant to the second prong of the *Strickland* test, Henyard did not suffer any prejudice because the testimony of the four witnesses was substantially similar to and cumulative with testimony that was actually presented during the penalty phase.

Henyard, 883 So.2d at 759.

The Petitioner has failed to demonstrate that the state court disposition of this part of his claim was "contrary to" or constituted an "unreasonable application of" governing Supreme Court precedent.

2. *Not revealing Ewing's spanking of the Petitioner.*Petitioner claims that his counsel was prejudicially ineffective for not offering evidence that he suffered corporal punishment as a teenager when Edith Ewing, his father's common law wife, spanked him on the legs with a belt. After the evidentiary hearing conducted on the Petitioner's post-conviction motion under Florida Rule of Criminal Procedure 3.850, the state trial court found:

At the age of fourteen or fifteen, the defendant stole items from [Ewing's] home, including a VCR and a pistol. As punishment, Ms. Ewing on occasion spanked the defendant with a belt on the legs. These spankings were neither frequent nor excessive, and never resulted in injury to or complaint from the defendant. (H-171;H-176 to 178).

Mr. Henyard's trial attorneys did not present evidence of the spankings to the jury. But probably made a strategic decision to keep from the jury any evidence of the defendant's history of stealing other people's property. (R-2440); (H-192).

The rejection of this claim by the trial court was discussed at length and affirmed by the Supreme Court of Florida. *SeeHenyard*, 883 So.2d at 760-761.

There was no evidence of any significant or long term physical abuse, and Petitioner's trial counsel-being well aware of the spankings-deliberately and reasonably decided not to pursue that thread of mitigation because of its downside. Evidence of the spankings would have opened the door to the reasons for the discipline, namely, thefts by the Petitioner of Ms. Ewing's property (R. 2440).

*14 There was no ineffective assistance of counsel on this point of dispute; and, if there was, Petitioner is wholly unable to demonstrate any prejudice. Indeed, as counsel reasonably assessed the situation, evidence of the spankings would have been more harmful than beneficial.

3. *Not presenting evidence of Petitioner's desire to stay back in school with younger children and his harassment by younger children.*The Petitioner claims that evidence should have been submitted by his counsel during the penalty phase of his trial that he did not want to be promoted in school, preferring to remain with younger children. He also contends that evidence should have been presented about his harassment by other children. In making this claim the Petitioner simply overlooks the fact that such evidence *was* presented to his jury. Nyoka Wiley testified about the Petitioner's desire to remain in a lower grade to associate with younger children (R. 2244), and Jacqueline Turner testified about the Petitioner's harassment by his peers. (R. 2286). This claim is simply refuted by the record.

4. *Not presenting testimony about Petitioner's sexual abuse as a child.* Several witnesses testified at the state trial court's evidentiary hearing on the Petitioner's 3.850 motion that the Petitioner had told them that he had been sexually molested as a child by a neighbor. Yet no evidence of such abuse was presented by Petitioner's counsel during the penalty phase of his trial.

The Supreme Court of Florida disposed of this claim as follows:

Initially, we would note that the evidence of [Petitioner's sexual] abuse introduced at the evidentiary hearing came from witnesses who were repeating what Henyard had told them and there was no indication that these witnesses shared this information with Henyard's trial counsel. Moreover, defense counsel was aware of at least two instances where Henyard had specifically said that he was not sexually abused. As noted above, according to *Strickland,* the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* further states, '[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.' *Id.* When determining reasonableness, there is a 'heavy measure of deference to counsel's judgments.' *Id.* Although we recognize the difficulty individuals may have in reporting such abuse, in this situation where Henyard had specifically denied on at least two occasions that he had been sexually abused, it is not clear that trial counsel's failure to investigate the conflicting evidence that Henyard may have been molested amounts to ineffective assistance of counsel.

Of course, Henyard was able to introduce evidence that at least one member of his defense team was aware that Henyard claimed he had been abused. Nevertheless, even if we were to determine that trial counsel should have conducted further investigations into the allegations of molestation, the evidence that Henyard introduced at the evidentiary hearing does not demonstrate that he was prejudiced in this case. The only information introduced at the hearing consisted of brief, second-hand accounts by witnesses of what Henyard had told them. There was no additional evidence that the alleged molestation had in fact occurred. Likewise, there was no testimony from mental health experts as to how the alleged molestation, which occurred a decade before the crime, had affected Henyard. Therefore, the trial court did not err in finding that Henyard has not demonstrated prejudice on this claim.

***15** *Henyard,* 883 So.2d at 761-762.

The United States Supreme Court's most recent decision applying *Strickland* to claims of deficient investigation and presentation of evidence at the penalty phase of a capital murder trial is *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d360 (2005). In that case the Court found that a failure to investigate the circumstances surrounding the defendant's prior conviction, which the prosecution intended to use as an aggravator, constituted prejudicial ineffective assistance of counsel. However, those were not the circumstances in this case. Petitioner's counsel *did* investigate the Petitioner's prior juvenile adjudication and called a witness to explain the Petitioner's relative lack of culpability in the commission of that offense.

The few other decisions in which the high court has found a violation of its *Strickland* standards for evaluating the effective assistance of counsel are also distinguishable. In *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), for example, defense counsel failed to investigate the defendant's background and did not present any mitigating evidence at all. Similarly, in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), there was no investigation and no presentation of any humanizing mitigation. In *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), counsel for the defendant

was ineffective because he did not perform any investigation which would have prompted the filing of a motion to suppress.

In sum, the Petitioner has not demonstrated that the Supreme Court of Florida's decision in his case was either contrary to clearly established federal law or involved an unreasonable application of such law. This aspect of his claim is therefore without merit.

5. *Not presenting evidence of the Petitioner's abuse of alcohol.*The Supreme Court of Florida dealt with this sub issue as follows:

Henyard alleges that trial counsel was ineffective for failing to investigate or present evidence to the jury regarding his "chronic use of alcohol." The trial court in its order noted that the only germane evidence at the evidentiary hearing came from the testimony of Henyard's expert witness, Dr. Bauers. Moreover, the trial court concluded that the first prong of *Strickland* had not been met because Henyard had not shown that the failure to present the alleged evidence of his history of chronic alcohol and marijuana use was based on trial counsel's deficient performance.

We agree with the trial court's assessment of this claim. During the evidentiary hearing, Dr. Bauers testified that Henyard told him he started drinking beer and smoking marijuana between the ages of eight and ten, but he denied ever being seriously intoxicated or using hard drugs. He also told Dr. Bauers that his use of alcohol and marijuana decreased when he went to live with his father at the age of eleven. There was no other evidence presented during the evidentiary hearing regarding Henyard's chronic use of alcohol. Therefore, based on the fact that this issue was not addressed in any detail at the evidentiary hearing, Henyard has not demonstrated error in the trial court's conclusion that he has not shown his counsel's performance was deficient.

***16** *Henyard*, 883 So.2d at 762-763

The Petitioner has not demonstrated that this resolution by the Florida Court was "contrary to," or involved an "unreasonable application of" governing precedent of the Supreme Court of the United States.

6. *Not presenting evidence that the Petitioner had suicidal ideation.*Petitioner's lead trial counsel testified at the evidentiary hearing in the state trial court that after he spoke with Henyard about his alleged suicide attempt while in jail awaiting trial, counsel came away with the impression that Henyard faked the suicide attempt in order to be moved to the medical wing in the jail. (Ex. C6 at 1156; Ex. C7 at 1183), The Lake County Jail's medical department supervisor testified that Petitioner placed a nylon cord around his neck and inched down the bed until the cord tightened around his neck, a method not likely to prove fatal. (Ex. C7 at 1234-36). When the supervisor examined Petitioner after his "suicide attempt," the Petitioner pretended to be unconscious, and the supervisor informed Petitioner's attorneys of his opinion that this had not been a legitimate suicide attempt. (Ex. C7 at 1238). In analyzing this claim, the state trial court stated:

Had the jury and the Court heard about this incident [at the penalty phase] in all likelihood it would have established only that Henyard is a prevaricating manipulator of the system. Even if the jury somehow concluded that this suicidal gesture was sincere, which the Court sincerely doubts, when viewed in light of Henyard's villainous deeds, it is trivial and would not have changed the jury's recommendations or the Court's sentences.

On appeal, the Supreme Court of Florida also rejected this aspect of the Petitioner's claim saying:

Henyard contends that trial counsel was ineffective for not presenting evidence to the jury during the penalty phase of the trial of his mental state as characterized by his suicidal ideations. Although Jacqueline Turner, Henyard's godmother, testified that Henyard told her he did not want to live after he had been arrested, the primary evidence related

to suicidal tendencies that came out at the evidentiary hearing, centered on an alleged suicide attempt in the Lake County Jail after Henyard had been arrested for the murders. Trial counsel was made aware of Henyard's suicide attempt by the medical department supervisor from the Lake County Jail, Dan Pincus. Pincus also advised trial counsel that Henyard was placed on suicide watch because it was possible that Henyard would try to commit suicide again. However, Pincus also informed Henyard's trial counsel that he did not believe the suicide attempt to be legitimate because Henyard was purposely keeping his eyes shut as Pincus was trying to examine him. Additionally, although Henyard was placed on suicide watch, the standard procedure when there was any threat of suicide, whether legitimate or not, was to place the prisoner on suicide watch. When trial counsel, T. Michael Johnson, asked Henyard about the suicide attempt, Henyard indicated that he wanted to go back in the medical wing of the jail.

***17** *Henyard*, 883 So.2d at 763.

The Petitioner is unable to demonstrate that the state courts' denial of this subclaim was contrary to, or constituted an unreasonable application of, the Supreme Court decision in *Strickland* or any of its progeny.

7. *Counsel was deficient in preparing Dr. Jethro Toomer, a psychologist.* Petitioner alleges that his counsel was ineffective for failing to adequately prepare one of his mental health experts, Dr. Jethro Toomer, for his testimony at the penalty phase.[FN8] Specifically, Petitioner questions defense counsel's preparation of Dr. Toomer because the doctor did not speak with Richard Henyard, Sr., Edith Ewing, or Jacqueline Turner's husband. Dr. Toomer testified at the penalty phase that defense counsel supplied him with Henyard's school records and the names of family members and individuals to talk to prior to examining Henyard. (Ex. A20 at 2303). Dr. Toomer interviewed Henyard's mother and Jacqueline Turner, but did not speak to Henyard's father because his involvement n Henyard's life was "somewhat limited compared to the other individuals" he spoke with. (Ex. A20 at 2305, 2386). In addition to speaking with family members and other individuals and reviewing school records, Dr. Toomer also examined Henyard on two occasions for a couple of hours at each session. (Ex. A20 at 2303-05).

> FN8. Defense counsel also had Dr. Elizabeth McMahon examine Henyard, but she advised counsel not to call her as a witness because she did not find any statutory or nonstatutory mitigators. (Ex. C7 at 1164-65).

The Supreme Court of Florida rejected this subclaim as well. The Court said:

Henyard claims trial counsel was ineffective for failing to adequately prepare one of his mental health experts, Dr. Jethro Toomer, for his testimony at the penalty phase. Henyard attempted to prove Dr. Toomer was not adequately prepared by comparing Dr. Toomer's results with the evidentiary hearing testimony of Dr. Bauers' results.

We find Henyard's claim to be without merit. The trial court found nothing in Dr. Bauers' testimony [at the post conviction evidentiary hearing] that was any more favorable to Henyard than the testimony Dr. Toomer provided at trial and also rejected this claim as legally insufficient because Henyard did not specify the mitigation that trial counsel failed to call to Dr. Toomer's attention. Moreover, the trial court noted that the defense team consulted two mental health experts and that there was no evidence presented at the evidentiary hearing that Dr. Toomer was inadequately prepared.

We agree with the trial court's decision on this claim. At the evidentiary hearing, Dr. Bauers testified that he did not believe that Dr. Toomer did anything improper or that he in any way mishandled his examination or testimony. In fact, Dr. Bauers characterized Henyard's neuropsychological abilities as exhibiting some strengths and some

weaknesses, but indicated that the weaknesses were relatively mild and that they were consistent with what Dr. Bauers knew about Henyard's educational, occupational, and sociocultural background. Therefore, we conclude the trial court did not err in finding that Henyard was not entitled to relief on this issue.

***18** *Henyard*, 883 So.2d at 763-764

The Petitioner has not demonstrated that the Florida courts' disposition of this issue was contrary to, or constituted an unreasonable application of, governing precedent of the Supreme Court of the United States. Claim Eight is without merit and is Denied.

COUNT NINE

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN COUNSEL FAILED TO RAISE THE TRIAL COURT'S DENIAL OF TRIAL COUNSEL'S MOTION TO WITHDRAW.

Before the Petitioner's trial, his appointed Public Defender moved to withdraw because the State had listed a former client of the Public Defender's office as a witness thus placing the Public Defender in the "untenable position of having to cross examine a former client."At the time, however, a governing Florida Statute, Section 27.53(3), Florida Statutes (1993) required more. The statute provided that such a motion required a Public Defender to represent to the Court in a motion to withdraw that "the interests of those accused are so adverse or hostile that they cannot all be counseled by the Public Defender or his staff without conflict of interest ..." The Public Defender made no such representation in his motion in the Petitioner's case, and the Supreme Court of Florida held that the motion was properly denied for that reason. The Court then concluded that appellate counsel could not be faulted for raising on appeal an argument that had no merit. *See Henyard*, 883 So.2d at 764-765.

