IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,

Appellant,

v.

CASE NO. 78,660

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATUTES AND CONSTITUTIONS

STATEMENT OF THE CASE AND FACTS

Albert Holland was indicted on August 16, 1990, for the first degree murder of a law enforcement officer (Officer Scott Winters), armed robbery, sexual battery (T J), and attempted first degree murder (T J) (TR 3315-3316). Holland's competency to stand trial was reviewed on December 3, 1990 (TR 45-295). Following an extensive hearing where both medical and lay testimony was presented, the trial court determined, on December 4, 1990, Holland was competent to stand trial based on the Court's belief that Holland was malingering; he could appreciate right from wrong and the consequences of his conduct (TR 290-291).

The record reflects on March 8, 1991, Judge Green, following argument, appointed the public defender's office as co-counsel to aid Mr. Giacoma who was originally appointed September 10, 1990. (TR 318-327). On March 15, 1991, the issue of the public defender's was reconsidered based on a motion to vacate filed by the Public Defender's. It was the Public Defender's view that a conflict of interest continued to exist hence that office could not act as co-counsel. Prior to the appointment of Mr. Giacoma, Assistant Public Defender Bill Laswell was assigned to handle the case. Judge Futch sua sponte vacated that appointment and assigned Mr. Giacoma as a special public defender due to a conflict which became apparent following the initial discovery exchange (TR 347-377). Mr. Yaung Tindall was then appointed to assist Mr. Giacoma and act as co-counsel for the entire case (TR 380-381).

On or about June 10, 1991, defense counsel filed one of a number of motions for continuance, arguing that the defense did not yet have doctors reports and still had witnesses to depose (TR **426-431**). Said motion was denied (TR 436).

On July 1, **1991**, the court entertained Holland's motion to suppress and motion to suppress identification (TR 448). As a result of an extensive hearing (TR 450-523), the trial court denied Holland's motion to suppress (TR **524**). Holland's motion to suppress physical show-up, photo line-up and courtroom identification (TR 526), was heard (TR 527-543, 721-861), and all relief was subsequently denied. (TR 862).

On July 1, 1991, the court entertained another motion for continuance (TR 661). Defense counsel argued that he was only appointed September 10, 1990, replacing Mr. Laswell (TR 661). A number of statements had been taken and a lengthy competency hearing was also heard. There existed a huge witness list and co-counsel Young Tindall had only been appointed on June 10, after the last motion for continuance had been denied (TR **663**). Since that time, the prosecution had turned over more discovery and had added additional witnesses to the witness list (TR *663*). Mr. Giacoma argued that he was still taking depositions in Washington, D.C., and was having difficulty securing medical records from St. Elizabeth's Hospital (TR **664-665**). Both Dr. Block-Garfield and Dr. Koprowski had changed their views since the original competency hearing as to Holland's competence to stand trial (TR 672). Mr. Giacoma opined that he had not prepared for the penalty phase and that he was having difficulty

locating the witnesses Holland had furnished to him (TR **673-675).** The trial court took the motion for continuance under advisement, but noted that he probably was not going to grant it (TR 712). On July 3, 1991, the trial court, after hearing testimony as to Holland's suppression motion, ruled on the motion for continuance, denying same. Although denying the motion, the court noted he intended to give the defense time if they needed it. It was the court's intention to pick a jury and then recess the case for a week (TR **858-867).**

On July **8,** 1991, defense counsel's request to remove Holland's shackles was granted. (TR **877).** The court further announced that after a jury was selected, the court would stand in recess for a **week** (TR 881).

Holland was personally permitted to speak to the court. He informed the court that he was scared **and** nervous. He complained that he had frequently asked his attorneys for the depositions that had been taken because he was having trouble relating back to the incident. He wanted to read the depositions so he could recall what had happened. Holland felt this was necessary in order to help in his defense however, he believed that his lawyers were ignoring him (TR **882-883).** Holland stated **he** wrote a letter on September 19, asking for a speedy trial by an impartial jury and that as far as he was concerned he wanted Mr. Laswell on his case (TR **883).** He believed his privacy rights were being violated because he did not initiate an insanity defense (TR **883).** He further lamented of being denied effective assistance of counsel. He wanted the trial judge recused because

Judge Futch had shown a bias by coming out of retirement to continue hearing Holland's case and being an ex-law enforcement officer (TR 883-885).

Holland did not want either Mr. Giacoma or Mr. Tindall to represent him because he believed they were working with the prosecution (TR 886). Holland stated that he wanted to go to the law library and help in his defense but defense counsel told him that that did not look good for an insanity defense (TR 888). He wanted new counsel because "these guys" were working with the State. Holland specifically was not waiving his right to counsel (TR 889), but if "I have to I'll represent myself but I'm not waiving my right to counsel." The State observed that Holland was not competent to represent himself (TR 889-890).

Holland continued to assert that his lawyers were just playing games and they were trying to railroad him to the chair (TR 893). Holland stated that he had confidence in Bill Laswell and he wanted Bill Laswell as his lawyer but was told that Laswell was off the case (TR 894). Holland stated that Ms. Tindall told him that the trial court did not like Laswell and that was why he was not on the case (TR 894). Holland demanded a list of all the material evidence, wanted a copy of the signed confession, and wanted to go to the law library (TR 897-898). He said defense counsel had told him not to start reading anything because it was not helpful to his insanity defense. He believed he needed a new investigator (TR 901-902).

The trial court concluded, Holland was not competent to represent himself. He denied the motion to dismiss defense

attorneys and denied the ore tenus motion to recuse the judge (TR 904).

Jury selection commenced (TR 907). During the jury selection, Holland blurted out how he did not want "these lawyers" because "they lied and deceived him" (TR 919-920). The court ordered Holland removed from the courtroom (TR 919), and asked defense counsels to talk to the defendant (TR 920). The trial court ultimately dismissed the jury panel because of Holland's outburst (TR 931), and informed Holland that such outburst would not be tolerated. Holland apologized to the court. (TR 930-931).

A second incident occurred during the second impanelment of a jury. Defense counsel observed his "client lost it today". The defendant said "defense counsel does not care if he goes to the chair" (TR 1180). The court ordered that if Holland continued to misbehave, the court would place Holland in another room and allow him to watch the trial on close-circuit television (TR 1183).

On July 10, 1991, the prosecutor requested a Faretta inquiry as to Holland's desire to represent himself (TR 1212-1213). The court, inquired of defense counsel whether Holland was on medication (TR 1214). Giacoma "did not know" because the defendant would not talk to him (TR 1214). Discussions resulted about Holland's history of trying to dismiss his counsel.[1]

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[1] In March 1986, while at St. Elizabeth's Hospital, Holland filed a complaint about his court-appointed lawyer, arguing that counsel was not actively defending him. In a letter sent to the trial judge in Washington, D.C., Holland argued that counsel was negligent and he was being denied his constitutional rights. He

Arrangements were made to have a monitored room set up in case Holland continued to be disruptive (TR 1220).

On July 10, 1991, Holland returned to the courtroom and stated that he felt better that day and was not taking any medication (TR **1223**). The court called the prison to find out whether in fact Holland was on any medication (TR 1224), and was told that Holland was under no special care; Holland made no complaints during the night; and had not been given any psychotropic drugs since March or April of that year (TR 1225). Holland was told that he could not continue to disrupt the trial (TR **1227**). Holland again stated he wanted to fire his lawyers and "defend himself". He believed his lawyers were incompetent **and** "he was willing to waive his right to counsel" (TR 1227). The court commenced a Faretta inquiry. The court asks Holland his age (which was thirty-three years), about his high school education and hospitalization. Holland got his GED but did not graduate from high school (TR 1230). Holland thought the prosecutor was trying to control everything and he wanted more time to prepare (TR 1230). A discussion took place about Holland's prior hospitalizations and his penchant for escaping (TR **1231-1232**). Holland admitted **he** never represented himself in court (TR 1232). When asked whether he understands the seriousness of the charges, Holland answered that he was being

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unspecifically stated that Robert Greenspan, his counsel, would not listen to him and that he, Holland, had no confidence in him. Additionally, in January **1990**, Holland wanted to file his own motions and to prepare for his defense for the federal charges. He did not like defense counsel's Mr. Bramson's defense of him on drug usage and battery on a law enforcement officer charges. (TR **1215-1217**).

rushed to court; everyone was being deceptive and he was tired of Mr. Giacoma "smiling" (TR 1232). He had only seen Mr. Giacoma "four or five times" and Mr. Giacoma was always rushing. Holland said most of his information was from the State and that Mr. Giacoma was concerned about Holland "receiving stuff" that would hurt his insanity defense (TR 1233). Holland wanted the transcripts of the instant proceedings and wanted to talk to the media (TR 1234). Holland wanted to file motions to have access to the law library and wants to exercise his right to be heard. He observed that he would like somebody with some experience from either "Florida State" or "the university" to help him in his research (TR 1235). He believed everybody knows their roles and that the prosecutor had committed constitutional error (TR 1236-1237).

Following the aforementioned dialogue, the court declared Holland was not qualified to represent himself (TR 1237). Said determination was based on Holland's prior commitments for mental health problems. Although the court believed Holland competent, he noted Holland suffers from some "belief" that they were playing games. While Holland understood the difference between right and wrong and was very eloquent and literate, that was not enough to allow Holland to represent himself (TR 1237). The court further ordered, (following another outburst by Holland), that Holland's disruptive conduct was part of "his" planned defense (TR 1239). The court reiterated that Holland was not qualified to represent himself (TR 1239-1240).

On July 22, 1991, defense counsel renewed his motion for continuance, arguing that he had just lost a ruling in Washington, D.C., concerning securing witnesses from St. Elizabeth's Hospital (TR 1707-1708). After extensive discussion, the trial court denied the motion for continuance (TR 1714-1715).

The jury canvicted Holland on all four counts as charged August 1, 1991 (TR 3084-3085). Following the penalty phase of Holland's death case, the jury returned an 11-1 death recommendation on August 12, 1991 (TR 3214).

On August 19, 1991, sentencing was held. Following Holland's personal comments to the trial court as to why he should not be sentenced and arguing the inequities of his trial, the trial court concluded that four statutory aggravating factors existed: (1) that Holland had previously been convicted of a violent felony; (2) that the murder was committed while engaged in flight from sexual battery/robbery; (3) that the purpose of the murder was to avoid arrest, and (4) that the victim of the murder was a law enforcement officer (TR 3240-3241). The trial court found that there might be a possible history of drug abuse as a mitigating factor but concluded that Holland had proved no statutory or non-statutory mitigating evidence that was sufficient to overcome the four aggravating factars found (TR 3242). With regard to the other sentences to be imposed for sexual battery, attempted first degree murder and robbery with a firearm, the trial court followed the sentencing guidelines recommendations as to the sentences to be imposed (TR 3245-3246). The trial court denied the State's motion to aggravate said

sentences (TR **3245**). Following sentencing, Holland was informed of his right to an appeal, at which point he observed that he hoped that he had better lawyers than Mr. Giacoma and Mr. Tindall, "But whatever the law requires, I'm not gonna waive my counsel . . . Don't want any more Peter Giacoma or Young Tindall's." (TR 3256).

On August **20, 1991**, the trial court was informed that the consecutive sentences imposed (on the non-death convictions) constituted departure sentence from the guidelines. As such, the court amended his order to reflect that the departure, to-wit: the consecutive sentences imposed were due to the unscored capital felony which accompanied the non-death convictions (TR **3262-3263**). On August **23, 1991**, in Holland's presence, the motion far clarification on sentence was entertained. The court told Holland that because the sentences for the non-capital convictions were to be served "consecutively", these sentences constituted departure sentences from the sentencing guidelines (TR **3297**).

Statement of the Facts

The facts as set out by Holland are accepted with the following additions.

On July 25, 1991, trial counsel indicated, based on what was known, he was ready to go to trial the following Monday (TR 2430).

On Monday, July 29, **1991**, the defense commenced the presentation of its case. Dr. William Love, a psychologist, testified that approximately three weeks earlier he had received

extensive documents such as prior hospitalizations and information from St. Elizabeth's Hospital an Holland (TR 2493, 2497). He interviewed Holland and Holland's father and prepared a nine-page report as a result of his interviews, review of the materials and other items (TR 2498). Dr. Love observed that based on the records and discussions with Holland's father, Holland had no problems until he was about 16 years old. Prior to that time, Holland was a average student, making A's and D's without a particular pattern; was a good athlete; and had prepared an honor science project (TR 2500). At age 16 or 17, Holland turned to drugs and started getting into trouble (TR 2501). Although Holland's father was a highly educated man, a Ph.D.; worked with the federal government, involved with substance abuse research, he did not realize his son was using drugs (TR 2501). Between the ages of 17 and 19, Holland got into a number of skirmishes where his father had to bail his son out of jail. Holland's father disapproved of Holland living with an older woman (20 years old), and he believed that this older woman was the one who got Holland involved in heroin (TR 2501).

Dr. Love observed that there were no childhood mental illnesses (TR 2501), and it was his view that Holland got into trouble while he was on drugs. Holland has an anti-social personality (TR 2502). Dr. Love recalled that when Holland was sent to federal prison for violation of his probation from a robbery charge, he received a severe beating and was unconscious for a long period of time (TR 2503). While there was only a small distortion found as a result of a CAT scan after the head

injuries healed, it was Dr. Love's view that the result of the injuries could cause Holland's schizophrenic problems (TR 2506). Dr. Love characterized schizophrenia as a range of problems characterized by a breakdown in reality testing (TR 2509). In the past, Holland had been on Haldol, a major tranquilizer and Thorazine, as well as using illegal drugs such as uppers and downers, Percodan, Didaudids and some heroin and cocaine (TR 2514-2518). Holland admitted to Dr. Love that he used cocaine at home frequently which set him into violent patterns. Dr. Love believed that ingestion of the crack cocaine could have set Holland off (TR 2519, 2522); therefore, at the moment of the crime, Holland did not know the difference between right and wrong because he "lost his mind before that period" (TR 2523). He doubted whether Holland was a malingerer because Holland indicated he only started to hallucinate when he used drugs and Dr. Love did not believe this was a way to develop an insanity defense (TR 2528). Moreover, Dr. Love opined that he did not believe somebody would spend 5 1/2 years in a mental hospital if they were not mentally ill (TR 2529). He observed that Holland would appear normal at times but his memory came and went (TR 2529-2530). In reviewing Dr. Strauss' report, Dr. Love could not understand why Dr. Strauss would find Holland was malingerer (TR 2533).

On cross-examination, Dr. Love admitted that he only testified in one other case prior to testifying in the instant cause (TR 2533). Moreover, Dr. Love admitted that usually there was violence with a sexual battery and, he did not know what a

$10 piece of crack looked like (TR 2537). He had just recently attended a workshop on malingering and noted one aspect discussed was the fact that a person would refuse to see a doctor. He admitted Holland was picking and choosing which doctors he wanted to see (TR 2540). Moreover, Dr. Love admitted that an anti-social personality disorder was common among people incarcerated however, he was not sure if Holland had a personality disorder. Since the doctor did not know the circumstances of other crimes to which Holland had previously been convicted, he was unable to determine whether Holland's conduct in the past was a result of drug usage or a personality disorder. "At this point, [defendant] he was certainly a drug addict and most probably an anti-social personality. It seems he planned and got involved in these incidents whether he was 'high' at the time or not." (TR 2544).

Love admitted that he had not tested Holland but merely assumed organicity based on his conduct, prior hospital records and the "changes of personality", (TR 2545). In reviewing with Dr. Love Holland's prior records, Dr. Love acknowledged that the doctors at St. Elizabeth's Hospital found no organic amnestic syndrome nor did Holland have a memory problem (TR 2546-2550). Dr. Love further admitted that he was not able to read all of the materials provided and in fact did not see a 1982 psychological profile or a 1985 profile (TR 2555). Dr. Love was unfamiliar with the details of Holland's statement to Detective Butler (TR 2556-2557), and did not view the videotaped statement (TR 2558). He did admit, however, that viewing these materials might have been critical to his diagnosis (TR 2558).

When asked about his private practice, Dr. Love admitted he only had one patient suffering from schizophrenia and that person was on medication (TR **2563-2564).** He noted he could not explain the fact that the last year prior to Holland's escape from St. Elizabeth's Hospital in 1986, Holland was on no medication (TR **2563-2566).** When asked how he drew a conclusion that Holland was under the influence of alcohol the day of the murder, Dr. Love had to admit that his only knowledge came from the defendant who said he had "had a beer." He could not point to any amount of drugs or alcohol used that day (TR 2568-2569). When asked about the sexual battery of T J , Dr. Love explained that when Holland was taking off his clothing, that was just a part of the "chain of events." He was, however, unable to explain whether Holland asking T J to put his "penis in her mouth" was part of the "chain of events". **(TR 2570).** Dr. Love clearly did not know the facts and circumstances surrounding the assault or murder and had no idea that Holland ran off after Randolph Canion came up to him and said "you're gonna kill that woman" (TR **2571-2572).** He did not know that Holland met up with Mr. Hill and Mr. Jamison and told them that he had just been robbed (TR 2572). Nor did he read the police reports regarding why Holland ran in the direction he did (TR 2574). This latter fact was important because Dr. Love bottomed part of his report on the fact that he believed Holland was running around in circles (TR 2574). Dr. Love did not know that Holland attempted to elude police nor hide himself (TR 2575). It was his belief that Holland does not trust women but he did not know that

Holland also expressed concern that women were helpless and ineffectual (TR 2577).

Dr. Love testified that he knew nothing or very little about Holland's prior arrest for drugs in Washington, D.C., and was certainly unaware that Holland had had a similar struggle with a police officer there and had made a statement about next time he would have a gun (TR 2583-2584). When he arrived for his interview with Holland, Holland already **had** a copy of Dr. Koprowski's report. In fact, Dr. Love indicated that Holland believed that Dr. Love was there to treat his physical complaints, specifically muscle spasms (TR 2585-2586). Holland said he did not remember shooting Scott Winters but remembered the incident concerning T and remembered getting beaten up (TR 2589). Dr. Love's report was wrong regarding a statement that Holland's brain was saturated with cocaine. Apparently only a trace of cocaine was found in the vomit retrieved and tested **(TR 2597-2598).**

Dr. Raymond Pattersan, a board certified psychologist, first met Holland in July 1981 at St. Elizabeth's. Dr. Patterson was asked to determine whether Holland needed medication since he had been determined not guilty by reason of insanity (TR 2612-2614). Holland was given Thorazine, a moderate prescription which "seemed to improve Holland." (TR 2615). Dr. Patterson testified that the standard in Washington, D.C., for determining whether somebody was not guilty by reason of insanity was "if defendant is suffering from mental disease or defect which substantially impaired their ability to recognize wrongfulness of

conduct or conform their conduct to the requirements of law." Dr. Patterson admitted that he was not sure about the not guilty by reason of insanity conclusion because he believed that Holland knew the difference between right and wrong but may have had difficulty in controlling himself (TR 2622). Other doctors who saw Holland at this time, in particular Dr. Sack, believed Holland was schizophrenic and disoriented, while Dr. Madison and Dr. Ratner believed Holland suffered from a psychosis and thought that medication would help (TR 2624-2625). Dr. Madison reported that while Holland was at St. Elizabeth's, he improved and eventually moved from a maximum security or Privilege A classification to a Privilege B classification which allowed staff to accompany an inmate to go outside on the hospital grounds (TR 2628, 2630). While incarcerated, Holland filed a court action against the hospital seeking further review of his status to allow his privileges to be upgraded to a Privilege D which was a conditional release (TR 2630). Two days after receiving an adverse ruling, Holland escaped (TR 2632).

Dr. Patterson observed that he did not believe Holland had an anti-social personality disorder because he did not meet the criteria. Dr. Patterson observed that Holland had the type of personality that could be influenced by the use of cocaine (TR 2637). On cross-examination, Dr. Patterson admitted that the tests in Washington, D.C., was much different from Florida's and that he had prepared, in a June 1982 report, a statement that Holland knew the difference between right and wrong and could differentiate (TR 2640). Between September 1981 through January

1982, Holland was not even in the hospital because he escaped after he obtained a special B Privilege to *go* see his father in the hospital. Apparently while at the hospital, Holland asked to go to the gift shop. Holland went to the gift shop and continued walking (TR 2644). Three days after his escape, Holland commits a robbery of two women who he had stopped, and asked help from because he said he had car trouble, When the women stopped, Holland robbed them and took their money and jewelry (TR 2645). Dr. Patterson admitted that the robbery took planning (TR 2646). Dr. Patterson noted Holland was tested by Dr. Polley for organicity and no evidence was found of same (TR 2646). No evidence was found that Holland suffered from organic amnestic syndrome and while there were times when Holland refused to take his medication, it was Dr. Patterson's belief that Holland was competent to make treatment decisions (TR 2649-2650). Dr. Patterson said the files reflected that as early as 1982, Dr. Polley found no evidence of psychosis and no active symptoms present (TR 2654). The prosecutor gave a detailed hypothetical to Dr. Patterson surrounding the facts and circumstances of the instant crime (TR 2654-2657). Dr. Patterson stated that he could not give an answer or an explanation as to the hypothetical question because he had not examined Holland (TR 2658). Dr. Patterson admitted that Holland's anxiety and depression stemmed from his confinement because he wanted more privileges and was denied same (TR 2667).

On July 29, 1991, defense called Dr. Thomas Polley, a psychologist at St. Elizabeth's Hospital, who also knew Holland

(TR 2676). Dr. Polley testified that he saw Holland daily after he was readmitted following Holland's first escape (TR 2677-2678). Holland was given a battery of tests including the Bender-Gestalt Test; House-Tree-Person Test; Weschler Adult Intelligence Test; Weschler Memory Test and the Rorschach Test (TR 2679). Dr. Polley, after giving the standard tests, found Holland to be of average intelligence although there was a discrepancy between his verbal and performance IQ (TR 2691). There were some impulse control problems but no gross organic impairment and Holland's short term memory was intact (TR 2692-2693). Holland saw men as threatening (TR 2694). These feelings towards men were manifested through Holland's relationship with his father. Holland admired his father but he secretly feared him (TR 2694). Holland did not have strong self-identification as a male (TR 2697). When he saw Holland, Holland had problems conforming his conduct but he was not sure beyond a medical certainty of his conclusion (TR 2702). He believed that Holland was dangerous to himself and could not have been released (TR 2703). In preparing to testify, Dr. Polley reviewed the files from 1981 to 1986. In his view, he did not think that Holland could be a malingerer (TR 2704-2708).

On cross-examination by the State, Dr. Polley testified that he first met Holland on March 9, 1982. On April 21, 1982, Holland was found competent to stand trial but later was determined to be not guilty by reason of insanity (TR 2720-2721). Dr. Polley found no neurological defects although it had come to his attention that Holland had been beaten while incarcerated in

Wisconsin (TR 2723). Holland, in his personal history, informed Dr. Polley that he had sexual relationships with women that were normal and there did not appear to be any overt psychosis or active psychosis which surfaced during the interviews (TR 2724-2727). Dr. Polley found no gross or organic impairment nor any evidence of brain damage or organicity (TR 2725). He was able to eliminate any diagnosis of organic amnestic syndrome and concluded that Holland believed women were helpless and ineffectual creatures (TR 2726). Holland would use women, felt that they were unreliable and unable to provide all of his needs and wants (TR 2727). Dr. Polley found that Holland's memory difficulties were due to conscious denial rather than organic problems (TR 2728). Holland was also treated by Dr. Turkiss, who had removed Holland from all medication (TR 2734). Holland had no psychotropic or anti-psychotic medication since January 1985, and was still progressing just prior to his escape. Holland had a positive attitude and had sound decision making ability. Beatrice Smirnough, a clinical administrator, had reviewed Holland's file and reported that Holland had matured based on her observations and recommended a Privilege B classification with a Privilege C classification to take effect eight weeks hence (TR 2734-2735). Dr. Polley could not say what specific affect drug usage would have on Holland and he had not seen Holland since 1986 (TR 2739-2740).

The defense rested its case, however, defense counsel asked the court to ask Holland whether he was desirous of testifying in his own behalf (TR 2741). When asked, Holland made no response.

Defense counsel indicated that Holland's father had spoken to him earlier that day and Holland's father had said that Holland did not want to testify (TR 2741). Defense counsel renewed the motions for judgment of acquittal and other motions filed. The court denied all motions (TR **2744).**

The State's case in rebuttal commenced with the testimony of Martha Williams, who lived in Washington, D.C., and knew Albert Holland as Roberto Gomez (TR **2745-2746).** She testified that she met Holland in June **1986,** at a Safeway grocery store. He just came up to her and started talking. They exchanged names and telephone numbers and approximately a week and a half later Holland called her (TR 2746-2747). Holland told her that he was Puerto Rican and after a number of weeks, they starting dating (TR 2748). Their relationship lasted four or five months, but ended when Holland told her that he was involved with another woman (TR 2749). On cross-examination, Ms. Williams testified she saw Holland once or twice a **week** and that Holland would speak Spanish around Spanish people. They never lived tagether, however, she never saw Holland take a drink or use drugs and observed that he always carried a Bible around with him (TR 2750). Holland was very polite and gentle. The only time that he ever got upset was one time when she was late (TR 2751).