The Petitioner cannot and does not demonstrate that this disposition of the claim by the Florida Supreme Court was "contrary to" or involved an "unreasonable application of" governing Supreme Court authority. Claim Nine is without merit and is Denied.

CLAIM TEN

THE PETITIONER'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE HE MAY BE INCOMPETENT AT THE TIME.

This claim, on its face, is obviously premature. No death warrant has yet been issued and the Petitioner is not confronted with execution. As such, Claim Ten is without merit and is Denied.

The Clerk is directed to enter final judgment denying the petition with prejudice.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 1st day of August, 2005.

M.D.Fla.,2005.
Henyard v. Crosby
Not Reported in F.Supp.2d, 2005 WL 1862694 (M.D.Fla.)

END OF DOCUMENT

Appendix F
Henyard v. Crosby, 883 So. 2d 753 (Fla. 2004).

H

Henyard v. State
Fla.,2004.

Supreme Court of Florida.
Richard HENYARD, Jr., Appellant,
v.
STATE of Florida, Appellee.
Richard Henyard, Jr., Petitioner,
v.
James V. Crosby, Jr., etc., Respondent.
Nos. SC02-1105, SC02-2538.

May 27, 2004.
Rehearing Denied Sept. 22, 2004.

Background: Following final appellate affirmance of his convictions of three counts of armed kidnapping, sexual battery with use of a firearm, attempted first-degree murder, robbery with a firearm, and two counts of first-degree murder, and of his sentence of death, petitioner sought post-conviction relief. The Circuit Court, Lake County, Mark J. Hill, J., denied relief, and petitioner appealed, in addition filing original petition for writ of habeas corpus.

Holdings: The Supreme Court held that:
(1) petitioner did not receive ineffective assistance of trial counsel;
(2) public defender's motion to withdraw did not satisfy statutory requirements and was properly denied; and
(3) imposition of death penalty did not implicate petitioner's constitutional right to due process.

Denial of post-conviction relief affirmed; habeas petition denied.

Anstead, C.J., concurred specially with opinion.

Cantero, J., concurred with opinion in which Bell, J., joined.

West Headnotes

[1] Criminal Law 110 ⚿1134.47(3)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.47 Counsel
110k1134.47(3) k. Effective Assistance. Most Cited Cases
(Formerly 110k1134(3))
Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the standard two-part test for ineffectiveness. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ⚿1134.47(3)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.47 Counsel
110k1134.47(3) k. Effective Assistance. Most Cited Cases
(Formerly 110k1134(3))

Criminal Law 110 ⚿1158.28

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.26 Course and Conduct of Trial
110k1158.28 k. Counsel. Most Cited Cases
(Formerly 110k1158(1))
Appellate review of a claim of ineffective assistance of counsel requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⚿1042.7(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.7 Proceedings After Judgment
110k1042.7(2) k. Post-Conviction Relief. Most Cited Cases
(Formerly 110k1042)
Post-conviction movant's claim on appeal that his trial counsel was ineffective for failure to present particular witnesses in sentencing phase of his capital murder prosecution, to demonstrate that he suffered from lack of parental contact and supervision, was procedurally barred, where such claim was not raised in post-conviction motion.

[4] Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))
Any deficiency in defense counsel's failure to locate and present particular witnesses in sentencing phase of capital murder prosecution, to demonstrate that defendant suffered from lack of parental contact and supervision, did not prejudice defendant and did not amount to ineffective assistance, where testimony of witnesses at issue was substantially similar to and cumulative with testimony that was actually presented during penalty phase. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))
Defense counsel's failure to present penalty phase testimony in capital murder prosecution concerning spankings and physical abuse allegedly inflicted upon defendant by his stepmother was reasonable strategic decision and did not amount to ineffective assistance, where introduction of such testimony would have opened door to evidence of defendant's involvement in various thefts. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))
Defense counsel's failure to present particular witness in sentencing phase of capital murder prosecution, to testify concerning instances demonstrating that defendant preferred to be around younger children, was not deficient performance, did not prejudice defendant, and did not amount to ineffective assistance, where testimony of witness at issue was substantially similar to and cumulative with testimony that was actually presented during penalty phase, including expert psychiatric testimony concerning defendant's mental and emotional age and intelligence. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⚿1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of Investigation of Mitigating Circumstances. Most Cited Cases

(Formerly 110k641.13(7))

Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))

Defense counsel's failure to investigate or put on evidence, during penalty phase of capital murder prosecution, with respect to defendant's claim that he was sexually abused in childhood, was reasonable strategic decision and did not amount to ineffective assistance, where only evidence of abuse came from witnesses who were repeating what defendant had told them, defense counsel was aware of at least two instances in which defendant had specifically said that he was not sexually abused, and witnesses did not share their information with defense counsel before or during trial. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of Investigation of Mitigating Circumstances. Most Cited Cases
(Formerly 110k641.13(7))

Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))

Any deficiency in defense counsel's failure to investigate or put on evidence, during penalty phase of capital murder prosecution, with respect to defendant's claim that he was sexually abused in childhood, given evidence that at least one member of defense team was aware that defendant claimed to have been sexually abused, did not prejudice defendant and did not amount to ineffective assistance, where only available evidence of abuse consisted of witnesses' brief, second-hand accounts of what defendant had told them and there was no testimony from mental health experts as to how alleged molestation, occurring decade before murders, had affected defendant. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))

Post-conviction petitioner failed to demonstrate that his counsel's failure to put on evidence, during penalty phase of his capital murder prosecution, with respect to petitioner's alleged history of chronic alcohol and marijuana use, amounted to ineffective assistance, where only evidence presented with respect to such claims at post-conviction hearing was one doctor's testimony that petitioner had told him that he started drinking beer and smoking marijuana between ages of eight and 10, but denied ever being seriously intoxicated or using hard drugs, and had further stated that his use of alcohol and marijuana decreased when he went to live with his father at age of 11. U.S.C.A. Const.Amend. 6.

[10] Criminal Law 110 ⚿1961

110 Criminal Law

110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))
Defense counsel's failure to put on evidence, during penalty phase of capital murder prosecution, with respect to defendant's mental state as characterized by his suicidal ideations and suicide attempt following his arrest, was reasonable strategic decision, where suicide attempt was of questionable legitimacy and could have been viewed as manipulative. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 ⚿1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
(Formerly 110k641.13(7))
Post-conviction petitioner failed to establish that defense counsel's preparation of mental health expert to give testimony in penalty phase of capital murder prosecution amounted to ineffective assistance, where testimony of expert at issue was no less favorable to petitioner than testimony of second expert, and petitioner failed to specify mitigation allegedly not called to attention of expert at issue or present evidence that expert at issue was inadequately prepared. U.S.C.A. Const.Amend. 6.

[12] Habeas Corpus 197 ⚿486(5)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel
197k486(5) k. Post-Trial Proceedings; Sentencing, Appeal, Etc. Most Cited Cases
Claims of ineffective assistance of appellate counsel are appropriately raised in a petition for writ of habeas corpus. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 ⚿1969

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1966 Appeal
110k1969 k. Raising Issues on Appeal; Briefs. Most Cited Cases
(Formerly 110k641.13(7))
Appellate counsel cannot be deemed ineffective for failing to pursue a meritless claim. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 ⚿1832

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1831 Withdrawal by Counsel
110k1832 k. In General. Most Cited Cases
(Formerly 110k641.10(2))
Public defender's motion to withdraw from representation of capital murder defendant, based upon prior representation by office of public defender of at least one witness on state's witness list, did not satisfy statutory requirements for such motions and was properly denied, where public defender did not reference applicable statute or allege that interests of defendant and state's witness were so adverse or hostile that both could not have been counseled by public defender or his staff without conflict of interest, but rather alleged that continued representation of defendant would place public defender's office "in the untenable position of having to cross-examine a former client." West's F.S.A. § 27.53(3).

[15] Sentencing and Punishment 350H ⚿1623

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1623 k. In General. Most Cited Cases
Florida's capital sentencing scheme does not violate the United States or Florida constitution.

[16] Constitutional Law 92 ⚿4744(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4741 Capital Punishment; Death Penalty
92k4744 Matters Considered
92k4744(1) k. In General. Most Cited Cases
(Formerly 92k270(1))

Constitutional Law 92 ⚿4745

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4741 Capital Punishment; Death Penalty
92k4745 k. Proceedings. Most Cited Cases
(Formerly 92k270(1))

Sentencing and Punishment 350H ⚿1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases

Sentencing and Punishment 350H ⚿1786

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1786 k. Unanimity. Most Cited Cases
Imposition of death penalty upon capital murder defendant did not implicate defendant's constitutional right to due process, where jury unanimously recommended death penalty, and where respective to each murder trial court found aggravating circumstances of previous conviction of seven prior violent felonies, six of which included contemporaneous convictions for crimes against instant victims, and that commission of murders was in course of enumerated felony of kidnapping, as charged in indictment and found by jury. U.S.C.A. Const.Amend. 14.

[17] Sentencing and Punishment 350H ⚿1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of Review. Most Cited Cases
Capital murder defendant could not seek appellate review of contention that his execution could violate Eighth Amendment ban against cruel and unusual punishment due to his potential incompetence at time of execution until after death warrant was issued. U.S.C.A. Const.Amend. 8; West's F.S.A. RCrP Rule 3.811(c).

***755** Bill Jennings, Capital Collateral Regional Counsel-Middle Region, Robert T. Strain, Assistant CCRC, and Frank Lester Adams, III, Assistant CCRC, Tampa, FL, for Appellant/Petitioner.
Charles J. Crist, Jr., Attorney General, and Stephen D. Ake, Assistant Attorney General, Tampa, FL, for Appellee/Respondent.

PER CURIAM.

Richard Henyard, Jr. appeals an order of the circuit court denying a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and petitions the Court for a writ of habeas corpus. We have jurisdiction. *See**756art. V, § 3(b)(1), (9), Fla. Const. For the reasons set forth below, we affirm the trial court's denial of Henyard's postconviction motion and deny the petition for writ of habeas corpus.

FACTUAL BACKGROUND

The facts of this case are set out in detail in our previous opinion. *See Henyard v. State,* 689 So.2d 239 (Fla.1996). Richard Henyard (Henyard), at the age of eighteen, took a gun that belonged to a family friend and decided he was going to steal a car, kill the owner, and put the victim in the trunk so he could go see his father. Henyard convinced a younger, fourteen-year-old friend, Alfonza Smalls, to help him rob someone. On January 30, 1993, Henyard and Smalls waited outside of a Winn-Dixie store in Eustis, Florida. Their victims were Mrs. Dorothy Lewis and her daughters, Jasmine, age three, and Jamilya, age seven, who were shopping at the Winn-Dixie. As the three left the store and returned to their car, Smalls approached Lewis with a gun and ordered her and her daughters in the back of the car. Henyard drove the car out of town.

Henyard stopped the car at a deserted location where the two boys raped Lewis on the trunk of the car while her daughters remained in the back seat. Afterward, Henyard shot Lewis four times, wounding her in the leg, neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Lewis's unconscious body off to the side of the road and got back in the car. Jamilya and Jasmine were then driven to a separate location and taken from the car into a grassy area where they were each shot in the head and killed. Lewis survived and was able to make it to a nearby house where the police were called.

At trial, Richard Henyard, Jr. was convicted of three counts of armed kidnapping, one count of sexual battery with the use of a firearm, one count of attempted first-degree murder, one count of robbery with a firearm, and two counts of first-degree murder. After the penalty phase hearing, the jury recommended the death sentence for each of the murder counts by a vote of twelve to zero. The court found four aggravating factors,[FN1] three statutory mitigating factors,[FN2] and six nonstatutory mitigating factors.[FN3] The court found that the mitigating circumstances did not outweigh the aggravating circumstances and sentenced Henyard to death.

FN1. The trial court found the following aggravating factors: (1) the defendant had been convicted of a prior violent felony; (2) the murder was committed in the course of a felony; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious or cruel.

FN2. The trial court found the following statutory mitigating factors: (1) Henyard's age of eighteen at the time of the crime; (2) evidence that Henyard was acting under an extreme emotional disturbance; and (3) Henyard's capacity to conform his conduct to the requirements of law was impaired.

FN3. The trial court found the following nonstatutory mitigating circumstances: (1) the defendant functions at the emotional level of a thirteen-year-old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family; (4) the defendant can adjust to prison life; (5) the defendant could have received eight consecutive life sentences with a minimum mandatory of fifty years; and (6) Henyard's codefendant, Smalls, could not receive the death penalty as a matter of law.

This Court rejected all eleven [FN4] of Henyard's claims on direct appeal and affirmed his conviction and sentence. Henyard *757 then filed the postconviction motion that is the subject of this appeal, wherein he made nine claims.[FN5] After holding a hearing pursuant to *Huff v. State,* 622 So.2d 982 (Fla.1993), the trial court conducted an evidentiary hearing on Henyard's ineffective assistance of counsel claim.[FN6] Both Henyard and the State introduced the testimony of a number of witnesses. Subsequently, the trial court entered an order denying relief. Henyard now appeals, claiming that the trial court erred in denying him relief on his postconviction motion.