Lee Smith testified that in 1986 he lived in Maryland and was a minister at the Central Baptist Church (TR **2752-2753).** One **day** in August or September of 1986, Mr. Smith was painting his church when Holland walked up to him and introduced himself (TR **2754).** Holland tried **to** be friends and before the fall was over,

Holland came to live in Mr. Smith's trailer with his family **(TR 2754).** Mr. Smith saw Holland on a daily basis because they worked together. Holland took an interest in learning to tune pianos and helped doing repairs around the church (TR 2755). Holland told Mr. Smith that his name was Roberto Gomez **(TR** 2757). While Holland stayed in his home, they would play chess together and became friends. After approximately three weeks, Holland left but periodically would call and they would have dinner together. Mr. Smith's final contact with Holland was in January 1988 (TR **2757). At** that last meeting, Holland returned Mr. Smith's piano tuning tools. Holland then told Mr. Smith that he, Holland, was not Spanish and was not from New York **(TR 2758).** Holland said he had been in trouble and was trying to straighten out his life. He was seeking legal counsel to help him **(TR 2759).** Holland told him, he had been a patient at St. Elizabeth's Hospital (TR **2760).** He described Holland as a bright **guy,** polite and never in trouble (TR **2761).**

Jerry Mahon, a pipe fitter foreman at Lawton Reformatory, testified that he met Holland in January 1990 **(TR 2762-2763).** Holland became his helper and worked with him for five months **(TR 2763-2764).** Holland was very polite, anxious to learn and did any kind of job. Holland told Mr. Mahon that his name was Roberto Gomez (TR **2765).** On cross-examination, Mr. Mahon said that he was shocked when he saw that Appellant had been arrested (TR **2766).**

Gregory **Bailey, a** Washington D.C. police officer, positively identified Holland as the man he met in November 1989

(TR 2767). Officer Bailey testified that he was with his partner, Officer Soulsby, around 1:00 a.m., when they received a call to check out someone soliciting drugs (TR 2768). Holland was one of the individuals in the drug transaction (TR 2769). When they approached the address, they saw three males standing in a hallway. As they came closer, one suspect ran but they stopped Holland and checked him for weapons (TR 2770). Holland told the officers he was there visiting a friend and started walking upstairs as if to *go* to one of the apartments. As he did so, he tossed aside a bag which was later found to contain thirteen ziploc bags of crack cocaine (TR 2770). Officer Soulsby attempted to search and handcuff him. Suddenly, Holland turned around and struck Soulsby in the chest, knocking him down. A fight ensued between Holland, Officer Soulsby and Officer Bailey. As the struggle continued, Holland reached down and got Officer Bailey's service revolver (TR 2772). Officer Soulsby was able to come to Bailey's aide and they placed Holland under arrest (TR 2772). Holland said his name was Roberto Gomez and during the booking process, said to Bailey, "It took two of you MF's to lock me up -- I'll have a gun for your ass (next time)," (TR 2774, 2778). Officer Bailey saw no evidence of either drug or alcohol usage (TR 2774).

The prosecution then introduced and played to the jury the testimony of Oscar Mayers, the Assistant U.S. Attorney who attempted to prosecute Holland for this crime (TR 2778).

Dr. James Jordan was next called by the State in rebuttal. Dr. Jordan, a psychiatrist, examined Holland on March 16, 1991,

as a result of a court order issued from Judge Green (TR 2785). Prior to evaluating Holland, Dr. Jordan had available a plethora of information including police reports, *eye* witnesses' testimony, records from Washington, D.C., records from St. Elizabeth's Hospital, Dr. Strauss' report, two psychologists' reports, law enforcement records (past criminal behavior), and other information (TR **2786).** Dr. Jordan met with Holland on two separate occasions, March 16, 1991, for about an hour, and April 26, 1991, which lasted ten to fifteen minutes. Two other trips were scheduled, however, Dr. Jordan was unable for various reasons to see Holland (TR **2786-2787).** Dr. Jordan also received information such as the transcript and videotape of Holland's court appearances on July 8, 1991, a videotape and Dr. Love's report dated July **27**, 1991 **(TR 2788).** After providing **a** detailed hypothetical to Dr. Jordan (TR **2792–2795),** Dr. Jordan was able to conclude that Holland knows the difference between right and wrong; understands the complex nature of events surrounding him and is goal-oriented in his conduct (TR 2795). Because Holland had been interviewed by at least six doctors, Dr. Jordan believed that Holland was careful and guarded about his answers (TR 2802).

Dr. Elizabeth Koprowski, a clinical psychologist, also testified on rebuttal for the State. She was first appointed September 10, 1990, to determine Holland's competency and insanity at the time of the offense (TR 2810). She interviewed Holland twice in September and before taping her first interview which lasted approximately a half hour, informed Holland that nothing he said was confidential (TR 2811). She returned a week

later and conducted another forty-five minute interview that was not taped. While she was able to form an opinion as to Holland's competency to stand trial, she did not have enough information to determine his sanity (TR 2812). At that time she testified she did not believe Holland was competent. She felt he was unbalanced and could not assist counsel. Holland expressed unhappiness about the replacement of Mr. Laswell as his attorney and did not want to talk about his charges. Because Holland stated he did not know why he was there, she asked to have continuing evaluations of Holland (TR 2813). When she did the initial interviews, Dr. Koprowski did not have the information from St. Elizabeth's Hospital, however, subsequently she did receive the hospital records, police reports and the depositions of Drs. Polley and Abudabbeh. She read sworn statements of witnesses from the night of the crime and saw a copy of the videotape (although the audio was very poor), and also saw a drug arrest reports from 1989, when Holland called himself Roberto Gomez (TR 2814-2815). She interviewed Holland a third time on May 17, 1991, which lasted approximately 50 minutes. At this third interview, Holland again did not want to discuss his charges and complained about his treatment in being locked up twenty-four hours a day (TR 2816). Holland told her that he wished he were back at St. Elizabeth's Hospital with Dr. Polley (TR 2816). Dr. Koprowski concluded that based on their discussions of past and present, Holland exhibited good memory; oriented time and place; and discussed in some detail his sexual fantasies and sexual identity about using cocaine and turning

into a lesbian (TR **2816-2817).** Holland had previously told her and repeated that he felt that when he used cocaine he turned into a part woman, part man (TR 2817). Dr. Koprowski concluded that after reading all of the prior reports, this sexual fantasy was never a part of any previous reports, specifically his sexual ambivalence, therefore he was probably exaggerating (TR 2817). Although she believed he was hostile towards women, he indicated to her how he liked psychologists better than psychiatrists (TR **2818).** Dr. Koprowski, who is a psychologist, believed Holland was saying this to get into her good graces (TR 2818). Based on the foregoing, Dr. Koprowski was able to form an opinion that Holland was competent and adequately understood the proceedings. In her mind with a strong degree of psychological certainty, "I feel he did know right from wrong and he understood the consequences of his behavior at the time (of the crime)." (TR 2819).

On cross-examination, Dr. Koprowski testified that she first found Holland incompetent October 15, 1991, but had no view at that time whether he was insane (TR 2819-2822). After several more months and more information, and after attending a seminar on malingering, she decided that she needed to rethink the issue and reached the conclusion that Holland was exaggerating his problems at the time of the crime and more likely than not was malingering to some degree (TR 2836). Dr. Koprowski testified that she erred earlier, **the** error was on the side of safety and based on what she knew now with the additional data, she was comfortable in changing her evaluation (TR 2831-2832).

Nathan Jones, an ordained minister, testified that he was at his church on the 1900th block of N.W. 9th Street, in Pompano Beach, one block from **Hammondville** Road on July **29**, 1990, when he saw Holland (TR 2836). Approximately 5:10 p.m., he was preparing to go inside to conduct a service when Holland called to him and asked if he could **have** something to eat (TR 2837-2838). Holland told Mr. Jones that he was down from Cincinnati, Ohio, with a friend and that he needed something to eat (TR 2838). Holland thanked Jones for the $5.00, and left at approximately 5:30 p.m. It **was** Mr. Jones' view **that Holland** did not appear to be on **drugs** or alcohol (TR **2839**).

Dr. Abbey Strauss, a psychiatrist, was the last witness called on rebuttal by the State. [Defense counsel objected to Dr. Strauss' testimony **because** Dr. Strauss was an **employee** of the State and had secured information from Holland (TR 2852). Defense counsel argued it was an abuse of his privilege (TR 2852).]

Dr. Strauss testified that during his activities working in the jail, specifically the Prison Health Service, **on** August **3**, **1990**, he was asked by the staff to look at Holland. Staff wanted a more detailed psychiatric evaluation to decide whether Holland needed medication or whether he needed to go into general population (TR 2853). Dr. Strauss felt that it was very difficult talking with Holland, although **Holland** indicated that he knew about Thorazine. Holland **seemed** preoccupied with something would not talk and developed no rapport with Dr. Strauss (TR 2854). Dr. Strauss indicated that it was hard to get

any information from Holland (TR 2855). The first interview lasted fifteen minutes and as a result of that interview, Dr. Strauss suggested Holland be kept on the unit for another week and tested for AIDS (TR 2855). On August 10, 1990, he returned to see Holland and at that time Holland started mumbling, asking for cigarettes but made no eye to eye contact (TR 2856). Based on the information Dr. Strauss received, he determined that Holland was malingering and this was based in part on other staff member's observations of Holland. Later on, Dr. Strauss was contacted by the State Attorney's Office to review Holland's records. He was provided an enormous amount of information from St. Elizabeth's Hospital; numerous legal documents; reports from Dr. Koprowski and from Dr. Block-Garfield. Dr. Strauss again tried to interview Holland in April 1990, but Holland seemed to not want to discuss anything and mumbled something about not being treated nicely (TR **2858-2859).** Dr. Strauss was later provided information such as Dr. Love's report, a transcript of his court appearance, both of which confirmed Dr. Strauss' view that Holland was not sick but just pretending to be (TR 2860). Dr. Strauss observed that there were no consistent patterns of clinical problems, sometimes the reports were bizarre, for example Holland was reportedly walking around touching the walls or sneezing after holding his nose a long time or having cotton in his ear and, on other occasions, having sexual identification problems. Dr. Strauss observed that when Holland saw the doctors he was incoherent yet, when Holland had court appearances he was alert and made cogent legal arguments (TR 2862). The prosecution

provided a detailed hypothetical to Dr. Strauss regarding the circumstances of the instant crime (TR 2865-2869). Dr. Strauss stated that in his view Holland knows the difference between right and wrong and knows what he is doing (TR 2869).

On cross-examination, Dr. Strauss said he saw Holland three times and, routinely he would have mare than one person in attendance when he conducted his interviews (TR 2984-2986). Dr. Strauss admitted that most of the times he testified for defense lawyers. This was the first time he had testified for the State (TR 2891). Strauss indicated that his opinion had not changed since the second time he observed Holland and that he believed that the other doctors who saw him had misdiagnosed Holland's mental condition (TR 2894-2895). On redirect examination, Dr. Strauss testified he would have changed his view had he been provided information that would have supported some other diagnosis (TR 2910-2911).

The State rested following the testimony of Dr. Strauss (TR 2912).

On August 1, 1991, the jury was charged and as a result of their deliberations, returned guilty verdicts on all four counts as charged (TR 3084-3085). The trial court recessed for further proceedings for a week and a half, setting August 12, 1991, as the date for the commencement of the penalty phase. On August 8, 1991, defense counsel informed the court they were having difficulty locating witnesses from Washington, D.C., and asked to have more time to prepare for the penalty phase of the trial. They desired a two-week delay (TR 3092). On August 12, 1991, the

penalty phase commenced. Prior to any testimany, defense counsel agreed to stipulate to a prior violent felony conviction of armed robbery dated March 6, 1979 (TR 3115). The prosecution introduced a letter by Holland to Judge Ugast, dated July 23, 1991, and the Washington, D.C., hearing transcript was made a part of the record (TR 3116-3117). Holland, declared he wanted to speak to the court (TR 3118), and commenced to argue that he had been rushed to court and had never had time to be heard. He believed he was entitled to a motion for new trial because he had not received effective assistance, because Mr. Giacoma and Mr. Tindall were forced on him. He was denied a speedy trial and not permitted to call witnesses who he desired called (TR 3118). Holland wanted the judge to recuse himself because the judge had two sons who were deputies and reiterated that he wanted a new trial because he though he could represent himself better (TR 3119). Holland did not like the fact that there were women jurors who sat and observed that it was unfair to force him to sit in another room during the trial. His alternative remedy was that he would have preferred to have been shackled and gagged in the courtroom (TR 3120). He argued that he was denied his opportunity to protect himself and never intended or initiated an insanity defense (TR 3123). He found out that Mr. Tindall was a former police officer and believed that he could not adequately represent him (TR 3124-3125). He had prepared written materials for the attorneys but they refused to use them (TR 3127). Holland indicated that he wanted an opportunity to represent himself (TR 3128). Based on Holland's ore tenus request, the court denied all relief (TR 3129).

The State's only witness at the penalty phase was Dr. Elizabeth Koprowski, who stated that based on her interviews and a plethora of information she received, she was prepared to give an opinion on Holland. Holland was not under extreme disturbance at the time of the crime and, she did not believe, Holland was substantially impaired, "I think he could conform his conduct." (TR 3132-3133). On cross-examination, Dr. Koprowski admitted that she had previously testified that Holland was mentally ill (TR 3134). After reviewing some of the evidence previously presented, Dr. Koprowski said that she changed her opinion and believed that he was not under the influence of severe or extreme emotional or mental disturbance on the night of the incident (TR 3140). Holland was upset and fleeing, he did not want to be apprehended. Based on the time-frame; the fact that he ingested no more crack cocaine after the sexual assault; that at 5:00 p.m., two and a half hours prior to the murder, he was very calm and playing the piano (TR 3141), she believed that his conduct that night was reasonable (TR 3142). Her judgment was based on how Holland acted that night and eyewitness testimony (TR 3143). The State rested (TR 3143).

The jury was told that the State and defense had stipulated to Holland's previous conviction of assault with intent to commit robbery while armed March 6, 1979 (TR 3144).

The defense called Albert Holland, Sr., Holland's father, and his sister (TR 3144-3178).

SUMMARY OF ARGUMENT

Holland raises thirteen issues directly relating to the correctness of his trial. Each viewed individually or collectively fail to state a basis upon which appellate relief may be granted. In those circumstances where an error has been arguably identified, the error is harmless beyond a reasonable doubt.

Moreover, as to the death penalty issues, no claim individually would warrant reversal. The trial court detailed each aggravating circumstance applicable and discussed the lack of any statutory or non-statutory mitigating evidence in his order. As to the constitutionality of the death penalty statute, caselaw is replete that such arguments are meritless.

The death sentence is proportionate.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTIONS TO THE TESTIMONY OF DR. STRAUSS

It would appear Holland is asserting in his first issue for appellate review that the trial court should not have allowed Dr. Strauss to testify either pretrial regarding Holland's competency to stand trial, or on rebuttal to counter Holland's insanity defense at the time of the offense. (See TR 3432-3434, Notice of Insanity Defense). As to each complaint, Holland is entitled to no relief.

The record reflects that on December 3, 1990, a competency hearing was held before the Honorable Judge Futch (TR 49-288). On December 4, 1990, the trial court, after hearing a number of witnesses, including Dr. Strauss, concluded that Holland was competent to stand trial, based on the court's view that Holland was malingering (TR 290-291). During the course of said hearing, the issue arose as to whether the State was required to move forward with the burden of proving Holland competent to stand trial in that Holland had twice previously been declared not guilty by reason of insanity and hospitalized in Washington, D.C. (TR 58) (Dr. Nuha Abudabbeh's testimony, a psychologist from St. Elizabeth's Hospital in Washington, D.C.). The trial court, following discussions with regard to who had the burden, stated that because Dr. Koprowski and Dr. Block-Garfield prepared reports stating that Holland was incompetent, it was the State's burden to move forward to prove Holland competent to stand trial (TR 50-51).

At the competency hearing, the defense called out of turn Dr. Nuha Abudabbeh, who testified that she had known Holland for more than ten years as a psychologist at St. Elizabeth's Hospital in Washington, D.C. (TR **57).** Holland had been hospitalized based on a determination by the court that he was not guilty by reason of insanity on two separate occasions (TR **58).** On cross-examination by the State, Dr. Abudabbeh admitted that the not guilty by reason of insanity standard in Washington, D.C., was different than Florida's, specifically that it meant Holland was suffering from a mental illness that substantially contributed to his ability to do the right or wrong thing. Holland had last been hospitalized for robbery and an unauthorized use of a motor vehicle for which he had been found not guilty by reason of insanity (TR 62). She testified that Holland escaped from the hospital in **1986,** after he was permitted to go visit his father who was hospitalized and that she had been treating Holland for schizophrenia, chronic, undifferentiated type. The treatment consisted of psychotherapy, medication, psychotropic medication and counseling. Dr. Abudabbeh testified that she had treated Holland for approximately two months prior to his escape (TR 66).

On cross-examination, Dr. Abudabbeh further testified that since she was now more experienced with this kind of a situation, she probably would have changed her diagnosis of Holland to borderline personality disorder (TR 68). Based on the tests that were done at St. Elizabeth's Hospital, there was no organic impairment nor was Holland psychotic. He was of normal intelligence but suffered from self-esteem problems and identity

problems equating to a personality disorder **(TR** 68-69). This diagnosis was based on a battery of tests that were done just prior to Holland's escape (TR 70). Dr. Abudabbeh testified that the medication, to-wit: Thorazine BID in 75mg dosage to be taken twice a day, was not a large dosage.

The State then called Dr. **Abbey** Strauss, a psychiatrist in private practice in Boca Raton, Florida, who was involved in forensic psychiatry **(TR** 78-79). Dr. Strauss testified that in the course of his normal practice he was called upon to testify based on his determinations of a person's sanity and ability to testify **(TR** 79-81). He was usually called by the defense and this was either the first or second time he was called to testify for the State (TR 82-83). Dr. Strauss testified that prior to coming to court, he had been provided information from the State, specifically a psychological evaluation from Dr. Block-Garfield; a psychological evaluation from Dr. Koprowski; notes from Dr. Ceros-Livingston; clinical notes from the Prison Health Services; a chronological account of events; police reports; other legal papers from **Washington,** D.C.; **brief clinical summaries** from other doctors in Washington, D.C.; some letters Holland had written; an escape report; reports from St. Elizabeth's Hospital, and his notes from his visits with Holland **(TR** 93-94).

Dr. Strauss first met Holland on August 3, 1990, as a result of a request of the Prison Health Services that he provide a second diagnosis as to whether Holland needed further evaluation or could be put into the general population (TR 95). Dr. Strauss spent fifteen minutes with Holland at that first visit and

determined that he was uncertain about Holland's mental state. Holland stated that he knew about Thorazine and had taken it before **(TR** 99). Holland did not indicate he was hearing voices and indicated that he wanted cigarettes **(TR** 100). Holland was not very responsive but did indicate to Dr. Strauss that he had seen his lawyer, a day before and indicated that he could talk to his lawyer without problems **(TR** 100). Holland denied all charges and admitted that in the past he had done cocaine and abused alcohol (TR 101). Because of the information Dr. Strauss received from other sources to the effect that Holland had been institutionalized for mental health problems and had been a heavy drug user, Dr. Strauss continued Holland under close observation and requested an AIDS test be performed due to Holland's heavy drug usage **(TR** 101). One **week** later on August 10, 1990, Dr. Strauss returned and visited with Holland for about fifteen minutes **(TR** 102-105). Holland remembered Dr. Strauss but continued mumbling about how he wanted cigarettes. Dr. Strauss reviewed the staff's observations that Holland had spoken lucidly on the phone to his attorneys, had watched television and had actually watched stories of the funeral of Officer Winters (TR 103). During the **week** Holland had asked to see a priest (TR 104). During the second interview, Holland sat mute and did not talk to Dr. Strauss at all **(TR** 104). It was Dr. Strauss' conclusion based on these two interviews that Holland's behavior seemed manipulative and that others' observations showed that he had no trouble on the unit. Dr. Strauss thought that Holland was malingering and ordered him transferred to the general population (TR 104).

Dr. Strauss testified that based on other information provided to him it was his view that the diagnoses that were performed at St. Elizabeth's Hospital were incorrect because Holland's conduct was a result of drug usage, not schizophrenia **(TR** 106). All the records indicated that there was no gross psychotic behavior and therefore it was clear to Dr. Strauss that Holland was malingering **(TR** 106). Dr. Strauss reviewed Dr. Block-Garfield's and Dr. Koprowski's reports only after he conducted his August 3 and August 10 interviews (since they were not even appointed until mid-September of that same year).

During the course of the competency hearing, Dr. Strauss was **handed** a letter that was written by Mr. Holland to Judge Futch **(TR** 114). **Defense** counsel objected to the doctor reviewing the letter since it had just been handed to the doctor **(TR** 114). After taking a moment to review the letter, Dr. Strauss observed that the letter was well-organized and not delusionary **(TR** 115). He concluded that based on everything he knew he thought Holland appreciated the charges against him and understood the range of penalties that could be imposed. He further observed that he believed Holland could relate to his attorney and could assist his attorney in his own defense. Holland could challenge state witnesses and could conduct himself appropriately in court. It was his view that Holland wanted to help himself and that he could cope with the stress of pretrial incarceration (TR 116-117).

On cross-examination by the defense, Dr. Strauss testified that he was working his normal duties for Prison Health Services

when he was called upon to see Holland by Mrs. Schwarz, a nurse on the unit (TR 119-121). Apparently from the records available to Dr. Strauss, a Dr. Gould had seen Holland a month earlier and Mrs. Schwarz was looking for a second opinion as to continuing treatment (TR 120-121). Dr. Strauss testified that it was not his intent when he saw Holland in August 1990, to determine his legal sanity or competency but rather, his purpose for the examinations were to diagnose and provide proper treatment (TR 127). As a result of later contact by the State, he reviewed more information which ultimately confirmed his initial observation and diagnosis that Holland did not need ta be on the psychiatric unit but could be placed in general population (TR 150). Dr. Strauss indicated that he believed that both Dr. Block-Garfield and Dr. Koprowski were incorrect in their diagnoses that Holland was incompetent.

Dr. Block-Garfield (TR 153-196), and Dr. Elizabeth Koprowski (TR 198-223), testified as to their belief that Holland was not competent to stand trial.

The State, in addition to Dr. Strauss' testimony, called Oscar Mayers, an Assistant U.S. Attorney from Washington, D.C., who testified that he had attempted to prosecute Holland a/k/a Roberto Gomez, for two counts of assault on a police officer and distributing cocaine in March 1990 (TR 228-230, 235). Mr. Mayers recounted his observations of Holland's conduct in court and Holland's personal ability to secure a third party custodial release (TR 231-232). He testified that during the course of the court proceedings, Holland seemed to have a rational

understanding of court proceedings and knew the roles of the parties **(TR 233).** Holland knew what he had to do to get his bond modified and did it **(TR** 234). Holland was conversant with legal terms in court and, Mr. Mayers stated that he noted an his file at the time that Holland must be a jailhouse lawyer **(TR 239).** A transcript of the status hearing dated March **30,** 1990, was presented for the court's review (TR **234-235).**

Lauretta Boccio, **a** registered nurse at the Prison Health Services, testified that she first came into contact with Holland at the Pompano Psychiatric Unit (TR **240-243).** She testified that she had observed Holland as part of the course of her duties and noticed that he was not acting psychotic, but rather acted normal **(TR 245-246).** She had last seen Holland approximately two to three weeks prior to the competency hearing **(TR 246).** On **cross** she indicated that Holland's records indicated that he was not to be put in general population because he appeared to be a threat **(TR 246-247).**

Lee Smith testified that in August 1986, he met Holland a/k/a Roberto Gomez (TR **249).** He knew Holland from August 1986 through January **1988,** and during that time he thought Holland was a bright, intelligent, hard-working, enthusiastic, friend. Holland told Mr. Smith that he'was from New York and that Spanish was his native language **(TR** 251). Mr. Smith last saw Holland in January 1988, when Holland told him he had some legal problems **and** he was trying to get over them, seeking the assistance of counsel **(TR** 252). It **was** Mr. Smith's view that Holland interacted well with people **(TR 253).** Officer Robert Rios

testified that he met Holland a/k/a Antonio Rivera on July 29, 1990, on the day of the murder. Officer Rios was called to assist the Pompano Beach Police Department, acting as a translator because they believed the person in custody was Puerto Rican and only spoke Spanish. Officer Rios asked in Spanish, Holland's name, address, date of birth and weight (TR 254-255). Holland was also informed in Spanish of his rights and asked for an attorney (TR 255). Officer Rios testified that he secured, in Spanish, only booking information concerning Holland's name (which he gave as Antonio Rivera); where he was born (Holland said it was Puerto Rico-San Turce), and Holland's mother's maiden name (Saladrego). On cross-examination, Officer Rios testified that he was not often duped by an individual pretending to be a native Spanish-speaking person (TR 260).