FN4. The eleven claims were: (1) the trial court abused its discretion in failing to grant Henyard's motions for a change of venue; (2) the trial court erred when it (a) granted the State's challenge for cause of one prospective juror (who stated he could not, under any circumstances, recommend a death sentence for Henyard because of his youth), and (b) refused to excuse three prospective jurors Henyard challenged for cause; (3) the trial court erred in denying Henyard's motions to suppress his statement to the police because the interrogating officers failed to honor Henyard's request to cease questioning in violation of his right to remain silent under article I, section 9 of the Florida Constitution; (4) the trial court abused its discretion in admitting DNA evidence which was not supported by a proper predicate of reliability; (5) the trial court erred by (a) allowing the State, during voir dire, to tell prospective jurors that if the evidence of aggravators outweighed the evidence of mitigators then the jury's sentence recommendation must be for death as a matter of law, and (b) suggesting during closing argument that Henyard never admitted to raping Lewis when, in fact, he did confess to raping her in his third confession to police on the day after the murders; (6) the trial court erred in allowing a police officer to testify as to hearsay statements Lewis made to him when he came to her aid after the offense; (7) the trial court erred by giving the standard jury instructions on premeditated murder and reasonable doubt, and by failing to give the jury a special verdict form on the theory of guilt; (8) the trial court erred during the penalty phase by (a) instructing the jury on the avoid arrest aggravator, (b) expressly considering as an aggravator, and allowing the jury to hear, evidence of Henyard's prior juvenile adjudication for robbery with a weapon, and (c) allowing Lewis and Leroy Parker to testify at the penalty phase because their testimony did not tend to prove any statutory aggravating circumstance; (9) the trial court abused its discretion in denying Henyard's specially requested penalty-phase jury instruction on the heinous, atrocious or cruel aggravating circumstance, which instructed on "tortuous [sic] intent," and further erred by giving the standard heinous, atrocious or cruel instruction, which is unconstitutionally vague and overbroad; (10) the trial court erred by relying upon two aggravating circumstances-pecuniary gain and heinous, atrocious or cruel-as support for Henyard's death sentences because they were not proven beyond a reasonable doubt; and (11) the death penalty is not proportionally warranted in this case.

FN5. The nine claims raised in Henyard's motion were: (1) ineffective assistance of counsel during penalty phase because trial counsel failed to adequately investigate and prepare mitigating evidence and to adequately challenge the State's case; (2) trial counsel was ineffective for failing to interview the jurors about any changes in their penalty phase voting; (3) trial counsel was ineffective for failing to ask jurors various

questions; (4) the jury instructions violated *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (5) the Florida death penalty statute is unconstitutional on its face and as applied; (6) electrocution is unconstitutional; (7) entitlement to relief because of "cumulative error;" (8) the death sentence rests on an unconstitutionally automatic aggravating circumstance; (9) the death sentence is unconstitutional because Henyard has the intellectual capacity of a thirteen-year-old child.

FN6. The evidentiary hearing was held only as to portions of Henyard's first claim regarding ineffective assistance of counsel.

ANALYSIS

3.850 APPEAL

Henyard's claims on appeal are rooted in his claim from his postconviction motion that trial counsel was ineffective in investigating and presenting different types of mitigating evidence. On appeal, Henyard divided his claim on ineffective assistance of counsel into six subclaims, alleging that his trial counsel did not adequately investigate or present the following nonstatutory mitigating circumstances: (1) Henyard's ***758** lack of stable parental contact and supervision; (2) Henyard suffered physical abuse at the hands of his father's common law wife, Edith Ewing; (3) Henyard's pattern of seeking out younger children as companions due to his lower IQ and "mental" age and to avoid harassment from children his own age; (4) Henyard suffered sexual abuse as a child; (5) Henyard's chronic use of alcohol; (6) Henyard's mental state as characterized by his suicidal feelings. Additionally, Henyard argues that counsel was deficient in preparing one of Henyard's mental health experts for trial. We consider each of Henyard's subclaims in turn.

Investigation and Presentation of Mitigation

[1][2] In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Wike v. State,* 813 So.2d 12, 17 (Fla.2002); *Rutherford v. State,* 727 So.2d 216, 219-20 (Fla.1998); *Rose v. State,* 675 So.2d 567, 569 (Fla.1996). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. *See Stephens v. State,* 748 So.2d 1028, 1033 (Fla.1999). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. *See id.*

Henyard alleges that trial counsel's performance was deficient in investigating potential nonstatutory mitigating circumstances. Under *Strickland,*"counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Strickland, 466 U.S. at 691, 104 S.Ct. 2052. However, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* While trial counsel has a duty to investigate, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

Following this standard from *Strickland,* this Court has held that "[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Rose,* 675 So.2d at 571. Moreover, this Court has also recognized that "[t]he failure to investigate and present available mitigating evidence is a relevant concern along with the reasons ***759** for not doing so." *Id.*[FN7]

> FN7. Recently, the United States Supreme Court in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), applied the *Strickland* standard with regard to the adequacy of counsel's investigation into mitigating evidence. The Court reiterated:
>
> > [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> *Wiggins,* 123 S.Ct. at 2535 (quoting *Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052). The Court determined that the principal concern about whether the attorneys in the case exercised reasonable professional judgment hinged on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable. *Id.* at 2536. The Court concluded that the attorneys' investigation, which was limited to obtaining two documents that indicated that the defendant had a troubled social and family history, fell short of the prevailing standards in place at the time of the trial. *Id.* at 2536.

Parental Contact and Supervision

[3] First, Henyard argues that trial counsel was ineffective for not presenting four witnesses to show Henyard suffered from a lack of parental contact and supervision. Initially, we would note that this specific claim was not made in Henyard's postconviction motion, and therefore it is procedurally barred. However, even if we were to address the merits, we would conclude that Henyard has not demonstrated a basis for relief. These four witnesses testified at the evidentiary hearing and, in general, their testimony demonstrated that Henyard had a difficult childhood. It was not clear from the evidentiary hearing whether the names of each of these individuals was given to Henyard's defense counsel. Although there was some dispute over trial counsel's attempts to contact one of the witnesses, all four testified that no one from Henyard's defense team had talked to them at the time of Henyard's trial.

[4] Nevertheless, even if we were to assume that Henyard's attorneys performed deficiently by failing to track down these four witnesses and present their testimony at the penalty phase, pursuant to the second prong of the *Strickland* test, Henyard did not suffer any prejudice because the testimony of the four witnesses was substantially similar to and

cumulative with testimony that was actually presented during the penalty phase.[FN8] *See *760 Gudinas v. State,* 816 So.2d 1095, 1106 (Fla.2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation). The various witnesses at both proceedings testified to the fact that Henyard had a difficult childhood, often living in multiple households because his mother was not an adequate caregiver. Thus, even assuming that trial counsel was ineffective in failing to locate the additional witnesses that could have provided additional confirmation to the testimony that was presented at the penalty phase, Henyard has failed to meet the prejudice prong of *Strickland,* and hence is not entitled to relief on this subclaim. *See, e.g., Sweet v. State,* 810 So.2d 854, 863-64 (Fla.2002) (noting that the Court did not need to reach the issue of whether trial counsel was deficient in failing to have additional penalty phase witnesses testify, because the testimony of the witnesses at the evidentiary hearing did not establish prejudice where the majority of the testimony was cumulative with other witnesses' trial testimony).

> FN8. At the evidentiary hearing, the four witnesses testified that Henyard had to live with people in the neighborhood because his mother did not take good care of him. They also testified that Henyard's mother was promiscuous and was addicted to drugs and alcohol. Although these witnesses may have provided some evidence as to Henyard's difficult childhood, this evidence would have been cumulative with the evidence that was presented during the penalty phase. At the penalty phase of the trial, Jacqueline Turner, Henyard's godmother, who also testified at the evidentiary hearing, testified in some detail about Henyard's upbringing and childhood. She testified that Henyard's mother had a chronic problem with alcohol and drug abuse during Henyard's entire life. Henyard's mother also testified that she constantly drank heavily and did other drugs while Henyard was young. She also testified that Henyard lived with his godmother and his father most of the time while he was young and she rarely stayed in contact with him when he was not staying with her. Henyard's father also testified that he had to take custody of Henyard because Henyard's mother was not taking care of him. Henyard's father testified that he could not spend much time with his son either because of his work schedule. During the penalty phase of the trial, Henyard's godsister also testified that Henyard had to stay with her mother because his mother was not taking care of him. This testimony was stressed in some detail in the defense's closing argument.

Physical Abuse

[5] Second, Henyard alleges that trial counsel was ineffective for not presenting evidence that Henyard's stepmother, Edith Ewing, physically abused him as a youth. Initially, any evidence of physical abuse presented at the hearing was extremely limited. The allegations of any significant amount of physical abuse came during the testimony of Henyard's "sister," Trena Lenon.[FN9] All of Lenon's testimony was confined to information that Henyard told her on the phone. She admitted that she was never present for any physical abuse, and that she had no knowledge of whether what Henyard told her was true or not. Other than this, the only other testimony or evidence that might support Henyard's claim was Ewing's own testimony that she spanked Henyard on one or two occasions on the legs with a belt. However, she testified that she did so after Henyard stole a pistol and a VCR.

> FN9. Although they were not biologically related, Lenon testified that she and Henyard were raised in the same household for a time and she referred to him as a brother.

The trial court rejected Henyard's claim, in part

stating that "Ms. Ewing provided a loving and stable home for the defendant, and treated him as one of her own" and that counsel made a strategic decision not to introduce any evidence of the spankings. Notably, the trial court cites Ewing's own testimony from the penalty phase of trial in support of the statement that she provided a loving and stable home. However, there was other testimony from the evidentiary hearing that the relationship between Henyard and Ewing may have been strained.[FN10]

> FN10. For example, T. Michael Johnson, Henyard's lead trial counsel, in explaining that there were strategic decisions not to have certain witnesses testify stated, "His stepmother and he did not get along. And she was of the opinion that she had been a great stepmom and he was a little thief when he came down there so we did not want that to come in." Dr. Russell Bauers, an expert witness in the field of neuropsychology and clinical psychology, testified that Henyard felt his stepmother treated her own son preferentially and would get things for her son that would be denied to Henyard. Henyard told Dr. Bauers that he decided that if he really wanted something he would have to go out and get in on his own by stealing it.

Nevertheless, even if Henyard's relationship with his stepmother may not have been ideal, his lead counsel, T. Michael ***761** Johnson, stated that the defense team did not want to present any evidence that Henyard was abused by Ewing because that would have opened the door to other evidence that Henyard had been involved in various thefts. Moreover, Mark Nacke, another member of Henyard's trial team, specifically testified that the defense looked into Henyard's claims of Ewing's physical abuse and had asked both Henyard's stepmother and his father about these allegations. Nacke said both denied any such abuse and that ultimately the defense team decided not to call Ewing because of evidence that Henyard had stolen money from her.

Therefore, trial counsel made a tactical choice not to discuss the spankings, alleged abuse, or strained relationship with Ewing at the penalty phase in order to prevent evidence of any thefts from being introduced. Henyard's collateral counsel's claim that this evidence should have been introduced despite trial counsel's fears about negative repercussions does not amount to ineffective assistance of counsel in this case, and we find no error in the trial court's rejection of this claim. *See Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.").

Mental Age

Third, Henyard contends that trial counsel was ineffective for failing to call Angellette Wiley to testify at the penalty phase of the trial because she would have given a clear account of incidences where Henyard's behavior proved he preferred to be around younger children. The trial court rejected this claim correctly noting that this evidence was presented to the jury.

[6] Specifically, to the extent any testimony from Angellette Wiley was helpful in showing Henyard's "mental" age, it was cumulative with the statements of her mother, Jacqueline Turner, and her sister, Nyoka Wiley, both of whom testified during the penalty phase of trial.[FN11] Moreover, the trial testimony of Dr. Jethro Toomer, the psychologist who testified for the defense in the penalty phase, that Henyard was functioning on the level of a thirteen-year-old would have indicated Henyard's mental age to the jury. In fact, the trial court specifically found that Henyard "functions at the emotional level of a thirteen year old and is of low intelligence" as a nonstatutory mitigating factor. *See Henyard,* 689 So.2d at 244. Because Wiley's evidentiary hearing testimony was cumulative with the arguably more extensive evidence and testimony

that trial counsel *did* present at the penalty phase, we find no error in the trial court's conclusion that Henyard has not satisfied either prong of *Strickland.*

> FN11. For example, at trial, Nyoka specifically testified that most of Henyard's friends were younger than he was and she recounted an incident where Henyard did not want to go to the ninth grade because he wanted to return to middle school to be with younger people. At the evidentiary hearing, Angellette Wiley and Jacqueline Turner testified regarding the same incident, and this was the only indication that Henyard preferred the company of younger children.

Alleged Sexual Abuse

Fourth, Henyard claims that trial counsel was ineffective because the defense conducted no investigation and presented no testimony regarding childhood sexual abuse during the penalty phase. Several witnesses at the evidentiary hearing testified that Henyard told them he was molested. However, none of these individuals said they informed defense counsel of Henyard's allegations. Additionally, there is ***762** some question about the extent to which Henyard relayed this information to his defense team. J.T. Williams, an investigator for the Public Defender's Office, testified that he asked Henyard in a questionnaire soon after the arrest if he had ever been sexually abused and Henyard wrote that he did not remember ever being sexually abused. According to lead counsel T. Michael Johnson's notes, Henyard also denied ever being sexually abused to a jail psychiatrist. However, although Johnson could not recall what effort he made in investigating the alleged sexual abuse, the notes also indicated that Henyard had told him that he had been fondled by an older man when he was eight or nine, roughly a decade before the murders.

[7] Initially, we would note that the evidence of abuse introduced at the evidentiary hearing came from witnesses who were repeating what Henyard had told them and there was no indication that these witnesses shared this information with Henyard's trial counsel. Moreover, defense counsel was aware of at least two instances where Henyard had specifically said that he was not sexually abused. As noted above, according to *Strickland,* the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. 466 U.S. at 691, 104 S.Ct. 2052. *Strickland* further states, "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* When determining reasonableness, there is a "heavy measure of deference to counsel's judgments." *Id.* Although we recognize the difficulty individuals may have in reporting such abuse, in this situation where Henyard had specifically denied on at least two occasions that he had been sexually abused, it is not clear that trial counsel's failure to investigate the conflicting evidence that Henyard may have been molested amounts to ineffective assistance of counsel.

[8] Of course, Henyard was able to introduce evidence that at least one member of his defense team was aware that Henyard claimed he had been abused. Nevertheless, even if we were to determine that trial counsel should have conducted further investigations into the allegations of molestation, the evidence that Henyard introduced at the evidentiary hearing does not demonstrate that he was prejudiced in this case. The only information introduced at the hearing consisted of brief, second-hand accounts by witnesses of what Henyard had told them. There was no additional evidence that the alleged molestation had in fact occurred. Likewise, there was no testimony from mental health experts as to how the alleged molestation, which occurred a decade before the crime, had affected Henyard. Therefore, the trial court did not err in finding that Henyard has not demonstrated prejudice on this claim.

Use of Alcohol and Drugs

Fifth, Henyard alleges that trial counsel was ineffective for failing to investigate or present evidence to the jury regarding his "chronic use of alcohol." The trial court in its order noted that the only germane evidence at the evidentiary hearing came from the testimony of Henyard's expert witness, Dr. Bauers. Moreover, the trial court concluded that the first prong of *Strickland* had not been met because Henyard had not shown that the failure to present the alleged evidence of his history of chronic alcohol and marijuana use was based on trial counsel's deficient performance.

***763** [9] We agree with the trial court's assessment of this claim. During the evidentiary hearing, Dr. Bauers testified that Henyard told him he started drinking beer and smoking marijuana between the ages of eight and ten, but he denied ever being seriously intoxicated or using hard drugs. He also told Dr. Bauers that his use of alcohol and marijuana decreased when he went to live with his father at the age of eleven. There was no other evidence presented during the evidentiary hearing regarding Henyard's chronic use of alcohol. Therefore, based on the fact that this issue was not addressed in any detail at the evidentiary hearing, Henyard has not demonstrated error in the trial court's conclusion that he has not shown his counsel's performance was deficient.

Suicide Attempt

[10] Sixth, Henyard contends that trial counsel was ineffective for not presenting evidence to the jury during the penalty phase of the trial of his mental state as characterized by his suicidal ideations. Although Jacqueline Turner, Henyard's godmother, testified that Henyard told her he did not want to live after he had been arrested, the primary evidence related to suicidal tendencies that came out at the evidentiary hearing centered on an alleged suicide attempt in the Lake County Jail after Henyard had been arrested for the murders. Trial counsel was made aware of Henyard's suicide attempt by the medical department supervisor from the Lake County Jail, Dan Pincus. Pincus also advised trial counsel that Henyard was placed on suicide watch because it was possible that Henyard would try to commit suicide again. However, Pincus also informed Henyard's trial counsel that he did not believe the suicide attempt to be legitimate because Henyard was purposely keeping his eyes shut as Pincus was trying to examine him.[FN12] Additionally, although Henyard was placed on suicide watch, the standard procedure when there was any threat of suicide, whether legitimate or not, was to place the prisoner on suicide watch. When trial counsel, T. Michael Johnson, asked Henyard about the suicide attempt, Henyard indicated that he wanted to go back in the medical wing of the jail.

> FN12. Pincus also did not believe Henyard's suicide attempt was legitimate because the method Henyard used was a difficult and rare way to attempt suicide.

The circuit court found that Henyard's suicide attempt could have potentially been viewed as manipulative. We agree with the trial court's finding that trial counsel was not deficient in not introducing this evidence. Rather, the decision not to present evidence of this suicide attempt to the jury was a reasonable strategic decision by Henyard's counsel given what counsel knew about the attempt, and therefore Henyard's claim does not satisfy the first prong of *Strickland.*

Preparation of Mental Health Expert

Finally, Henyard claims trial counsel was ineffective for failing to adequately prepare one of his mental health experts, Dr. Jethro Toomer, for his testimony at the penalty phase.[FN13] Henyard attempted to prove Dr. Toomer was not adequately prepared by comparing Dr. Toomer's results with the evidentiary hearing testimony of Dr. Bauers' results.

FN13. Henyard argues that Dr. Toomer was not prepared because he did not speak with Richard Henyard, Sr., Edith Ewing, or Jacqueline Turner's husband or review any of Henyard's hospital records.

[11] We find Henyard's claim to be without merit. The trial court found nothing in Dr. Bauers' testimony that was any more favorable to Henyard than the testimony*764 Dr. Toomer provided at trial and also rejected this claim as legally insufficient because Henyard did not specify the mitigation that trial counsel failed to call to Dr. Toomer's attention. Moreover, the trial court noted that the defense team consulted two mental health experts and that there was no evidence presented at the evidentiary hearing that Dr. Toomer was inadequately prepared.

We agree with the trial court's decision on this claim. At the evidentiary hearing, Dr. Bauers testified that he did not believe that Dr. Toomer did anything improper or that he in any way mishandled his examination or testimony. In fact, Dr. Bauers characterized Henyard's neuropsychological abilities as exhibiting some strengths and some weaknesses, but indicated that the weaknesses were relatively mild and that they were consistent with what Dr. Bauers knew about Henyard's educational, occupational, and sociocultural background. Therefore, we conclude the trial court did not err in finding that Henyard was not entitled to relief on this issue.

HABEAS PETITION

Henyard's petition for writ of habeas corpus raises three claims: (1) appellate counsel rendered ineffective assistance for not raising on direct appeal the improper ruling on trial counsel's motion to withdraw; (2) under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), Florida's capital sentencing statute violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution; and (3) Henyard's right preventing cruel and unusual punishment will be violated as he may be incompetent at the time of his execution.

Ineffective Assistance of Appellate Counsel

[12][13] Henyard argues that appellate counsel was ineffective for failing to raise the trial court's denial of his public defender's motion to withdraw. Claims of ineffective assistance of appellate counsel are appropriately raised in a petition for writ of habeas corpus. *See Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000). Consistent with the *Strickland* standard, in order to grant habeas relief based on ineffectiveness of counsel, this Court must determine:

> [W]hether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986); *see also Freeman,* 761 So.2d at 1069; *Thompson v. State,* 759 So.2d 650, 660 (Fla.2000). "The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman,* 761 So.2d at 1069. Moreover, appellate counsel cannot be deemed ineffective for failing to pursue a meritless claim. *See Johnson v. Singletary,* 695 So.2d 263, 266-67 (Fla.1996).

The facts underlying this claim are as follows. Before trial, Henyard's public defender filed a motion to withdraw on the grounds that the State had listed a former client as a witness in the case. The motion stated that the public defender's office had represented the witness a number of times in the past and if Henyard was represented by the office of the public defender it would put the public defender's

office in *765 the "untenable position of having to cross-examine a former client." Subsequently, the public defender filed an addendum to the motion to withdraw. No additional argument was offered, but the addendum listed nine additional witnesses that had previously been represented. Of these nine individuals, only one ultimately testified at trial.

At the hearing on the motion to withdraw, the State argued that the witness listed on the original motion to withdraw had not been represented recently because all of her cases had been closed. The State had not checked each of the witnesses on the addendum, but opined that based on the case numbers other witnesses' cases were also closed. After defense counsel volunteered that none of the witnesses were being represented the trial court denied the motion.

[14] In his reply brief, Henyard argues that the governing law at the time of trial, notably section 27.53(3), Florida Statutes (1993), as interpreted by *Guzman v. State,* 644 So.2d 996 (Fla.1994), presumed that a conflict existed upon the filing of the motion to withdraw and that the trial court judge had no discretion other than to grant the motion. In other words, Henyard is arguing that the trial court's questioning surrounding the motion was inappropriate. In relevant part, section 27.53(3) stated:

> If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to move the court to appoint other counsel.

§ 27.53(3), Fla. Stat. (1993). Notably, trial counsel's motion to withdraw made no reference to section 27.53(3). Moreover, the motion did not allege that the public defender had determined that Henyard and the potential witnesses had interests that were so adverse or hostile that they could not be counseled by the public defender's office, as required by *Guzman. See* 644 So.2d at 999. Rather, the motion stated, as to potential witness Neal, that the public defender's office would be placed "in the untenable position of having to cross-examine a former client." The addendum in which the only witness that actually testified at trial was listed contained no reference to section 27.53(3) or additional legal argument either. Under these specific circumstances, we conclude that the motion did not satisfy the requirements of section 27.53(3), and therefore appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal. *See Johnson v. Singletary,* 695 So.2d 263, 266-67 (Fla.1996).

Ring Claim

[15] Next, Henyard asserts that Florida's capital sentencing scheme violates the United States and Florida Constitutions. This Court addressed similar contentions in *Bottoson v. Moore,* 833 So.2d 693 (Fla.), *cert. denied,*537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore,* 831 So.2d 143 (Fla.), *cert. denied,*537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and, while there was no single majority view expressed, we denied relief. We have since rejected similar claims on other occasions and find that Henyard is likewise not entitled to relief on this claim. *See, e.g., Rivera v. State,* 859 So.2d 495 (Fla.2003); *Jones v. State,* 855 So.2d 611, 619 (Fla.2003); *Chandler v. State,* 848 So.2d 1031, 1034 n. 4 (Fla.2003).

*766 [16] Moreover, we note that the jury unanimously recommended the death penalty in this case, and respective to each murder the trial court found the aggravating circumstances of previous conviction of seven prior violent felonies, six of which included the contemporaneous convictions for crimes against the victims in this case, and that the commission of the murders was in the course of an enumerated felony (kidnapping). These two aggravating circumstances were charged in the indictment and found by the jury, and therefore Henyard is not

entitled to relief on this claim. *See Banks v. State,* 842 So.2d 788, 793 (Fla.2003).

Incompetence to be Executed

[17] Finally, Henyard argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute him since he may be incompetent at the time of execution. Because this issue is being raised to preserve federal claims, Henyard concedes that it is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. *See Hall v. Moore,* 792 So.2d 447, 450 (Fla.2001); Fla. R.Crim. P. 3.811(c). As no death warrant for Henyard has been signed, Henyard's claim is not yet ripe for review by this Court.

CONCLUSION

For the reasons discussed above, we affirm the lower court's denial of Henyard's motion for post-conviction relief and we also deny his petition for writ of habeas corpus.

It is so ordered.

WELLS, PARIENTE, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.
ANSTEAD, C.J., concurs specially with an opinion.
CANTERO, J., concurs with an opinion, in which BELL, J., concurs.ANSTEAD, C.J., specially concurring.
I concur in the majority opinion in all respects except for its discussion of the decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).
CANTERO, J., concurring.
I concur in the majority opinion. Moreover, regarding Henyard's claim that Florida's capital sentencing scheme violates *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), I also would hold, for the reasons stated in my specially concurring opinion in *Windom v. State,* 29 Fla. L. Weekly S191, S197-203 (Fla. May 6, 2004), that *Ring* does not apply retroactively.

BELL, J., concurs.
Fla.,2004.
Henyard v. State
883 So.2d 753, 29 Fla. L. Weekly S271

END OF DOCUMENT

Appendix G
Henyard v. State, 289 So. 2d 239 (Fla. 1997).

Appendix G
Henyard v. State, 689 So. 2d 239 (Fla. 1997).

Henyard v. State
Fla.,1996.

Supreme Court of Florida.
Richard HENYARD, Appellant,
v.
STATE of Florida, Appellee.
No. 84314.

Dec. 19, 1996.
Rehearing Denied March 11, 1997.

Defendant was convicted in the Circuit Court, Lake County, Mark Hill, J., of sexual battery, kidnapping, and murder. Defendant appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying motions for change of venue; (2) trial court's error in instructing prospective jurors during voir dire was harmless; (3) one victim's statements to police officer were admissible under excited utterance hearsay exception; and (4) evidence was sufficient to support death sentence.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases
Test for determining change of venue is whether general state of mind of inhabitants of community is so infected by knowledge of incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try case solely upon evidence presented in courtroom.

[2] Criminal Law 110 ⇐126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases
Knowledge of incident because of its notoriety is not, in and of itself, grounds for change of venue.

[3] Criminal Law 110 ⇐137

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k137 k. Determination. Most Cited Cases
Absent extreme or unusual situation, need to change venue should ordinarily not be determined until attempt is made to select jury.

[4] Criminal Law 110 ⇐126(2)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(2) k. Particular Offenses. Most Cited Cases
Trial court did not abuse its discretion in denying defendant's motions for change of venue, where each prospective juror was questioned thoroughly and individually about his or her exposure to pretrial publicity surrounding case, and each stated that he or she had not formed opinion and would consider only evidence presented during trial in making decision.

[5] Jury 230 ⇐108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases
Trial court did not abuse its discretion in excluding potential juror who stated that he could not recommend death sentence because of 18-year-old's young age.