The State also called Jerry Mahon who testified that he worked with Holland in January 1990 and that Holland seemed very competent (TR 264-265). Terminally, Kevin Butler was called to the stand and testified that as a detective with the Pompano Beach Police Department. He took part in the investigation of the shooting death of Officer Winters on July 29, 1990 (TR 267-268). Detective Butler came into contact with Holland when he was going through the booking process and became suspicious when the name Holland gave, specifically Antonio Rivera, did not check out (TR 268-269). Detective Butler subsequently spoke with Holland after Miranda warnings and videotaped his conversation with Holland concerning the facts and circumstances of the sexual battery and murder (TR 272-276). Defense counsel objected to the

testimony of Officer Butler based an the fact that Holland had previously asserted a desire for counsel (TR 270). The competency hearing ended at this point and the trial court, the next day, declared Holland competent to stand trial (TR 290-291).

Holland's suggestion that Dr. Strauss should not have been permitted to testify at the competency hearing is without merit. The fact that counsel had been appointed to assist Holland was not significant with **regard** to facts and circumstances surrounding why Dr. Strauss initially was called in by the Prison Health Services to provide medical assistance for Mr. Holland. Nothing Dr. Strauss said during the course of the Competency hearing resulted from a violation of Holland's constitutional rights. The authorities cited by Holland in his pleading, specifically Walls v. State, 580 So.2d 134 (Fla. 1991), and Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), do not provide legal succor for his claim that Dr. Strauss should not have been permitted to testify. In Walls v. State, 580 So.2d at 135, this Court, speaking through **Justice** Kogan, observed:

> We hasten to distinguish this case from other cases in which police surveillance does not involve a ruse or subterfuge. The state and its agents clearly are entitled to watch a person in custody and **make** notes of that person's voluntary or spontaneous behavior or comments. Psychiatric evaluations conducted in good faith and with proper authorization also clearly are an acceptable means for the state to employ, especially when competency ok sanity may be an issue. Nothing prohibits **the** state from good faith efforts to determine whether the defendant's allegations of incompetency or insanity is genuine or spurious.

580 So.2d at 135 (emphasis added).

In the instant case, Holland was being treated at the Pompano Psychiatric Unit following his arrest for the murder of Scott Winters. He was seen by a number of doctors, one of which was Dr. Strauss. Dr. Strauss' determination that Holland was competent to stand trial was not premised on anything that Holland told him about the crime but rather was based on his observations and the observations of others while Holland was hospitalized. Clearly, the underlying circumstances do not fall into the quagmire that existed in the Walls case where this Court found:

> By any stretch of the imagination, the subterfuge used against Walls in the instant fails to either to be fair or honest. Thus, since the subterfuge led to information later used against Walls, due process is implicated and the courts are required to conduct an intensive scrutiny of the police conduct in question.

580 So.2d at 133.

No such problem exists sub judice. Moreover, Holland's reliance on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and Michigan v. Jackson, 475 U.S. 625 (1986), is totally misplaced. Simply because counsel has been appointed to assist Holland in his defense does not mean that every observation made by a doctor can only be made in the presence of a defendant's lawyer. Ironically, Holland is not arguing sub judice that other observers who witnessed and testified as to Holland's behavior could not have testified at the competency hearing. See Gilliam v. State, 514 So.2d 1098 (Fla. 1987); Muhammed v. State, 494 So.2d 396 (Fla. 1986), and Trucie v. State, 438 So.2d 396 (Fla. 4th DCA 1983). Moreover, to the

extent Holland suggests that his rights should have been protected under the "patient/psychotherapist privilege", the State would submit that nothing that was testified to by Dr. Strauss was derived based on a "privilege". Therefore, any reliance on Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), or such a proposition is misplaced.

As a second part of Point I, Holland also argues that Dr. Strauss should not have been permitted to testify on rebuttal after Strauss brought into issue a defense of not guilty by reason of insanity. The record reflects that Dr. Strauss was only one of a number of doctors called by the State to testify to Holland's competency to stand trial and his sanity at the time of the offense. Once Holland brought his sanity into issue, the State was permitted to present evidence in rebuttal to said defense. In fact, the record reveals, as reflected by the State's extensive Statement of the Case and Facts, that on rebuttal Dr. James Jordan, a psychiatrist, based on a plethora of information including Dr. Strauss' report and that of other doctors, concluded that Holland knew the difference between right and wrong and could understand the complex nature of events surrounding him and was goal-oriented in his conduct (TR 2795). Dr. Elizabeth Koprowski, one of the attending psychologist's who initially found Holland incompetent to stand trial, testified on rebuttal that she was incorrect in her initial conclusion and that it was her belief that Holland was competent and adequately understood the proceedings against him. "I feel he did know right from wrong and he understood the consequences of his

behavior at the time (of the crime)." (TR 2819). On rebuttal, Dr. Strauss again repeated his competency hearing testimony (TR 2852-2911).

The State would submit that no error resulted from the testimony of Dr. Strauss. The authorities cited by Holland are neither controlling nor persuasive with regard to relief. Even assuming for the moment this Court determines that some error may have resulted in the trial court overruling defense counsel's objections to Dr. Strauss' testimony, said error is harmless error beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986); Clause11 v. State, 548 So.2d 889, 890-891 (Fla. 3rd DCA 1989); Burr v. State, 550 So.2d 444, 446 (Fla. 1989), and Erickson v. State, 565 So.2d 334-335, wherein the court observed that the improper admission of expert psychiatric evidence was harmless error where, upon review of the record, it can be concluded beyond a reasonable doubt that there is no reasonable possibility that the erroneous admission of evidence affected the verdict. In the instant case, based on the fact scenario heretofore presented, there can be absolutely no doubt that the error was harmless beyond a reasonable doubt. See Satterwhite v. Texas, 486 U.S. 249 (1988). No relief should be forthcoming as to this claim.

POINT II

WHETHER THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT COLLATERAL CRIME TESTIMONY INTO EVIDENCE

Holland argues he was denied a fair trial because the trial court allowed, over objection, admission of collateral crime

evidence. The collateral crime evidence to which Holland refers initially arose during cross-examination of two of Holland's doctors who had reviewed Holland's files, including prior police reports and criminal history, reached a conclusion that Holland did not appreciate the criminality of his acts at the time he committed the crimes. Specifically, Holland points to the fact that the prosecutor cross-examined Dr. Love and Dr. Patterson regarding Holland's arrest for possession of cocaine with intent to sell and battery on a law enforcement officer in Washington, D.C., in November 1989, He further complains that the evidence of similar fact evidence was reinforced through the cross-examination of Dr. Polley and during the prosecution's rebuttal witnesses, specifically, Oscar Mayers, the prosecutor in the District of Columbia; Officer Gregory Bailey from the District of Columbia and the testimony of Jerry Mahon.

In would seem axiomatic that once a defendant brings into issue his sanity and his competency at the time he committed the crime, and in an effort to prove same, he provides his medical experts with his life history, including his prior adjudications and prior conduct, those experts may be fully quizzed on cross-examination with regard to the information utilized in formulating their opinion. Jones v. State, 612 So.2d 1370 (Fla. 1993); Walton v. State, 547 So.2d 622, 625 (Fla. 1989); Slawson v. State, So.2d (Fla. 1993), 18 Fla.L.Weekly S211. Moreover, the State has an equal right to demonstrate that the basis upon which these experts premised their opinions was either faulty or misperceived, by the State's introduction of witnesses

who could testify to the facts and circumstances surrounding those events. Holland argues that the circumstances concerning the 1989 Washington, D.C., charges were introduced improperly for two reasons. First, the mandatory written notice was not filed pursuant to §90.404(b)(1), Fla.Stat. (1989); and second, regarding the collateral offenses where Holland was found not guilty by reason of insanity, the State may not use collateral offenses where the defendant has been acquitted pursuant to Burr v. State, 576 So.2d 278 (Fla. 1991), and State v. Perkins, 349 So.2d 161 (Fla. 1977). Both arguments fail.

First of all, the State did not rely on similar fact evidence to support the conviction for which Holland was charged. Rather, evidence of Holland's prior activities came about only after Holland's sanity was alleged as an affirmative defense and, Dr. Love made references to Holland's prior convictions but concluded such conduct was based on drug usage and brain damage, Dr. Patterson similarly related how Holland was the product of his drug usage **and** his mental illness and thus not competent at the time he committed the crime. Mr. Oscar Mayers' and Officer Bailey's testimony on rebuttal went to identity as well as to the issue of Holland's sanity because the crimes in Washington, D.C., were much more contemporaneous to the July 29, 1990, murder of Officer Winters. Second, Holland has provided no caselaw which provides that, in cross-examination or impeachment of a witness, a party may not make reference to evidence concerning prior criminal conduct by a defendant. While the only barrier to the admission of bad acts is that such evidence cannot be admitted

for the sole purpose of proving "bad character or propensity", see §90.404(2)(a), Fla.Stat. (1991), no evidence of this type was admitted sub judice. Certainly, so-called "similar fact evidence" could properly be admitted to refute any claim of insanity or affirmative defense, For example, in Rossi v. State, 416 So.2d 1166 (Fla. 4th DCA 1982), the court found, in a sexual battery prosecution, that it was proper for the State to introduce evidence of the defendant's sexual assault upon another victim in order to rebut the defendant's claim of insanity or that the sexual battery at issue had been the result of an isolated breakdown. The court held:

> In essence, Appellant's defense in this case was that his actions against the victim resulted from an isolated and temporary mental breakdown. In considering the validity of such assertion, we believe the jury was entitled to know that the Appellant had engaged in virtually the identical conduct on a prior occasion. This evidence, of course, may give rise to differing inferences. One inference may be that the Appellant's conduct, as opposed to being an isolated incident, was merely one episode in a serious of willful actions. Another inference may be that the alleged mental instability of the Appellant is one of long-standing and the occurrence of prior episodes simply adds credence to its existence. Regardless of these possibly conflicting inferences, however, we cannot accept the Appellant's contention that a prior act was not relevant to a determination of his mental state at the time of the subsequent act.

416 So.2d at 1168.

See Parkin v. State, 238 So.2d 817 (Fla. 1976) (court noted that a defendant pleading insanity may end proving himself guilty while trying to establish his insanity); Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982), cert. denied, 430 So.2d 452 (Fla.

1983) (State could cross-examine defense expert as to admission that defendant had made two collateral crimes, in order to rebut insanity defense); Gould v. State, 558 So.2d 418 (Fla. 2nd DCA 1990), reversed on other grounds, 577 So.2d 1302 (Fla. 1991) (fact that defendant had committed prior assault against victim properly admitted in sexual battery prosecution to rebut insanity defense).

Holland's secondarily argues that it was error to admit collateral crimes where an acquittal or not guilty by reason of insanity resulted in violation of Burr v. State, supra. The State, in the instant case, did not emphasize those crimes, in fact, if anything, the defense overemphasized those events not for the nature of the crimes but rather to give credibility to the insanity defense. It is amazing that Holland now attempts to argue that somehow the State improperly questioned the circumstances surrounding the not guilty by reason of insanity events. No violation of Burr v. State, supra, resulted here.

To the extent Holland argues that the "collateral offenses in question occurring eight or nine years ago bear no similarity to the current offense", first, the passage of time in and of itself does not make the offenses unimportant, see Rossi v. State, 416 So.2d at 1168. Second, the very offenses that occurred eight or nine years ago are the events which triggered Holland's hospitalization as a result of a not guilty by reason of insanity finding. Presumably, if it was too old for one purpose it was certainly too old for the purpose for which it was used by Holland.

Terminally, the State would submit should this Court find error occurred with the admission of "any" of the so-called "similar fact evidence!!, any error is harmless beyond a reasonable doubt. See Rossi v. State, supra. To the extent Holland argues in this point that the admission of collateral crime evidence at the trial portion of his case may have impacted the mitigation that was presented at the penalty phase, the State would submit that defense counsel stipulated to the fact that Holland had a prior violent felony March 6, 1979 (TR 3115, 344) (specifically, an assault with intent to commit robbery while armed), and no instruction was given the jury with regard to the statutory mitigating factor that Holland had no significant prior criminal history. There is no way the "mitigation" could have been "negated" by the admissions of Holland's prior criminal activity when, those events were at times the focus of the defense's defense. The instant case is totally distinguishable from Castro v. State, 547 So.2d 111 (Fla. 1989).

POINT III

WHETHER THE TRIAL COURT ERRED IN REMOVING MR. HOLLAND'S ORIGINAL COUNSEL WITHOUT NOTICE AND A HEARING AND OVER MR. HOLLAND'S SUBSEQUENT OBJECTION

Holland argues the trial court, without reason or explanation, removed Mr. William Laswell, an Assistant Public Defender, from defending Holland and sua sponte appointed private counsel as a Special Assistant Public Defender on September 10, 1990. Holland suggests that he repeatedly asked the court for a reason for the removal but that he received no response and that the record is void of any reason why such a result occurred.