[6] Criminal Law 110 ⇐412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Defendant, who voluntarily went to police department to provide information about murders, did not indicate his desire to terminate questioning, as would have required officers to cease that questioning, by asking how much longer questioning would take. West's F.S.A. Const. Art. 1, § 9.

[7] Criminal Law 110 ⇐412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Defendant, who voluntarily went to police department to provide information about murders, did not indicate his desire to terminate questioning, as would have required officers to cease that questioning, by requesting to be taken to aunt's house to secure her presence during later polygraph test. West's F.S.A. Const. Art. 1, § 9.

[8] Criminal Law 110 ⇐1169.12

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases
Any error in admitting defendant's statements to police was harmless in prosecution for murder, in light of motive and intent testimony of several of defendant's acquaintances, surviving victim's testimony, deoxyribonucleic acid (DNA) evidence, testimony of several witnesses that defendant implicated himself in crime, and fact that defendant's trial strategy was consistent with disputed statements.

[9] Criminal Law 110 ⇐388.2

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.2 k. Particular Tests or Experiments. Most Cited Cases
Trial court did not abuse its discretion in admitting deoxyribonucleic acid (DNA) evidence in murder prosecution, where Department of Law Enforcement used Restriction Fragment Length Polymorphisms (RFLP) method accepted in scientific community, National Research Council (NRC) report did not question validity of RFLP process, analyst who performed test had never failed routine proficiency test, and Department had in place written quality control procedures consistent with NRC recommendations.

[10] Criminal Law 110 ⇐388.2

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientif-

ic and Survey Evidence
110k388.2 k. Particular Tests or Experiments. Most Cited Cases
To admit deoxyribonucleic acid (DNA) evidence, testing procedures utilized by laboratory need not precisely conform to National Research Council recommendations, so long as laboratory's testing procedures meet test to protect against false readings and contamination.

[11] Criminal Law 110 ⚿1166.16

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.16 k. Impaneling Jury in General. Most Cited Cases
Trial court's error in instructing prospective jurors during voir dire that if evidence of aggravators outweighed mitigators behind murder, their recommendation must be for death sentence was harmless, where error occurred only three times during extensive voir dire, misstatement was not repeated by trial court prior to penalty phase deliberations, and jury was advised that prosecutor's statements were not to be treated as law or evidence upon which to base decision.

[12] Sentencing and Punishment 350H ⚿1658

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1658 k. Manner and Effect of Weighing or Considering Factors. Most Cited Cases
(Formerly 110k1208.1(5))
Jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.

[13] Criminal Law 110 ⚿2098(2)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(2) k. Credibility of Accused. Most Cited Cases
(Formerly 110k713)
Prosecutor's argument, that because state's evidence contradicted and discredited defendant's initial assertion that he did not rape victim, jury should not believe defendant's further assertions that he did not kill other victims, was legitimate comment on truthfulness, or lack thereof, of defendant's claim of innocence.

[14] Criminal Law 110 ⚿366(6)

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k366 Acts and Statements of Person Injured
110k366(6) k. Length of Time Elapsed as Affecting Admissibility. Most Cited Cases
Victim's statements to police officer that she had been raped and shot by two assailants who fit description of defendant and accomplice, and that they had taken her children, were admissible in prosecution for armed kidnapping, sexual battery, and murder, under excited utterance hearsay exception where victim made statements immediately after officer responded to call for help concerning woman covered with blood who collapsed on front porch near crime scene. West's F.S.A. § 90.803(2).

[15] Criminal Law 110 ⚿363

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances

110k363 k. In General. Most Cited Cases

Length of time between event and statement is factor to be considered in determining whether statement may be admitted under excited utterance hearsay exception, but immediacy of statement is not statutory requirement. West's F.S.A. § 90.803(2).

[16] Criminal Law 110 ⚿1169.2(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(6) k. Admissions, Declarations, and Hearsay; Confessions. Most Cited Cases

Any error in admitting rape victim's statements to police officer was harmless, where officer's testimony was nothing more than generalization of specific information which victim testified to at trial from her own personal knowledge.

[17] Sentencing and Punishment 350H ⚿1706

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1706 k. Juvenile Record. Most Cited Cases
(Formerly 110k1208.1(5))

Defendant's prior juvenile adjudication for robbery with weapon was not "conviction" for prior violent felony and thus could not be used as aggravating factor in death sentence. West's F.S.A. § 921.141(5)(b).

[18] Sentencing and Punishment 350H ⚿1788(10)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(10) k. Harmless and Reversible Error. Most Cited Cases
(Formerly 110k1177)

Sentencing court's improper use of defendant's prior juvenile adjudication as prior violent felony aggravator for death sentence did not entitle defendant to new death sentencing hearing, where six other contemporaneous felony convictions supported aggravator. West's F.S.A. § 921.141(5)(b).

[19] Sentencing and Punishment 350H ⚿1759

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1759 k. Nature and Circumstances of Offense. Most Cited Cases
(Formerly 203k358(1))

One victim's testimony that upon hearing her prayers, defendant stated, "You might as well stop calling Jesus, this ain't Jesus this is Satan," was admissible to show mental anguish inflicted upon two other victims before they were killed, and as evidence of heinous, atrocious, and cruel aggravating circumstances supporting death sentence, where victim testified that she was sitting in back seat of car with daughters, and that defendant spoke loudly enough for all to hear. West's F.S.A. § 921.141(5)(h).

[20] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))

Heinous, atrocious, or cruel aggravating circum-

stance supporting death sentence may be proven in part by evidence of infliction of mental anguish which victim suffered prior to fatal shot. West's F.S.A. § 921.141(5)(h).

[21] Sentencing and Punishment 350H ⚿320

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk320 k. Expert Evidence. Most Cited Cases
(Formerly 203k358(1))
Testimony that, based on blood splatters found on defendant's clothing, defendant was approximately four feet from murder victim when she was shot was admissible in penalty phase of trial to rebut defendant's continued assertion that he did not actually kill his victims.

[22] Sentencing and Punishment 350H ⚿320

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk320 k. Expert Evidence. Most Cited Cases
(Formerly 203k358(1))
Testimony that, based on blood splatters found on defendant's clothing, defendant was approximately four feet from murder victim when she was shot was admissible in penalty phase of trial to show nature of crime. West's F.S.A. § 921.141(1).

[23] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
Evidence that defendant bragged that he was going to steal car, kill its owner, and use it to drive to his father was sufficient to prove pecuniary gain aggravating circumstance supporting death sentence. West's F.S.A. § 921.141(5)(f).

[24] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Evidence that defendant raped and shot mother of two children in close proximity to and in earshot of children, and then executed each child with single bullet to the head while they pled for their mother was sufficient to find heinous, atrocious, or cruel aggravating circumstance supporting death sentence. West's F.S.A. § 921.141(5)(h).

[25] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Fear and emotional strain may be considered as contributing to heinous nature of murder supporting death sentence, even where victim's death is almost instantaneous.

[26] Sentencing and Punishment 350H ⚿56

350H Sentencing and Punishment
350HI Punishment in General
350HI(C) Factors or Purposes in General
350Hk56 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)
If codefendant is equally culpable or more culpable than defendant, disparate treatment of codefendant may render defendant's punishment disproportionate.

[27] Sentencing and Punishment 350H ⚿1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)
Defendant's death sentence for murder, sexual battery, and kidnapping was not disproportionate to eight consecutive life sentences and 50-year mandatory minimum sentence received by 14-year-old accomplice.

[28] Infants 211 ⚿69(1)

211 Infants
211VI Crimes
211k69 Sentence and Punishment
211k69(1) k. In General. Most Cited Cases

Sentencing and Punishment 350H ⚿1643

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1643 k. Juveniles. Most Cited Cases
(Formerly 110k1208.1(5))
If defendant is under age 16, his or her youth is such substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances, and bars death penalty. West's F.S.A. Const. Art. 1, § 17.

[29] Sentencing and Punishment 350H ⚿1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases
(Formerly 203k356)

Sentencing and Punishment 350H ⚿1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
(Formerly 203k356)

Sentencing and Punishment 350H ⚿1727

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1727 k. Age. Most Cited Cases
(Formerly 203k356)
Death sentences imposed on defendant who raped and shot one victim in close proximity to and in earshot of her young children and who later executed children while they pled for their mother were not disproportionate to death sentences imposed in other cases.

***242** James B. Gibson, Public Defender and Michael S. Becker, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, for Appellant.
Robert A. Butterworth, Attorney General; and Mark S. Dunn and Kenneth S. Nunnelley, Assistant Attorneys General, Daytona Beach, for Appellee.

PER CURIAM.
We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Richard Henyard. We have jurisdiction, art. V, § 3(b)(1), Fla. Const., and affirm the convictions and sentence.

FACTS

The record reflects that one evening in January, 1993, eighteen-year-old Richard Henyard stayed at the home of a family friend, Luther Reed. While Reed was making dinner, Henyard went into his bedroom and took a gun that belonged to Reed. Later that month, on Friday, January 29, Dikeysha Johnson, a long-time acquaintance of Henyard, saw him in Eustis, Florida. While they were talking,

Henyard lifted his shirt and displayed the butt of a gun in the front of his pants. Shenise Hayes also saw Henyard that same evening. Henyard told her he was going to a night club in Orlando and to see his father in South Florida. He showed Shenise a small black gun and said that, in order to make his trip, he would steal a car, kill the owner, and put the victim in the trunk.

William Pew also saw Henyard with a gun during the last week in January and Henyard tried to persuade Pew to participate in a robbery with him. Later that day, Pew saw Henyard with Alfonza Smalls, a fourteen-year-old friend of Henyard's. Henyard again displayed the gun, telling Pew that he needed a car and that he intended to commit a robbery at either the hospital or the Winn Dixie.

Around 10 p.m. on January 30, Lynette Tschida went to the Winn Dixie store in Eustis. She saw Henyard and a younger man sitting on a bench near the entrance of the store. When she left, Henyard and his companion got up from the bench; one of them walked ahead of her and the other behind her. As she approached her car, the one ahead of her went to the end of the bumper, turned around, and stood. Ms. Tschida quickly got into the car and locked the doors. As she drove away, she saw Henyard and the younger man walking back towards the store.

At the same time, the eventual survivor and victims in this case, Ms. Lewis and her daughters, Jasmine, age 3, and Jamilya, age 7, drove to the Winn Dixie store. Ms. Lewis noticed a few people sitting on a bench near the doors as she and her daughters entered the store. When Ms. Lewis left the store, she went to her car and put her daughters in the front passenger seat. As she walked behind the car to the driver's side, Ms. Lewis noticed Alfonza Smalls coming towards her. As Smalls approached, he pulled up his shirt and revealed a gun in his waistband. Smalls ordered Ms. Lewis and her daughters into the back seat of the car, and then called to Henyard. Henyard drove the Lewis car out of town as Smalls gave him directions.

The Lewis girls were crying and upset, and Smalls repeatedly demanded that Ms. Lewis "shut the girls up." As they continued to drive out of town, Ms. Lewis beseeched Jesus for help, to which Henyard replied, "this ain't Jesus, this is Satan." Later, Henyard*243 stopped the car at a deserted location and ordered Ms. Lewis out of the car. Henyard raped Ms. Lewis on the trunk of the car while her daughters remained in the back seat. Ms. Lewis attempted to reach for the gun that was lying nearby on the trunk. Smalls grabbed the gun from her and shouted, "you're not going to get the gun, bitch." Smalls also raped Ms. Lewis on the trunk of the car. Henyard then ordered her to sit on the ground near the edge of the road. When she hesitated, Henyard pushed her to the ground and shot her in the leg. Henyard shot her at close range three more times, wounding her in the neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Ms. Lewis's unconscious body off to the side of the road, and got back into the car. The last thing Ms. Lewis remembers before losing consciousness is a gun aimed at her face. Miraculously, Ms. Lewis survived and, upon regaining consciousness a few hours later, made her way to a nearby house for help. The occupants called the police and Ms. Lewis, who was covered in blood, collapsed on the front porch and waited for the officers to arrive.

As Henyard and Smalls drove the Lewis girls away from the scene where their mother had been shot and abandoned, Jasmine and Jamilya continued to cry and plead: "I want my Mommy," "Mommy," "Mommy." Shortly thereafter, Henyard stopped the car on the side of the road, got out, and lifted Jasmine out of the back seat while Jamilya got out on her own. The Lewis girls were then taken into a grassy area along the roadside where they were each killed by a single bullet fired into the head. Henyard and Smalls threw the bodies of Jasmine and Jamilya Lewis over a nearby fence into some underbrush.

Later that evening, Bryant Smith, a friend of

Smalls, was at his home when Smalls, Henyard, and another individual appeared in a blue car. Henyard bragged about the rape, showed the gun to Smith, and said he had to "burn the bitch" because she tried to go for his gun. Shortly before midnight, Henyard also stopped at the Smalls' house. While he was there, Colinda Smalls, Alfonza's sister, noticed blood on his hands. When she asked Henyard about the blood, he explained that he had cut himself with a knife. The following morning, Sunday, January 31, Henyard had his "auntie," Linda Miller,FN1 drive him to the Smalls' home because he wanted to talk with Alfonza Smalls. Colinda Smalls saw Henyard shaking his finger at Smalls while they spoke, but she did not overhear their conversation.

FN1. Linda Miller is not actually Richard Henyard's aunt.

That same Sunday, Henyard went to the Eustis Police Department and asked to talk to the police about the Lewis case. He indicated that he was present at the scene and knew what happened. Initially, Henyard told a story implicating Alfonza Smalls and another individual, Emmanuel Yon. However, after one of the officers noticed blood stains on his socks, Henyard eventually admitted that he helped abduct Ms. Lewis and her children, raped and shot her, and was present when the children were killed. Henyard continuously denied, however, that he shot the Lewis girls. After being implicated by Henyard, Smalls was also taken into custody. The gun used to shoot Ms. Lewis, Jasmine and Jamilya was discovered during a subsequent search of Smalls' bedroom.

The autopsies of Jasmine and Jamilya Lewis showed that they both died of gunshot wounds to the head and were shot at very close range. Powder stippling around Jasmine's left eye, the sight of her mortal wound, indicated that her eye was open when she was shot. One of the blood spots discovered on Henyard's socks matched the blood of Jasmine Lewis. "High speed" or "high velocity" blood splatters found on Henyard's jacket matched the blood of Jamilya Lewis and showed that Henyard was less than four feet from her when she was killed. Smalls' trousers had "splashed" or "dropped blood" on them consistent with dragging a body. DNA evidence was also presented at trial indicating that Henyard raped Ms. Lewis.

Henyard was found guilty by the jury of three counts of armed kidnapping in violation of section 787.01, Florida Statutes (1995), one count of sexual battery with the use of a ***244** firearm in violation of section 794.011(3), Florida Statutes (1995), one count of attempted first-degree murder in violation of sections 782.04(1)(a)(1) and 777.04(1), Florida Statutes (1995), one count of robbery with a firearm in violation of section 812.13(2)(a), Florida Statutes (1995), and two counts of first-degree murder in violation of section 782.04(1)(a), Florida Statutes (1995).

After a penalty phase hearing, the jury recommended the death sentence for each murder by a vote of 12 to 0. The trial court followed this recommendation and sentenced Henyard to death. The court found in aggravation: (1) the defendant had been convicted of a prior violent felony, *see*section 921.141(5)(b); (2) the murder was committed in the course of a felony, *see*section 921.141(5)(d); (3) the murder was committed for pecuniary gain, *see*section 921.141(5)(f) and, (4) the murder was especially heinous, atrocious or cruel, *see*section 921.141(5)(h).

The court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, *see*section 921.141(6)(g), and accorded it "some weight." The trial court also found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired,[FN2] *see*section 921.141(6)(b), (f), and accorded these mental mitigators "very little weight." As for nonstatutory mitigating circumstances, the trial court found the following circumstances but accorded them "little weight": (1) the defendant functions at the emotional level of a thirteen year

old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family; (4) the defendant can adjust to prison life; and (5) the defendant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial court accorded "some weight" to the nonstatutory mitigating circumstance that Henyard's codefendant, Alfonza Smalls, could not receive the death penalty as a matter of law.[FN3] The court concluded that the mitigating circumstances did not offset the aggravating circumstances.

FN2. In its sentencing order, the trial court incorrectly characterized these "mental mitigators" as nonstatutory mitigating circumstances.

FN3. In *Allen v. State,* 636 So.2d 494 (Fla.1994), we held that the death penalty is either cruel or unusual punishment under article I, section 17 of the Florida Constitution if imposed upon a person who is under the age of sixteen when he or she commits a capital crime. *Id.* at 497. Because Alfonza Smalls was fourteen years of age at the time of the offense, he is ineligible to receive the death penalty as a matter of law.

APPEAL

Henyard raises eleven claims on appeal.[FN4] Claims (2)(b) and (8)(a) were not properly ***245** preserved for appellate review and are therefore procedurally barred. Assuming arguendo that claims (2)(b) and (8)(a) were preserved for appeal, we find claim (2)(b) to be without merit and claim (8)(a) to be harmless error. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986); *see also Floyd v. State,* 497 So.2d 1211, 1214-15 (Fla.1986); *Menendez v. State,* 368 So.2d 1278, 1282 (Fla.1979). Claims (7) [FN5] and (9) [FN6] have been previously rejected by this Court in other cases and do not require additional discussion here.

FN4. The eleven claims are: (1) The trial court abused its discretion in failing to grant Henyard's motions for a change of venue; (2) The trial court erred when it (a) granted the state's challenge for cause of one prospective juror (who stated he could not, under any circumstances, recommend a death sentence for Henyard because of his youth), and (b) refused to excuse three prospective jurors Henyard challenged for cause; (3) The trial court erred in denying Henyard's motions to suppress his statement to the police because the interrogating officers failed to honor Henyard's request to cease questioning in violation of his right to remain silent under article I, section 9 of the Florida Constitution; (4) The trial court abused its discretion in admitting DNA evidence which was not supported by a proper predicate of reliability; (5) The trial court erred by (a) allowing the state, during voir dire, to tell prospective jurors that if the evidence of aggravators outweighed the evidence of mitigators then the jury's sentence recommendation must be for death as a matter of law, and (b) suggesting during closing argument that Henyard never admitted to raping Ms. Lewis when, in fact, he did confess to raping her in his third confession to police on the day after the murders; (6) The trial court erred in allowing a police officer to testify as to hearsay statements Ms. Lewis made to him when he came to her aid after the offense; (7) The trial court erred by giving the standard jury instructions on premeditated murder and reasonable doubt, and by failing to give the jury a special verdict form on the theory of guilt; (8) The trial court erred during the penalty phase by (a) instructing the jury on the avoid arrest aggravator, (b) expressly considering as an aggravator, and allowing the jury to hear, evidence of Henyard's prior juvenile adjudication for robbery with a weapon,

and (c) allowing Ms. Lewis and Leroy Parker to testify at the penalty phase because their testimony did not tend to prove any statutory aggravating circumstance; (9) The trial court abused its discretion in denying Henyard's specially requested penalty-phase jury instruction on the heinous, atrocious or cruel aggravating circumstance, which instructed on "tortuous intent," and further erred by giving the standard heinous, atrocious or cruel instruction, which is unconstitutionally vague and overbroad; (10) The trial court erred by relying upon two aggravating circumstances-pecuniary gain and heinous, atrocious or cruel-as support for Henyard's death sentences because they were not proven beyond a reasonable doubt; and (11) the death penalty is not proportionally warranted in this case.

FN5. As to Henyard's claim that the premeditated murder instruction is deficient, *see Spencer v. State,* 645 So.2d 377, 382 (Fla.1994). As to the claim that the reasonable doubt instruction is deficient, *see Spencer,* 645 So.2d at 382; *Esty v. State,* 642 So.2d 1074, 1078-79 (Fla.1994), *cert. denied,*514 U.S. 1027, 115 S.Ct. 1380, 131 L.Ed.2d 234 (1995); *Brown v. State,* 565 So.2d 304, 307 (Fla.), *cert. denied,*498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). Finally, as to Henyard's claim that a special verdict form on the theory of guilt was required, *see Patten v. State,* 598 So.2d 60 (Fla.1992), *cert. denied,*507 U.S. 1019, 113 S.Ct. 1818, 123 L.Ed.2d 448 (1993); *Jones v. State,* 569 So.2d 1234 (Fla.1990).

FN6. As to Henyard's claim that he was entitled to his requested instruction containing the element of "tortuous intent," *see Taylor v. State,* 638 So.2d 30, 33 n. 4 (Fla.), *cert. denied,*513 U.S. 1003, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). As to Henyard's claim that the standard heinous, atrocious or cruel instruction is constitutionally deficient, *see Johnson v. State,* 660 So.2d 637, 648 (Fla.1995), *cert. denied,*517 U.S. 1159, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996); *Hannon v. State,* 638 So.2d 39, 43 (Fla.1994), *cert. denied,*513 U.S. 1158, 115 S.Ct. 1118, 130 L.Ed.2d 1081 (1995); *Preston v. State,* 607 So.2d 404, 410 (Fla.1992), *cert. denied,*507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); *Power v. State,* 605 So.2d 856, 864-65 (Fla.1992), *cert. denied,*507 U.S. 1037, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993).

Change of Venue

[1][2][3] In *McCaskill v. State,* 344 So.2d 1276, 1278 (Fla.1977), we adopted the test set forth in *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), and *Kelley v. State,* 212 So.2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Id. at 1278 (quoting *Kelley,* 212 So.2d at 28). *See also Pietri v. State,* 644 So.2d 1347 (Fla.1994), *cert. denied,*515 U.S. 1147, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). In *Manning v. State,* 378 So.2d 274 (Fla.1980), we further explained:

> An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of ... showing that the setting of the trial is inherently prejudi-

> cial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.

Id. at 276 (citation omitted). Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury.

[4] During the actual voir dire here, each prospective juror was questioned thoroughly and individually about his or her exposure to ***246** the pretrial publicity surrounding the case. While the jurors had all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. Further, the record demonstrates that the members of Henyard's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, we find that on the record before us, the trial court did not abuse its discretion in denying Henyard's motions for a change of venue.

Voir Dire

[5] Next, Henyard asserts that the trial court erred during jury selection by granting the state's challenge for cause of a prospective juror who stated that Henyard's young age of eighteen at the time of the crime would prevent him from recommending the death penalty. Henyard asserts that the prospective juror "merely stated that he would follow the law and in his opinion would give great weight to the statutory mitigating factor of age." However, the record reflects that when Henyard's defense counsel attempted to rehabilitate the prospective juror, the following colloquy occurred:

> DEFENSE COUNSEL: Okay. Now, do you think that-Well, let's get down to the bottom line here. I guess from what you're telling me that even though you have some reservations about the death penalty, you could follow the law if the Judge told you this is the law this is what you have to apply; is that fair to say?
>
> [JUROR]: No.
>
> DEFENSE COUNSEL: You couldn't do it at all?
>
> [JUROR]: I couldn't do it.
>
> DEFENSE COUNSEL: Okay, no further questions, your Honor.

Contrary to Henyard's assertion on appeal, the prospective juror never stated that he could follow the law. Rather, he expressly stated that he could *not* follow the law, and could not recommend a death sentence for Henyard because of his young age. Consequently, we find that the trial court did not abuse its discretion in excluding this juror for cause.

Admissibility of Henyard's Confession

Next, Henyard argues that his right against self-incrimination under article I, section 9 of the Florida Constitution was violated during his interrogation at the Eustis Police Department when he indicated to the officers his desire to terminate questioning. Because the officers failed to terminate the interrogation or clarify his requests to cease questioning, Henyard maintains that the trial court erred in admitting his first confession against him at trial.FN7

> FN7. Henyard made three, independent confessions to law enforcement officers on the day after the Lewis children were

> murdered. At the suppression hearing, the trial court deemed all three of Henyard's statements to be admissible against him, but only Henyard's initial confession was admitted against him at trial. Henyard contends that all three confessions were obtained in violation of his right to remain silent, and urges us to address the trial court's alleged error in finding his second and third statements to be admissible, even though he was not prejudiced by the ruling. Because we affirm his convictions and sentences, we decline to address whether the trial court erred in finding admissible Henyard's last two statements which the state did not offer into evidence at trial.

In *Owen v. State,* 560 So.2d 207 (Fla.), *cert. denied,*498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990), we reversed a defendant's convictions, concluding that his statements were erroneously admitted into evidence contrary to *Miranda* and that his confession was the "essence" of the state's case against him. *Id.* at 211. During his interrogation, Owen never requested counsel, but expressly stated: "I'd rather not talk about it." *Id.* Subsequently, we held in *Traylor v. State,* 596 So.2d 957 (Fla.1992), that a suspect's request to cease interrogation is also protected under the Florida Constitution. Thus, our decisions in *Owen* and *Traylor* give effect to an individual's right to remain silent.

In this case, Henyard voluntarily went to the Eustis Police Department to provide information about the murders of the Lewis children. He saw Sergeant Wayne Perry in the parking lot when he arrived, and immediately***247** told him he had been present when the children were killed but that he did not do it. Henyard voluntarily accompanied Sergeant Perry inside the stationhouse where the officers investigating the Lewis murders were advised that Henyard had come to the police station with information about the crime. Henyard talked with the investigating officers in an interview room at the Eustis Police Department.

[6] Initially, Henyard contends that the officers should have ceased their interrogation of him when he asked how long the questioning would last. He cites the following exchange:

> HENYARD: Can I go home soon, man?
>
> OFFICER: Soon. You know how these federal people are though. They're not like us local boys.
>
> ....
>
> HENYARD: Excuse me, sir. How long [am] I gonna have to stay here?
>
> FBI AGENT: Huh?
>
> HENYARD: How long do I have to stay here?
>
> FBI AGENT: Ah, just a few more minutes.

We find that Henyard's queries do not constitute even an equivocal indication that he wished to cease questioning. *See Moore v. Dugger,* 856 F.2d 129 (11th Cir.1988)(holding defendant's request during interrogation for information about when, in the future, he would be allowed to leave was not attempt to exercise right under *Miranda* to terminate questioning and remain silent); *see also Delap v. Dugger,* 890 F.2d 285, 291-93 (11th Cir.1989)(holding defendant's questions to interrogating officers concerning how long it would be before he could go home did not constitute equivocal invocation of Fifth Amendment right to terminate questioning), *cert. denied,*496 U.S. 929, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990). Rather, Henyard asked for a time frame, inquiring as to how long the questioning would take. Moreover, immediately after this exchange, Henyard was provided with a written "*Miranda* " form explaining his Fifth Amendment rights and was also orally advised of his rights. When asked if he understood his rights, Henyard not only indicated that he did, but he expressly waived them and continued answering questions about his activities on the preceding evening.