The record indeed is not void of reason as to why Mr. Laswell was removed as Holland's Assistant Public Defender, in fact, the reason came to light on March 15, 1991, when Judge Green agreed to reconsider his assignment of the Public Defender's Office as co-counsel to assist Mr. Giacoma in the representation of Holland (TR 347). On March 8, 1991, Judge Green, following oral argument, assigned as second counsel or co-counsel to assist Mr. Giacoma, the Public Defender's Office. Upon reconsideration, it was brought to the attention of Judge Green that the Public Defender's Office could not serve even as co-counsel because a conflict of interest continued to exist in representing Mr. Holland. Judge Green was told that Bill Laswell, an Assistant Public Defender, had originally been assigned the case but that Judge Futch had sua sponte vacated that appointment and appointed Mr. Giacoma as a Special Assistant Public Defender when it became apparent that a conflict existed as a result of the initial discovery exchange (TR 347-377).

Clearly, the authorities cited by Holland, in particular Finkelstein v. State, 574 So.2d 1164 (Fla. 4th DCA 1991), and Ull v. State, 613 So.2d 923 (Fla. 3rd DCA 1993), are distinguishable sub judice in that there was no nefarious basis upon which Mr. Laswell was replaced by Mr. Giacoma, merely a conflict of interest with the Public Defender's Office that continued to exist pretrial. Presumably, a conflict of interest would constitute sufficient good cause to allow for the replacement of Mr. Laswell with Mr. Giacoma.

POINT IV

WHETHER THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. HOLLAND'S COMPLAINTS CONCERNING COUNSEL

Due to Holland's dissatisfaction with the fact Bill Laswell was replaced by Peter Giacoma and Young Tindall pretrial, Holland, throughout the course of the trial, periodically reminded the court of same. At various intervals Holland, either through outbursts or lengthy oration, observed that he wanted Bill Laswell and did not want Peter Giacoma or Young Tindall on his case. For example, on July 8, 1991, Holland addressed the court and indicated that he was scared and nervous and had frequently asked his attorneys for the depositions that had been taken. His reasons for wanting to read the depositions was so that he could recall what had happened. Moreover, he complained his lawyers were ignoring him (TR 882-883). Holland complained he was being denied a speedy trial by an impartial jury; that he believed his privacy rights were being violated because he did not want an insanity defense; he was being denied effective assistance of counsel and he wanted Judge Futch recused because Judge Futch had agreed to come out of retirement to try Holland's case (TR 883-885). Holland was unhappy that Judge Futch ruled unfavorably regarding his mental health motions and was concerned that the court was always worried about the cost of the trial (TR 885). Holland believed Mr. Giacoma and Mr. Tindall were working with the prosecution and stated that he wanted to go to the law library in order to help in his defense but defense counsel told him that it would look good for him to be reading in a library

and asserting an insanity defense (TR 888). Holland specifically stated he was nat waiving his right to counsel but if he had to he would (TR 889-890). Holland continued his oration indicating that he was not happy with his lawyers and they were trying to railroad him into the chair (TR 893). Holland stated that he had confidence in Bill Laswell and he wanted Bill Laswell a5 his attorney (TR 894). (Apparently at this point, Holland had been told that Mr. Laswell was off his case) (TR 894). Holland asked for a list of information from the prosecutor and wanted a copy of his signed confession and wanted to go to the law library (TR 897-898). The trial court, after listening to Holland's complaints, determined that Holland was not competent to represent himself, denied his motion to dismiss his attorneys and denied the ~~ore~~ ~~tenus~~ motion to recuse the trial judge (TR 904).

Holland's next memorable outburst came during the jury selection process when Holland started talking about how he wanted these lawyers off his case because they lied and deceived him (TR 919-920). After further discussions with regard to the impact of Holland's outburst on the panel, the trial court dismissed the jury panel (TR 931), and informed Mr. Holland that such outbursts would not be tolerated (TR 930-931). A second incident during jury selection occurred when again Holland "lost it" (TR 1180). On July 10, 1991, Holland was returned to the courtroom and allowed to remain. Prior to the proceedings commencing, however, Holland again informed the court that he did not want his lawyers and he wanted to defend himself (TR 1227-1229). As a direct result of this request, the trial court made

a Faretta inquiry (TR 1229-1237), at which point the court declared that Holland was not competent to represent himself and that there was no basis to remove either Mr. Tindall or Mr. Giacoma from the case (TR **1239-1240**).

On July **24, 1991**, Holland was again welcomed back into the courtroom at which point Holland expressed a complaint about defense counsels' talking to the press because he had not authorized said discussion (TR 2169-2170). Holland told the trial judge that his lawyers were doing him in and that he was being denied a fair trial. After making his statement, Holland informed the court that he "wanted to go back to the other room" but just wanted to tell the jury if he could speak to them that he would prove his innocence (TR 2171). On August **12, 1991**, prior to the commencement of taking testimony for the penalty phase, Holland again informed the court that he was unhappy with his lawyers because he felt they were rendering ineffective assistance of counsel. He complained that he was denied a speedy trial and was not permitted to call witnesses (TR **3118**). He again sought to recuse the trial judge (TR 3119), did not like the fact there were women on the jury, and thought it was unfair that he had to sit in another room during the course of the trial. He stated that an alternative remedy would have been to have shackled and gagged him in the courtroom (TR **3120**). Holland stated he did not want an insanity defense and was concerned that Mr. Tindall had been a former police officer and could not adequately represent him (TR **3124-3125**). Holland said he prepared written materials for his attorneys but they refused to

use them (TR 3127). Based on Holland's ore tenus requests, the court denied all relief (TR 3129). On August 19, 1991, prior to sentencing, Holland reargued all of his complaints previously cited (TR 3221-3232).

Beyond peradventure, Holland was a difficult defendant. The trial court provided him a number of opportunities to air his complaints and listened with patience to same of Holland's more exotic complaints. Presumably, all his concerns would have dissipated if he had only had Mr. Laswell to represent him. While not unmindful that a defendant's right to discharge appointed counsel could be subject to inquiry with regard to the nature of the complaints, Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla. 1988), this Court has, in Hunt v. State, 613 So.2d 893, 899 (Fla. 1992), recognized that a review of the record in total could satisfy Hardwick, supra. The Court observed:

> Our review of the record reveals that the trial court made adequate inquiry into each of Hunt's repeated claims of ineffective assistance of counsel. Moreover, Hunt was not entitled to an inquiry on self-representation under Faretta [v. California, 422 U.S. 806 (1975)] because she made no unequivocal request for self-representation. Watts, 593 So.2d at 203; Hardwick, 521 So.2d at 1074. Numerous times during the hearings on her motions, Hunt stated that she did not want to represent herself and agreed to continue representation by court-appointed counsel. At one point Hunt expressly agreed to continue representation even after the trial judge informed her that he would probably appoint new counsel if that was her desire.

613 So.2d at 899.

Similarly, in Jones v. State, 612 So.2d 1370 (Fla. 1992), Jones argued trial counsel failed to make a sufficient inquiry into his desires to dismiss counsel. Although Jones did not want to represent himself, he did say that he wanted the court to appoint someone else to represent him. The court held:

> Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel. Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 955, 117 L.Ed.2d 122 (1992). We agree with the trial court that Jones did not establish adequate grounds. The complaint about Pearl's being an honorary deputy had been resolved because Pearl had resigned that position. Jones' complaints about Pearl's handling of prior sentencing proceedings do not provide a legal basis for challenging his prospective performance in the resentencing.
>
> We hold that the court conducted a sufficient inquiry into Jones' complaints and Pearl's concerns. The State argued that Pearl was a good attorney, and the trial judge pointed out Pearl's extensive trial experience and stated that he had never known Pearl to compromise his advocacy over a period of thirty years. We find that the refusal to dismiss Pearl was within the court's discretion and that no error occurred.

612 So.2d at 1372-1373). See also Wilder v. State, 587 So.2d 543, 545 (Fla. 1st DCA 1991), wherein the district court found that Wilder's complaint about a substitution of counsel was bottomed on a general allegation of ineffectiveness of his court-appointed attorney:

> At the hearing, the trial court observed that counsel had been effectively assisting appellant thus far, so far as the court was concerned. Appellant's only response was that he 'has failed to do anything.' The court then stated: 'General allegations like that do not hold water with me. I won't some

> specific allegations. In your motion you have failed to set forth specific allegations warranting any change of counsel.' The court then advised that the motion was being denied.

587 So.2d at **544-545.**

The court further observed:

> As stated in Kott v. State, 518 So.2d 957, 958 (Fla. 1st **DCA** 1988), 'where a defendant voices a seemingly substantial complaint about counsel, the court should make a thorough inquiry concerning the reasons for a defendant's dissatisfaction . . .", (citations omitted); (emphasis added). It **appears** clear to use from the foregoing that the trial court found no reasonable basis for Appellant's charge of ineffective assistance of counsel, and therefore, the court properly denied the motion. See Hardwick v. State (cite omitted). We note further that the trial court properly inquired **as** to Appellant's ability to hire his own attorney, and advised Appellant concerning his right to represent himself. Appellant was unable to employ his own attorney, and made no request for self-representation. We find no error at this point.

587 So.2d at **545.** **See** also **Kenney** v. State, ___ So.2d ___ (Fla. 1st DCA 1992), **18** Fla.L.Weekly D247 (limited inquiry sufficient to comply with Hardwick -- no error shown). **See** also Peede v. State, **474 So.2d 808,** 815-816 **(Fla.** 1985); Bowden v. State, 588 So.2d 225, 229-311 (Fla. 1991), and Sweet v. State, So.2d ___ **(Fla. August 5, 1993), 18 Fla.L.Weekly S447.**

The instant issue naturally leads into the next point on appeal, that being, whether sufficient inquiry occurred **as** to whether Holland desired to represent himself. As to the instant claim, however, Holland's complaints were merely general allegations of ineffectiveness without specific reference to his concerns. He complained about the fact that he was not given

depositions so that he could refresh hi3 memory about the crime, yet, he acknowledged trial counsel told him that was not a good idea because it tended to negate his insanity defense. For the most part, Holland was complaining about well-reasoned strategies utilized by Giacoma and Tindall in their defense of Holland. The trial court did not err or abuse its discretion in denying Holland's repeated outbursts to fire his lawyers. See Sweet v. State, supra.

POINT V

WHETHER THE TRIAL COURT ERRED IN HOLDING AN INADEQUATE INQUIRY INTO HOLLAND'S DESIRE FOR SELF-REPRESENTATION AND IN REFUSING TO ALLOW HOLLAND TO REPRESENT HIMSELF

The record shows Holland made a number of requests to have counsel removed. The record also reflects that on a couple of those occasions Holland suggested that he would represent himself (TR 1227). As a result of Holland's request, on July 10, 1991, the trial court conducted a Faretta inquiry asking Holland a number of questions (TR 1229-1237), and concluded that it was the court's view that Holland was not qualified to represent himself (TR 1237). The court found that the reason Holland was not qualified was based on his prior commitments for mental health problems; his conduct in court; the fact that Holland knows the difference between right and wrong, and that just because Holland can express his views eloquently that in and of itself did not convince the trial court to allow him to represent himself (TR 1237, 1239-1240).

It is truly unclear whether Holland ever seriously intended to represent himself. The record is replete with Holland's

accusations about the ineffectiveness of his counsel yet his assertions to represent himself always occur at a point when the trial court had not favorably looked upon actions by defense counsel. In fact, following sentencing, Holland unquestionably apprised the trial court that he did not intend to waive counsel but did not "again" want someone like Peter Giacoma or Young Tindall **(TR 3256).**

In Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla. 1988), this Court, citing to Jones v. State, **449** So.2d 253 (Fla. 1984), stated that when a defendant attempts to dismiss his court-appointed counsel, "it is presumed that he is exercising his right to self-representation." 521 So.2d at 1074. The court went on to say:

> . . . However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so. (cites omitted). This particularly is true where, **as** here, the accused indicates **that** his actual desire is to obtain ***different*** court-appointed counsel, which is not his constitutional right. Donald v. State, 166 So.2d 453 (Fla. 2nd **DCA** 1964).
>
> The record before us reflects that the trial court construed Hardwick's comments as effectively requesting self-representation, albeit equivocally, and made the appropriate inquiry. The court examined the defendant's ability to make a knowing and intelligent waiver, his age and mental status, and his **lack** of knowledge or experience in criminal proceedings. Johnston v. State, 497 So.2d **863, 868 (Fla. 1986). We** find no error in the trial court's procedure or its findings.
>
> We note that courts have long required that a request for self-representation be stated unequivocally. (cite omitted). The record

> here reflects that Hardwick repeatedly asked for new counsel, admitted his incompetence to conduct the trial, and stated that 'I'm not choosing to represent myself.' Although vacillation on the question of self-representation has been held a sufficient grounds for denying the request, (cite omitted) the trial court gave the defendant every benefit of the doubt and made the proper inquiry. We conclude that the court below did not err in refusing to dismiss court-appointed counsel, appoint Hardwick as co-counsel or permit Hardwick to represent himself.