[7] Henyard also asserts that he made a second re-

quest to terminate the questioning. After the initial interrogation, an FBI agent asked Henyard if he would be willing to take a polygraph test. Henyard responded that he would not do so without the presence of his aunt. When told that his aunt could be contacted but she could not sit next to him during the test, he refused to submit to the test. A discussion ensued concerning the whereabouts of Henyard's "auntie" so that she could be contacted and brought to the station for his support:

> FBI AGENT: After you talk to her-Don't you want to resolve this right now?
>
> HENYARD: Yes, I do.
>
> FBI AGENT: Okay, you just hang out here. What else you going to do? You going to hang out at the Manors, you can hang out here, okay?
>
> HENYARD: Huh?
>
> FBI AGENT:You just stay here a minute-you know, we can't force you to stay here (Inaudible.)
>
> HENYARD: Take me to my auntie's house.
>
> FBI AGENT:We're going to have your aunt come down here.
>
> HENYARD: Ya'll (Inaudible.)
>
> FBI AGENT: Yeah, we're going to have-
>
> HENYARD: Superbowl, man. I'm missing my game.
>
> FBI AGENT: Well, it's 6:00. You've got a couple of [sic] three hours yet. I mean you're equivocating [sic] a Superbowl to two kids, two innocent children being killed?

In this instance, Henyard's request to be taken "to his auntie's house" was made incidental to securing her presence during the polygraph test, and as an aside from the interrogation. Henyard's discussion with the officers at this point did not concern his activities on the preceding evening or his involvement in the offense, but rather focused on whether he would be willing to take ***248** a polygraph test if his aunt could be with him at the police station. In this context, and in light of Henyard's voluntary presence at the police station for the purpose of disclosing information he had concerning the offense, we find no error in the trial court's conclusion that this discussion did not constitute a request to end the interrogation. *Cf. Delap; Moore.*

[8] Even assuming arguendo that Henyard's request to be taken to his aunt's house was an equivocal invocation of his right to terminate questioning, we find that any error in admitting these statements did not contribute to the outcome in this case and would be harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986). Unlike our decision in *Owen* where we explained that "[e]ven though there was corroborating evidence, Owen's statements were the essence of the case against him,"560 So.2d at 211, Henyard's statements to police certainly were not the "essence" of the state's case here. Rather, the other evidence presented at trial of Henyard's guilt was extensive and overwhelming, to include: (1) the "motive" and "intent" testimony of several of Henyard's acquaintances who, during the week preceding the offense, saw him with the gun later shown to have killed the Lewis girls to the exclusion of all others, and heard him brag that he was going to steal a car, kill the owner, and put the victim in the trunk; (2) the testimony of the surviving victim, Ms. Lewis, who identified Henyard and Smalls, and detailed the sequence of events leading up to her daughters' deaths; (3) DNA evidence establishing that Henyard raped Ms. Lewis and had blood on his clothes that matched the blood of Jasmine and Jamilya Lewis; (4) the gun found in a search of Smalls' bedroom was the same one used to shoot Ms. Lewis and kill the Lewis children; and (5) the testimony of several witnesses who saw and heard Henyard implicate himself in the crime after its commission.

Moreover, Henyard consistently denied any role in killing the Lewis girls, and, at trial, Henyard's trial

strategy was, in essence, to concede his participation in the crimes except as to the killing of the children. Hence, his statements were consistent with this strategy.

The Admissibility of DNA Evidence

Henyard argues that the trial court abused its discretion in admitting DNA evidence at trial because the state failed to establish a proper predicate of reliability for the DNA testing procedures employed by the Florida Department of Law Enforcement (FDLE) in this case. At trial, an FDLE serologist testified about the DNA analysis she conducted on blood stains found on the clothing of Henyard and Smalls. She testified that blood stains on Henyard's clothing matched the blood of Jamilya and Jasmine Lewis, and that blood stains on Alfonza Small's clothing matched the DNA of Ms. Lewis and Jamilya Lewis.

Henyard contends that FDLE testing procedures were unreliable because (1) the laboratory was not in compliance with the recommendations of the National Research Council in its report on DNA testing and methodology, and (2) the only person who testified as to the reliability of the testing procedures utilized by FDLE was the FDLE employee who conducted the tests.

In *Robinson v. State,* 610 So.2d 1288 (Fla.1992), *cert. denied,*510 U.S. 1170, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994), we explained:

> In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. *Ramirez v. State,* 542 So.2d 352 (Fla.1989). If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within the trial court's discretion. *Stevens v. State,* 419 So.2d 1058 (Fla.1982), *cert. denied,*459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry *supported by authorities indicating that there may not be general scientific acceptance of the technique employed.*" *Correll v. State,* 523 So.2d 562, 567 (Fla.), *cert. *249 denied,*488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988) (emphasis supplied).

Id. at 1291. Subsequently, in *Hayes v. State,* 660 So.2d 257, 264 (Fla.1995), we took judicial notice "that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the *Frye* [FN8] test to protect against false readings and contamination." In so doing, we placed great emphasis on the recommendations concerning the standards and methodology for DNA testing set forth by the National Research Council (NRC) in its latest report, *DNA Technology in Forensic Science* (1992). *Id.* at 263.

> FN8. *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923).

[9][10] Henyard argues that in *Hayes* we "approved of the NRC Report and apparently endorsed it as a means of determining the admissibility of DNA evidence at trial." Conversely, the State contends that in order for DNA evidence to be admissible under *Hayes,* DNA testing procedures utilized by a laboratory need not precisely conform to NRC recommendations so long as the laboratory's testing procedures meet the *Frye* test for reliability. We agree with the State.

In this case, the trial court conducted a *Frye* hearing as to the admissibility of the DNA tests and results prior to trial. Evidence offered at the hearing established that: (1) FDLE's DNA analysis in this case was conducted pursuant to the Restriction Fragment Length Polymorphisms (RFLP) method; (2) the RFLP method is accepted in the scientific community; (3) the NRC report does not question the validity of the RFLP process; [FN9] (4) FDLE ana-

lysts are subject to routine proficiency testing, and the analyst in this case has never failed a proficiency test; and finally, (5) FDLE has in place written quality control procedures which are consistent with NRC recommendations.[FN10]

FN9. *See also Hayes,* 660 So.2d at 263.

FN10. Henyard's claim that the DNA testing procedure is unreliable because the FDLE laboratory is not accredited is somewhat misleading. In 1989 when the FDLE lab last underwent accreditation review, the lab did not perform DNA testing. The accreditation period is five years, and the lab was scheduled for reinspection and reaccreditation in the fall of 1994, several months after Henyard's trial.

In *Hayes,* we stated that DNA testing procedures conducted in a case must meet the *Frye* test for reliability before the DNA test results can be admitted at trial. *Hayes,* 660 So.2d at 264. Our decision sets forth NRC recommendations as an example of testing procedures that meet the *Frye* test for reliability. *Id.* at 263. However, contrary to Henyard's assertion, *Hayes* does not hold that testing procedures which do not meet NRC recommendations are per se unreliable and thereby render the test results inadmissible. In light of our decisions in *Robinson* and *Hayes,* and based on the evidence offered at the *Frye* hearing, we find that the trial court did not abuse its discretion in admitting the results of FDLE's DNA analysis at trial.

The Prosecutor's Misstatements of Law and Improper Argument

[11] First, Henyard claims the trial court erred in allowing the prosecutor to instruct several prospective jurors during voir dire that "[i]f the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death."

[12] In *Alvord v. State,* 322 So.2d 533, 540 (Fla.1975), *cert. denied,*428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), we stated:

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

See also Gregg v. Georgia, 428 U.S. 153, 203, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976) (stating that jury can constitutionally dispense mercy in case deserving of death penalty). Thus, a jury is neither compelled nor ***250** required to recommend death where aggravating factors outweigh mitigating factors.

In this case, we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law. But, contrary to Henyard's assertions,[FN11] we do not find that he was prejudiced by this error. Initially, we note the comments occurred on only three occasions during an extensive jury selection process. Moreover, the misstatement was not repeated by the trial court when instructing the jury prior to their penalty phase deliberations. In fact, the jury was advised that the statements of the prosecutor and defense lawyer were not to be treated as the law or the evidence upon which a decision was to be based. Further, Henyard does not contend that the jury was improperly instructed before making an advisory sentence recommendation in the penalty phase of his trial. In this context, we find the prosecutor's isolated misstatements during jury selection to be harmless error. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

FN11. Henyard contends that the prejudicial nature of this error is evidenced by the fact that the advisory recommendation forms contained three different vote totals,

> one, 10 to 2, which is crossed out and replaced with 11 to 1, which is in turn crossed out and then recorded 12 to 0. Henyard argues, "While we cannot speculate on what caused this to occur, it certainly could have been due to the fact that at least two of the jurors simply wanted to exercise mercy and recommend life, yet were reminded by the other jurors that the prosecutor had told them if the aggravating factors outweigh the mitigating they had to vote for death." Initial Brief at 54. As Henyard concedes, this theory is wholly speculative and therefore is not appropriate for consideration when determining whether reversible error has occurred.

[13] Next, Henyard contends that the prosecutor made a false statement during his closing argument. The complained-of argument is as follows:

> And then they [defense counsel] will tell you he was cooperative when he went to the police. He eventually told them what happened and he told them that he didn't kill the girls. And my first thought in that regard is, does it matter how many times you tell a lie for it to become the truth? Because I say it nineteen times or nineteen thousand times, does it make it so? And we all know it doesn't. You have to look at everything that is going on and see in that same story he is telling them, I never raped anybody.

Henyard contends that the prosecutor's argument was improper because the prosecutor characterized the defendant as a liar by intimating that Henyard never admitted to the rape when, in fact, he did admit that he raped Ms. Lewis in his final statement made to police. We disagree. As previously noted, *see supra* note 7, Henyard made three confessions at the Eustis Police Department on the day following the murder of the Lewis girls, but only his first statement was admitted against him at trial. In his first statement, Henyard confessed that he abducted Ms. Lewis and her children and drove them to a deserted area where he shot Ms. Lewis in the leg and head, but denied that he raped Ms. Lewis or killed her daughters. In his last statement, Henyard finally confessed that he did rape Ms. Lewis, but continued to deny that he killed her daughters.

When the prosecutor's closing argument is read in its entirety and fairly considered, it is clear that the prosecutor was referring to Henyard's lack of candor and failure to be completely forthcoming about his involvement in the offense when he *initially* confessed, and was not making a bad faith argument which implied that Henyard *never* confessed to the sexual battery of Ms. Lewis. In essence, the prosecutor argued to the jury that because the state had offered evidence at trial [FN12] which clearly contradicted and discredited Henyard's initial assertion that he did not rape Ms. Lewis, the jury should not believe Henyard's further assertions that he also did not kill Jasmine and Jamilya Lewis. We find that the prosecutor's argument was a legitimate comment on ***251** the truthfulness, or lack thereof, of Henyard's claim of innocence, and, contrary to Henyard's assertion, was not improper.

> FN12. On the night of the offense, Ms. Lewis was taken to the Orlando Regional Medical Center where she underwent surgery for gunshot wounds and a rape examination. Vaginal swabs collected for the rape test showed the presence of semen which, when compared with Henyard's DNA, provided for a match in a statistical probability of 1 in 809 million persons.

The Admissibility of Ms. Lewis's Hearsay Statements

[14] Henyard contends that the trial court erred by allowing a Eustis police officer to testify to statements Ms. Lewis made to him under the excited utterance exception to the hearsay rule because her statements were inadmissible hearsay. We again disagree.

[15] In order for a hearsay statement to be admiss-

ible as an excited utterance under section 90.803(2), Florida Statutes (1995) the statement: (1) must have been made regarding an event startling enough to cause nervous excitement; (2) must have been made before there was time to contrive or misrepresent; and (3) must have been made while the person was under the stress or excitement caused by the event. *State v. Jano,* 524 So.2d 660, 661 (Fla.1988). While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception, *id.* at 662, the immediacy of the statement is not a statutory requirement. *See*§ 90.803(2).

In the early morning hours of Sunday, January 31, a Eustis police officer responded to a call for help concerning a woman covered with blood who had collapsed on the front porch of a home near Hicks Ditch Road. When the officer arrived, he found Ms. Lewis, who was hysterical but coherent. At trial, the officer was permitted to recount statements Ms. Lewis made to him on the front porch immediately after his arrival. The police officer testified that Ms. Lewis told him she had been raped and shot, identified her assailants as two young black males who fit the description of Henyard and Smalls, and said they had taken her children. Given these circumstances, we find that Ms. Lewis was still experiencing the trauma of the events she had just survived when she spoke to the officer and her statements were properly admitted under the excited utterance exception to the hearsay rule.

[16] Even assuming arguendo that Ms. Lewis's statements were not properly admitted, we find the error harmless. Ms. Lewis also testified at length at Henyard's trial, identifying him as one of her assailants and describing the clothing he was wearing when he abducted her and her children. Because the officer's testimony concerning Ms. Lewis's statements was nothing more than a generalization of specific information which Ms. Lewis testified to at trial from her own personal knowledge, we find that any error in allowing him to testify to Ms. Lewis's statements is harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

The Admissibility of Penalty Phase Evidence

[17] First, Henyard claims that the trial court erred in allowing the state at the penalty phase to present evidence of his prior juvenile adjudication for armed robbery with a weapon which the trial court specifically relied on to find the prior violent felony aggravating circumstance. *See*§ 921.141(5)(b), Fla. Stat. (1995).[FN13] We agree.