521 So.2d at 1074.

Hardwick is certainly controlling sub judice. The trial court listened with patience to Holland's ramblings about all the things he did not like. The allegations with regard to Mr. Giacoma and Mr. Tindall were generic in nature and in a number of instances where Holland complained that he was not given access to materials or to go to the law library, it was clear that defense counsel was attempting to protect the "insanity" defense by discouraging Holland from making a record the State could use against him. Clearly under this Court's most recent decision in *Amos* v. State, 618 So.2d 157 (Fla. 1993), the trial court conducted an adequate inquiry into Holland's ability to represent himself. Moreover, pursuant to Bowden v. State, 588 So.2d 225 (Fla. **1991**); Johnson v. State, **497** So.2d **863** (Fla. **1986**); Waterhouse **v.** State, **596** So.2d **1008** (Fla. 1992), **and** Naret **v.** State, 605 So.2d 949 (Fla. 3rd **DCA** 1992), and Ventura v. State, 560 So.2d **217, 218** (Fla. 1990), the trial **court**, after making full inquiry of Holland, did not err in denying dismissal of either Peter Giacoma or Young Tindall; denying Holland's charges that they were rendering ineffective assistance of counsel or

denying Holland's "equivocal" request for self-representation. Note: Sweet v. State, supra (while court's inquiry fell short of Faretta, court "could not have reasonably permitted Sweet to represent himself. . . .").

POINT VI

WHETHER THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S SPECIAL JURY INSTRUCTION ON FELONY MURDER

Holland argues the trial court erred in granting the prosecution's "special jury instruction" concerning felony murder. His argument is premised on the fact that said instruction eliminated or relieved the prosecution of its burden on a critical element of felony murder. The record reflects that during the charge conference, defense counsel objected to the State's "special jury instruction'' to be added to the felony murder instruction based, not on misstatement of the law or relieving the prosecution of its burden, but rather the defense objected to "anything other than what the standards were, Judge, anything they elaborate on." (TR 2946). Defense counsel, right after that, states: "But you're giving it to them twice." (TR 2946). Ultimately defense counsel argued: "But you can tell the jury that sexual battery is the -- I don't want the underlying felonies that you're arguing in felony murder and sexual battery is not a specific intent crime and the Judge will tell you that under the voluntary intoxication part instruction." (TR 2948).

At this point the State suggested to the court that the instruction should be as clear as possible and the trial court agreed (TR 2949).

The instruction that was given (TR 3048-3049), was an accurate reflection of the law. Moreover, defense caunsel failed to object to the trial court that the "instruction relieved the prosecution of its burden on a critical element of felony murder." As such the issue is not properly preserved for appellate review. Even assuming for the moment the aforenoted recital of defense counsel's objections can somehow be construed as a timely objection on point, Buford v. State, **492** So.2d **355, 359** (Fla. **1986),** dispels any merit to Holland's argument that that portion concerning sexual battery was a misstatement of the law. Moreover, with regard to the robbery portion of the special instruction, review of the language utilized reflects that there is no misstatement of the law pertaining to robbery as an underlying offense to the felony murder instruction. Indeed, the jury was informed that robbery is a specific intent crime, see Daniels v. State, 587 So.2d 460 (Fla. **1991),** and the jury instruction did not relieve the prosecution of its burden of proving that element.

Terminally, the State would suggest that any misstatement that might have resulted from the instruction given is harmless error beyond a reasonable doubt. When viewed in its totality, the instructions given were appropriate, informative, and accurately reflected the state of the law. Holland has presented neither case authority nor legal argument that would support relief being granted as to this point.

POINT VII

WHETHER THE TRIAL COURT ERRED IN FORCING DEFENSE COUNSEL TO PROCEED WITHOUT ANY MEANS OF COMMUNICATION WITH MR. HOLLAND

During jury selection, Holland was removed from the proceedings because of his continuing disruptive behavior (TR 919-920; 930-931; 1180-1183; 1249-1250). The trial court, following the defendant's outbursts at (TR 1249), had Holland escorted out of the courtroom and then took a recess (TR 1251). The court reconvened and at that time defense counsel stated:

> We just want to put an objection an the record to go forward without any verbal communication.
>
> THE COURT: Well, I expect we will have it within an hour. We are going to go in the process of talking to this jury. We won't swear them, but we will *go* into the process of talking to them. I'm not going to allow the people to dictate how this Court is operated. We are going to proceed.
>
> MR. SATZ: Your Honor, is the Court going to let them confer with their client before they **excuse** anybody for challenges?
>
> THE COURT: They can do anything that they want. One of them can be with him on the phone if they want. I don't care how they work it.
>
> MR. SATZ: You ought to meet together.

(TR 1251-1252).

Communications were ultimately put into place at (TR 1414).

While there is no question that a defendant is entitled to be present during every critical stage of his trial, it is also quite true that when a defendant becomes *so* disruptive that he stops progress of a trial, the trial court has the wherewithal and ability to take those measures necessary to insure that the

defendant receives a fair trial but that the trial occurs. In the instant case, Holland now asserts that, "There was easy capability establishing telephonic communication between Mr. Holland and his counsel. Indeed, it was done later in the jury selection process. The trial court had a duty to briefly recess until this was set up." (Appellant's Brief, pg. 52). Holland has cited neither authority nor presented argument that would support a conclusion that he was denied his constitutional right by being removed from the courtroom. He had been previously warned about his outbursts and in fact apologized to the trial court and stated that he understood that he had to behave (TR 930-931). Shackling or gagging the defendant in the courtroom certainly would not have been the "least restrictive means available to the trial court" in the instant case. Most importantly, Holland has pointed to no juror that was excused for cause during the period of time Holland was "out of communication" with his lawyer, that should have sat on his case. Absent any evidence of prejudice with regard to the trial court's conduct, Holland should not be given the benefit on appeal of his continual misconduct during the course of the trial. Any error was harmless. DiGuilio, supra.

POINT VIII

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS HOLLAND'S STATEMENTS

A hearing was held on Holland's pretrial motion to suppress (TR 447-524, 4531-4532), and as a result of said hearing, the trial court found Holland's statements to police to be valuntary

and not in contravention of Holland's invocation of his right to counsel.

The recital of the facts set forth in Holland's brief, pages 53-55, are relatively accurate as far as they go. Officer Butler testified that at about 2:30 a.m., he was called back to the jail to pick up photographs of Holland and Holland's fingerprints (TR **474-475**). While waiting to do so, he saw Holland return to the booking room but said nothing to him (TR 475). Holland looked at him and said, "Can I talk to you." (TR **476**). Officer Butler tald him to come with him and took him to the detective bureau interviewing room (TR **476**). At that point Holland had no restraints and was given something to drink and some cigarettes (TR **476-477**). Officer Butler specifically told Holland that he had already asked for an attorney and they could not talk to him (TR **477**). Butler then read Holland his Miranda rights again and went through each right carefully (TR 478-479). Holland was asked to read each right and made an affirmative answer when asked if he understood that he could speak to an attorney (TR **480**). When asked did he understand and still wanted to speak to Officer Butler, Holland answered, "I'll talk to you" (TR 480-481). Holland was then physically handed the waiver affidavit (TR 481), and placed his initials as to every question and answer and signed the form, Albert Holland, Jr. (TR 481-482). Holland was told that all the rooms were monitored (TR 483), and that the session was being videotaped from the other room (TR **484**). Holland then proceeded to discuss with Officer Butler the fight with T J (TR 485), and then discussed Holland's

encounter with Officer Winters (TR 486-487). Following the taped interview, Holland accompanied Officer Butler to the 2700 block of Hammondville Road to help police in locating the gun (TR 488).

On cross-examination, Officer Butler testified that after he found out Holland's real name and that Holland understood English (TR 505), he told Holland not to talk anymore (TR 507), but gave him his card and told Holland to call if he wanted to talk (TR 507). Officer Butler stated on cross-examination that he made it clear to Holland about having a choice and that he did not have to talk to him (TR 514). Although Officer Butler testified that Holland seemed very tired when he talked with him, he did not appear to be on drugs or drunk (TR 515).

No other witnesses were called to testify at the suppression hearing.

The record is clear that when Holland initially requested to speak with an attorney, his interview with Detective Wesolowski and Sgt. Gooding ceased, as required under law. Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Minnick v. Mississippi, U.S. ___, 111 S.Ct. 486 (1990). When Lt. Rios and Officer Perez spoke to Holland it was for the purposes of booking him. They asked Holland his name, address and place of birth and did not ask him any questions about the offense. Routine booking questions are not prohibited by Miranda. In Pennsylvania v. Muniz, ___ U.S. ___, 110 S.Ct. 2638 (1990), the court held that questions regarding a suspect's name, address, height, weight, eye color, date of birth and current age, fall within the

"routine booking questions" exception to Miranda and thus may be secured for the biagraphical data necessary to complete booking or pretrial services.

Once it was determined that Holland had not given his true name to police, Officer Butler approached Holland and lawfully and properly attempted to ascertain his true identity. Pennsylvania v. Muniz, supra. As noted in Avila v. State, 545 So.2d 450 (Fla. 3rd DCA 1989), asking a defendant his real name is not an interrogation within the scope of Miranda. Likewise, Holland's truthful answer to this question, asked only for the purposes of booking, was not subject to suppression nor did it violate Holland's Miranda rights. State v. Foster, 562 So.2d 808 (Fla. 5th DCA 1990); State v. McAdams, 559 So.2d 601 (Fla. 5th DCA 1990).

The videotaped discussion by Officer Butler of Holland was a direct and unexpected result of Holland's instigation and initiation. Keen v. State, 504 So.2d 396 (Fla. 1987); Cannady v. State, 427 So.2d 723 (Fla. 1983); Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Waterhouse v. State, 429 So.2d 301, 305 (Fla. 1983); Long v. State, 517 So.2d 664, 666 (Fla. 1987), and Slawson v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S209. Holland's voluntary and knowing waiver of his previously invoked right to have counsel was demonstrated by the fact that he voluntarily signed a written waiver. A voluntarily executed written waiver of a previous request for counsel is conclusive proof of a knowing and voluntary waiver of the right to counsel. Cannady, supra; Keen, supra, and Witt v. State, 342 So.2d 497

(Fla. 1977). Holland's statements were neither coerced nor the product of the police "wearing him down" as Holland is intimating. While "coercion" that vitiates a confession can be either mental or physical, the facts are clear that Holland was not mentally or physically coerced into a confession because of the atmosphere. Holland was interviewed in a **detox** room; and was neither handcuffed nor shackled. He was offered cigarettes and beverages throughout the night and at all times was treated with consideration. Wasko v. State, 505 So.2d 1314 (Fla. 1987); State v. Chavis, 546 So.2d 1094 (Fla. 5th DCA 1989) (where defendant was offered food, drink and cigarettes, was not questioned at length and was not threatened or given false promises and treated with consideration, said confessions were voluntary and admissible). Moreover, there was no evidence that Holland's statements were a product of direct or implied promises of benefit. Hudson v. State, 538 So.2d 829 (Fla. 1989); Bruno v. State, 574 So.2d 76 (Fla. 1991). Moreover, any emotional condition that Holland found himself in was not the product of police conduct, but rather the result of apprehension due to the situation in which he found himself. Patterson v. State, 513 So.2d 1257 (Fla. 1987). Terminally, Holland's statements were not the product of prolonged detention. Holland made his statements approximately seven hours after he was apprehended. Prior to his statements he was permitted to rest and sleep and was alert at 2:30 a.m., when he initiated contact with Officer Butler. The interviewing session itself was not lengthy nor prolonged. See Owens v. State, 560 So.2d 207 (Fla. 1990).

As a result of the foregoing, it is clear the trial court correctly concluded pretrial that Holland's statements were voluntary and not the result of a violation of his Miranda rights. *See* Slawson v. State, supra; Cannady v. Duqqer, 931 F.2d 752 (11th Cir. 1991), and Zeigler v. State, **471** So.2d 172 (Fla. 1st DCA 1985).