FN13. Section 921.141(5) states:

> AGGRAVATING CIRCUMSTANCES.-Aggravating circumstances shall be limited to the following:
>
> ....
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

In *Merck v. State,* 664 So.2d 939 (Fla.1995), the defendant was convicted of first-degree murder, and at his sentencing trial the State introduced evidence of Merck's prior juvenile adjudication in North Carolina for assault with a deadly weapon. *Id.* at 943-44. The jury recommended death and the trial court followed the recommendation, finding Merck's juvenile adjudication to be an aggravating factor under section 921.141(5)(b). *Id.* at 941, 943. We reversed the death sentence and explained:

> [W]e agree with Merck that the juvenile adjudication was not a conviction within the meaning of ***252**section 921.141(5)(b), Florida Statutes (1993). This is expressly mandated in section 39.053, Florida Statutes (1993).... Despite correctly sustaining the objection to the admissibility of the North Carolina judgment, the trial court erred in stating in her sentencing order, "This is also a proper aggravating factor under [section]

921.141(5)(b)." We find the inclusion of this juvenile adjudication similar to the erroneous inclusion of community control as an aggravating factor in *Trotter v. State,* 576 So.2d 691 (Fla.1990). As noted in *Trotter,* penal statutes must be strictly construed in favor of the one against whom a penalty is imposed. *Id.* at 694. We therefore conclude as we did in *Trotter,* that a resentencing before a jury is required.

... We acknowledge that there was other substantial evidence to support the aggravating factor in section 921.141(5)(b). Nevertheless, from our review of the record we cannot say that the dramatic testimony concerning the North Carolina shooting did not taint the recommendation of the jury.

Id. at 944. As we indicated in *Merck,* section 39.053(4), Florida Statutes (1995), expressly states: "Except as the term 'conviction' is used in chapter 322, and except for use in a subsequent proceeding under this chapter, an adjudication of delinquency by a court with respect to any child who has committed a delinquent act or violation of law shall not be deemed a conviction...." Thus, Henyard's prior juvenile adjudication for robbery with a weapon is not a "conviction" for a prior violent felony. Consequently, in light of our recent decision in *Merck,* and the plain language of section 921.141(5)(b), which requires that the defendant be "previously convicted" of a violent felony for it to be considered in aggravation, we find the trial court erred in relying upon Henyard's juvenile adjudication for robbery to support the prior violent felony aggravating factor.

[18] Nevertheless, we reject Henyard's claim that the trial court's improper consideration of Henyard's prior juvenile adjudication as a violent felony entitles him to a new sentencing hearing. Unlike the violent felony adjudication at issue in *Merck,* the testimony concerning Henyard's juvenile adjudication was modest and served to minimize his role in the prior offense.[FN14] Moreover, the record reflects without dispute the presence of six other contemporaneous felony convictions of Henyard to support the prior violent felony aggravator for each death sentence even absent Henyard's juvenile adjudication for robbery with a weapon.[FN15] Accordingly, we find the trial court's improper admission into evidence and consideration of Henyard's juvenile adjudication for robbery with a weapon to be harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d at 1129.

FN14. Henyard's court-appointed attorney in the juvenile matter testified in pertinent part:

> The circumstances were it was a strong armed robbery that had a weapon involved, as far as like a broomstick, of a convenience store. And it was Larry Hayes who was the one who actually accosted the lady and who threatened her with the stick and grabbed the money. It was Mr. Henyard and Columbus Connley who were out there by the door just as a lookout at most. I thought Mr. Henyard was the least culpable of the three.

FN15. In conclusory fashion, Henyard argues that, to the extent that the contemporaneous convictions are considered under the prior violent felony aggravator, the trial court has improperly doubled this aspect with the aggravating circumstance that the murder was committed in the course of a kidnapping. *See Provence v. State,* 337 So.2d 783, 786 (Fla.1976) (evidence used to support two independent aggravating circumstances cannot refer to the same aspect of defendant's crime), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). In this case, the trial court imposed death sentences for the murders of both Jasmine and Jamilya Lewis. For each death sentence, the trial court considered the contemporaneous conviction for the kidnapping of the other sister under the prior

violent felony aggravating factor, and considered the victim's kidnapping under the murder in the course of a felony aggravating factor. *See*§ 921.141(5)(d). That is, the trial court considered different aspects of Henyard's crime in finding these two aggravators for each murder. Thus, the presence of these aggravators does not constitute improper doubling and Henyard's claim is without merit.

[19] Second, Henyard contends that the trial court erred in allowing Ms. Lewis to testify during the penalty phase that Henyard, upon hearing Ms. Lewis' prayers to Jesus, stated, "You might as well stop calling Jesus, this ain't Jesus this is Satan." Henyard***253** claims his statement is not relevant to prove the existence of any aggravating circumstance. We disagree.

[20] Under Florida law, the heinous, atrocious, or cruel aggravating circumstance may be proven in part by evidence of the infliction of "mental anguish" which the victim suffered prior to the fatal shot. *See, e.g., Preston v. State,* 607 So.2d 404, 409-10 (Fla.1992); *Phillips v. State,* 476 So.2d 194, 196 (Fla.1985); *Routly v. State,* 440 So.2d 1257, 1265-66 (Fla.1983), *cert. denied,*468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). In this case, Ms. Lewis testified that she was sitting in the back seat between her daughters, that her girls were quiet at the time Henyard made the statement at issue, and that Henyard spoke loudly enough for all to hear. Ms. Lewis explained that neither child had trouble hearing and she believed her daughters heard Henyard's statement. Thus, Henyard's statement, which the trial court characterized as the "harbinger" of the agonizing events to come, was relevant to show the mental anguish inflicted upon the Lewis girls before they were killed, and as evidence of the heinous, atrocious and cruel aggravating circumstance. Consequently, we find that the trial court properly admitted the statement into evidence during the penalty phase of Henyard's trial.

[21] Finally, Henyard claims the trial court erred in admitting the testimony of a blood stain pattern analyst because it was not relevant to prove the existence of any aggravating circumstance. The analyst testified that, based on the blood splatters found on Henyard's clothing, Henyard was approximately four feet from Jamilya Lewis when she was shot.

[22] In this case, Henyard offered evidence that he was not the triggerman in these murders and argued that lingering doubt as to whether he actually shot the Lewis girls should be considered in mitigation. Consequently, the testimony of the State's witness concerning blood-splatter evidence was proper to rebut Henyard's continued assertion that he did not actually kill the Lewis girls. Moreover, testimony concerning the close proximity of the defendant to the victim was relevant to show the "nature of the crime." *See*§ 921.141(1), Fla. Stat. (1995). Thus, we find that the trial court did not abuse its discretion in allowing the blood stain analyst to testify at the penalty phase of Henyard's trial.

The Pecuniary Gain and Heinous, Atrocious, or Cruel Aggravating Factors

Henyard claims that the trial court erred in finding the pecuniary gain aggravating circumstance in this case because the evidence was insufficient to prove this aggravating factor beyond a reasonable doubt. In *Hardwick v. State,* 521 So.2d 1071, 1076 (Fla.), *cert. denied,*488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), we held that in order for the pecuniary gain aggravating factor to be present, there must be proof beyond a reasonable doubt that the murder was an "integral step in obtaining some sought-after specific gain."

[23] Here, the trial court found that, during the week preceding the murders, Henyard "stated he was going to get himself a car," and "foretold or bragged on Friday evening[,] January 29, 1993[,] that he would steal someone's car, kill the owner and use the car to drive to Pahokee to see his father." The following evening, Henyard and his code-

fendant stole Ms. Lewis's car and abducted the Lewis family, raped and attempted to murder Ms. Lewis, and killed her children, Jasmine and Jamilya Lewis. Henyard's admissions and the facts of this case support a finding that the murders of Jasmine and Jamilya Lewis were "an integral step in obtaining some sought after specific gain." *See Hardwick,* 521 So.2d at 1076. Thus, the trial court did not err in finding the pecuniary gain aggravating factor to be proved beyond a reasonable doubt in this case. *See also Gamble v. State,* 659 So.2d 242 (Fla.1995)(pecuniary gain aggravator found when codefendants stole victim's car after murdering him), *cert. denied,*516 U.S. 1122, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996); *Hall v. State,* 614 So.2d 473 (Fla.) (pecuniary gain aggravator found when victim was abducted, beaten, raped, and murdered and car was stolen), ***254** *cert. denied,*510 U.S. 834, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993).

[24] Second, Henyard contends that the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance in this case because each child was killed with a single gunshot, and "if the victims were adults, heinous, atrocious, [or] cruel would not be present on this record." We disagree.

[25] We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. See, *e.g., Routly v. State,* 440 So.2d 1257, 1265 (Fla.1983), and cases cited therein. Moreover, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State,* 607 So.2d 404, 410 (Fla.1992), *cert. denied,*507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993). In this case, the trial court found the heinous, atrocious or cruel aggravating factor to be present based upon the entire sequence of events, including the fear and emotional trauma the children suffered during the episode culminating in their deaths and, contrary to Henyard's assertion, not merely because they were young children.[FN16] Thus, we find the trial court properly found that the heinous, atrocious, or cruel aggravating factor was proved beyond a reasonable doubt in this case.

FN16. The sentencing order reads in pertinent part:

> After shooting Ms. Lewis, Henyard and Smalls rolled Ms. Lewis' unconscious body off to the side of the road. Henyard got back into Ms. Lewis' car and drove a short distance down the deserted road, whereupon Henyard stopped the car.
>
> Jasmine and Jamilya, who had been in continual close approximation and earshot of the rapes and shooting of their mother, were continuing to plead for their mother; "I want my Mommy," "Mommy," "Mommy."
>
> After stopping the car, Henyard got out of Ms. Lewis' vehicle and proceeded to lift Jasmine out of the back seat of the car, Jamilya got out without help. Then both of the pleading and sobbing sisters, were taken a short distance from the car, where they were then executed, each with a single bullet to the head.

The Proportionality of the Death Penalty

As his final claim, Henyard argues that his death sentences are disproportionate to the sentence received by his codefendant, Alfonza Smalls, and that the mitigating factors in his case outweigh the aggravating factors.

[26] Under Florida law, when a codefendant is equally culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. *Downs v. State,* 572 So.2d 895 (Fla.1990), *cert. denied,*502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); *Slater v. State,* 316 So.2d 539 (Fla.1975). Thus, an equally or more culpable code-

fendant's sentence is relevant to a proportionality analysis. *Cardona v. State,* 641 So.2d 361 (Fla.1994), *cert. denied,*513 U.S. 1160, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995).

[27] Like Henyard, Alfonza Smalls was tried on the same charges and convicted, but he was not subject to the death penalty because his age of fourteen at the time of the offense prevented him from receiving the death penalty as a matter of law. Rather, Smalls received the maximum sentence possible for his crimes-eight consecutive life sentences, with a fifty-year mandatory minimum for the two first-degree murder convictions.

[28] In *Allen v. State,* 636 So.2d 494, 497 (Fla.1994), we held that the death penalty is either cruel or unusual punishment under article I, section 17 of the Florida Constitution if imposed upon a person who is under the age of sixteen when committing the crime. That is, when a defendant is under the age of sixteen, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances as a matter of law.

In this context, then, Smalls' less severe sentence is irrelevant to Henyard's proportionality review because, pursuant to *Allen,* the aggravation and mitigation in their cases are per se incomparable. Under the law, death was never a valid punishment option for Smalls, and Henyard's death sentences are not disproportionate to the sentence received***255** by his codefendant. *Cf. Larzelere v. State,* 676 So.2d 394 (Fla.1996)(holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death sentence because codefendant was exonerated from culpability as a matter of law).

[29] We also find that the evidence in Henyard's case supports the trial court's conclusion that the four aggravating factors outweighed the mitigating factors set forth in the sentencing order.[FN17] Finally, upon consideration of all of the circumstances, we further conclude that Henyard's death sentences are not disproportionate to death sentences imposed in other cases. *See, e.g., Walls v. State,* 641 So.2d 381, 391 (Fla.1994)(death sentence upheld for execution-style killing of woman after she witnessed boyfriend's murder), *cert. denied,*513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995); *Cave v. State,* 476 So.2d 180 (Fla.1985), *cert. denied,*476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986)(death sentence proportionate where co-perpetrators abducted, raped, and killed victim; defendant not actual killer).

> FN17. Henyard does not contend that the trial court failed to consider any mitigating evidence presented in this case.

Accordingly, we affirm Henyard's convictions and the imposition of the sentences of death in this case.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.
Fla.,1996.
Henyard v. State
689 So.2d 239, 22 Fla. L. Weekly S14

END OF DOCUMENT

Appendix H
Henyard v. Florida, 552 U.S. 846

H

Henyard v. Florida
U.S.,1997
U.S.FLA.

Supreme Court of the United States
Richard HENYARD, petitioner,
v.
FLORIDA.
No. 96-9391.

Oct. 6, 1997.

Case below, 689 So.2d 239.

Petition for writ of certiorari to the Supreme Court of Florida denied.

U.S.,1997
Henyard v. Florida
522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80, 66 USLW 3257

END OF DOCUMENT