POINT IX

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTIONS TO THE ADMISSIBILITY OF THE INAUDIBLE VIDEOTAPE

The audio portion of Holland's videotaped statements to Officer Butler was very poor. In fact, during the motion to suppress hearing Officer Butler testified that efforts were made to enhance the sound quality of the tape but it was to no avail (TR **491-492** At trial, defense counsel objected to the admission of the videotape based on the inaudibility of portions of the tape (TR 2382), however the trial court overruled said objection at which point both sides stipulated that the recording of the tape not be transcribed (TR 2383). The State argued that the publication of the tape to the jury was important because it demonstrated Holland's demeanor and the voluntariness of the statements based on the surraundings and the events occurring that evening (TR 2383).

Holland's sole reliance on Carter v. State, 254 So.2d 230 **(Fla. 1st DCA 1971),** is misplaced in that Carter does not even deal with videotapes but rather an inaudible audio tape. More importantly, however, the general rule regarding the admissibility of partially inaudible tape recordings is that such

recordings are admissible unless the inaudibility and unintelligibility portion are so substantial as to deprive the remainder of relevance. See Odom v. State, 403 So.2d 936 (Fla. 1981); Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983), wherein the court analyzed whether a trial court had properly allowed the State to visually display an incriminating portion of a written transcript of a tape recording that was admitted into evidence. The court held that the allowance of such display was not reversible error because, under the particular facts of that case, such display did not improperly displace the recording on which the display was based. In Uliano v. State, 536 So.2d 393 (Fla. 4th DCA 1989), the court therein found a trial court's authorization in permitting an officer to testify as to the inaudible portions of a tape error because the jury was in as good a position as the officer to determine what could be heard on the tape. While the court determined the error in that case was harmless, it did so because the officer participated in the taped conversation and testified as to what took place during the inaudible portions of the tape based upon his personal knowledge.

Beyond a shadow of a doubt, Officer Butler could have always testified as to the conversation that took place July 30, 1990, between he and Holland. Because, a video camera was running and recorded the statements does not change that fact. While it would have been preferred that the videotape sound was better, there is no question but that the trial court did not err in ruling that the videotape could be published to the jury. No relief should be forthcoming as to this claim. See Harris v.

State, ___ So.2d (Fla. 1993), 18 Fla.L.Weekly S1284, and Duggam v. state, 189 So.2d 890 (Fla. 1st DCA 1966)

POINT X

WHETHER THE EVIDENCE OF PREMEDITATION IS LEGALLY SUFFICIENT

Holland next argues that his judgment of acquittal should have been granted at the close of the State's case because the evidence was legally insufficient to prove premeditation for the death of Officer Winters.

The evidence reflects that after Mr. Randolph Canion interrupted Holland's sexual assault of T J , Holland ran away. Mrs. Canion had called the police and within seconds of the assault ceasing, the police arrived and were in the area running up and down the street looking for Holland (TR 1813-1814; 1820-1821). At around 7:00 p.m., on July 29, 1990, Rolland Everson heard noises and saw a police officer struggling with a black man (TR 1833-1834). When he first saw Officer Winters, Winters had Holland in a headlock. Within moments, Mr. Everson heard two shots, looked out again and saw Holland with the gun. Holland immediately started jogging off westbound (TR 1837-1839). Moreover, a number of other witnesses saw the struggle and heard the gunshots. Most importantly, Abraham Bell testified that on July 29, 1990, he was leaving his bait and tackle shop and 2600 Hammondville Road when he saw a police car and heard someone on a PA system Say, "Hey you, get over here." (TR 1968-1970). Mr. Bell saw a man walking down the street near the John Deere Tractor store and returned to the police car and the officer made

the suspect put his hands on the car (TR **1971).** The officer put his night stick on Holland's back and called on his car radio. Mr. Bell observed Holland turn around and swing at the police officer, at which point the police officer turned Holland around and managed to get him in a headlock (TR **1972-1973).** **A** struggle followed and Mr. Bell saw Holland grab for and get the officer's gun (TR **1973-1974).** Mr. Bell testified the officer apparently realized Holland was going for his gun and tried to stop Holland by pushing down on the holster (TR **1975).** Bell saw the gun come out and saw Holland point the gun **and** fire twice at the police officer. Mr. Bell said that the officer went down and at that point Holland took off with the gun down Hammondville Road **(TR 1976-1977).** On cross-examination, Mr. Bell testified that he did ***see*** the officer hit Holland with the night stick after Holland tried to swing at the police officer. Mr. Bell could see the gun when it was first fired and the shots were in a downward direction. Mr. Bell testified that he saw Holland look up to **see** where he was shooting **and** then he saw Holland fire (TR 1986-**1987).** Dr. Tate testified that Officer Winters died as **a** result of gunshot wounds (TR **2327).** Two bullets entered Officer Winters' body. The first was not fatal. The second wound, which was the fatal wound, caused a complete loss of blood pressure which resulted in Officer Winters' going into a profound shock from which he never recovered (TR 2361).

While Holland is correct that there are Some undisputed facts in the instant case, one of those facts is that Holland formulated the requisite intent to premeditate Officer Winters'

murder. Albeit a struggle ensued, it was Holland who got control of Officer Winters' holstered gun, drew it and within three to six inches of Officer Winters' body, fired two bullets. The first round was not fatal, but would have put Officer Winters in excruciating pain, based on Dr. Tate's testimony. The second wound perforated an artery and parts of Officer Winters' small bowel, causing blood loss and immediate loss of blood pressure.

In Sireci v. State, 399 So.2d 964 (Fla. 1981), the court, in discussing whether Sireci had formulated the requisite intent for premeditation, observed:

> Premeditation is a fully formed conscious purpose to kill, which exists in the mind of a perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensued. (cites omitted). Premeditation does not have to be contemplated by any particular period of time before the act, and may occur a moment before the act. . . . It must exist far such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as life of the victim is concerned. . . .

399 So.2d at 967.

There can be no serious contention that the murder of Officer Winters was a spur of the moment act only occurring after a fight had begun because, Holland was on the run after he was interrupted in his sexual assault of T J . The police were all about and when Officer Winters attempted to apprehend him, Holland did not just struggle with the officer and knock him down but rather he got Winters' gun, aimed it and shot twice. Clearly, the requisite intent was formulated to prove that Officer Winters' death was committed by a premeditated act of

Holland. See Jones v. State, 580 So.2d 143 (Fla. 1991); Asay v. State, 580 So.2d 610 (Fla. 1991); Tafero v. State, 403 So.2d 355 (Fla. 1981); Jackson v. State, 498 So.2d 406 (Fla. 1986), and Grossman v. State, 525 So.2d 833, 837 (Fla. 1988), wherein the court held:

> . . . On premeditation, Appellant's fear of going back to prison for violation of probation would not have been satisfied by beating the officer into submission and taking back the handgun and driver's license. Indeed, the assault on the officer only worsened his situation as she could have identified him as her assailant and his vehicle. On the evidence, the jury was entitled to believe that the murder was premeditated. Roberts v. State, 510 So.2d 885 (Fla. 1987); Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986); Preston v. State, 444 So.2d 939, 944 (Fla. 1984). The argument that Appellant makes here, that he merely panicked and killed the officer out of fear, is the same argument he made to the jury in which it rejected. We are satisfied that the evidence was legally sufficient to support the convictions. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). . . .

Based on the foregoing, it is respectfully submitted there was more than sufficient evidence to convict Holland of premeditated first degree murder.

POINT XI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW RELEASE, OR AT LEAST IN-CAMERA REVIEW, OF THE GRAND JURY TESTIMONY

Holland argues that the trial court's failure to grant release or in-camera review of the grand jury's testimony denied him due process of law and effective assistance of counsel. Without pointing to any reason other than sheer speculation, Holland urges that the trial court at the very least should have

conducted an in-camera review of the grand jury testimony for "exculpatory materials". (Appellant'sBrief, pg. 66).

There is no pretrial right to inspection of grand jury testimony as an aide in preparing for one's defense. Jent v. State, 408 So.2d 1024 (Fla. 1981), and Minton v. State, 113 So.2d 361 (Fla. 1959). Merely alleging that the grand jury proceedings "may reveal the names of favorable witnesses and other exculpatory evidence" does not automatically entitle Holland to a transcript and review of the grand jury testimony. In fact, §905.27, Fla.Stat., requires a proper predicate be provided by a defendant, that predicate being that the grand jury testimony contains material evidence requiring disclosure in order to attain justice and the vindication of truth. Certainly, the predicate for the production of grand jury testimony cannot be a fishing expedition. See State v. Drayton, 226 So.2d 469 (Fla. 1st DCA 1983); Pennsylvania v. Ritchie, U.S. ___ 107 S.Ct. 989, 1002 (1987); United States v. Baqley, ___ U.S. ___, 105 S.Ct. 3375 (1985), and Minton v. State, supra. Indeed, in State v. Meeks, ___ So.2d ___ (Fla. 3rd DCA 1992), 18 Fla.L.Weekly D4, the court therein, in granting the State's petition for writ of certiorari and quashing the order below, held:

> In the instant case, the Respondent's motion seeking disclosure did not contain any facts which supported his allegations that the State had withheld critical facts from the grand jury. Thus, we find that the Respondent's motion was based on 'mere surmise or speculation.' For this reason, we find that the trial court order was a departure from the essential requirements of law. . . .

Moreover, with regard to Holland's suggestion that the trial court hold an in-camera inspection of grand jury proceedings in order to review same for possible exculpatory materials, such a suggestion was rejected by this Court in Minton, supra, wherein the court held:

> Even inspection by the trial judge, it must be recognized, has serious drawbacks. . . . Imposing this task on the judge as a regular procedure would draw him to deeply into the partisan task of preparing the cross-examination.

113 So.2d at 367. See also State v. Gillespie, 227 So.2d 550 (Fla. 2nd DCA 1969), and Drayton, supra.

Based on the foregoing, no relief should be forthcoming to Holland as to this speculative claim.

POINT XII

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY

It has long been held that when a defendant has been charged with first degree murder the State may prove through either premeditation or a felony murder theory intent to commit the crime. See Young v. State, 579 So.2d 721, 724 (Fla. 1991), wherein the court held:

> There is no merit to Young's other arguments regarding the charge of premeditated first degree murder. Contrary to his contention, the State may proceed on theories on both premeditation and felony murder when only premeditated first degree murder is charged. Bush; O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). . . .

See also Bush v. State, 461 So.2d 936 (Fla. 1984); Adams v. State, 412 So.2d 850 (Fla. 1982); Roberts v. State, 164 So.2d 817 (Fla. 1964), and Larry v. State, 104 So.2d 352 (Fla. 1958). Holland is entitled to no relief as to this claim.

POINT XIII

WHETHER THE TRIAL COURT ERRED IN DENYING A CONTINUANCE PRETRIAL

Throughout the pretrial proceedings in Holland's case, defense counsel repeatedly sought motions for continuance either based on the fact the State was still giving him new witnesses or he was not able to take the depositions of current witnesses or he was still trying to secure witnesses. Mr, Giacoma was originally appointed to represent Holland on September 10, 1990. On or about March 15, 1991, Young Tindall was appointed to assist Mr. Giacoma and act as co-counsel for the entire case. As early as October 17, 1990, the first motion for continuance was filed at which point a hearing was held (TR 6-18), based on the defense lawyer's difficulties with having doctors see Holland. The next request for a continuance was filed on or about June 10, 1991, at which point defense counsel argued that the defense did not yet have the doctors reports and still had witnesses to depose (TR 426-431). On July 1, 1991, trial counsel filed yet another motion far continuance arguing that since Mr. Giacoma's original appointment, a number of pretrial matters such as a competency hearing and a suppression hearing had occurred. Although a number of statements had been taken, there was a huge witness list and the State was continuing to turn over more discovery,

adding additional witnesses to the witness list (TR 663). Mr. Giacoma argued that he was still taking depositions in Washington, D.C., and was having difficulty securing medical records from St. Elizabeth's Hospital (TR 664-665). At the July 1, 1991, motion for continuance hearing, Mr. Giacoma stated that he had not prepared for the penalty phase and that he was having difficulty locating witnesses Holland had furnished to him (TR 673-675). On July 3, 1991, the trial court denied defense counsel's motion for continuance and stated that the trial would commence on July 8, 1991, as previously ordered, The court observed that a jury would be selected and then the case would be recessed for a week (TR 858-867).

On July 8, 1991, the trial commenced with jury selection. By July 10, 1991, Holland had been so disruptive that a second voir dire panel had to be brought in and jury selection recommenced. A jury was finally selected on July 12, 1991 (TR 1693), and the case was in recess until July 22, 1991. On July 22, 1991, defense counsel again requested a continuance because he had just lost a legal ruling in Washington, D.C., with regard to securing witnesses from St. Elizabeth's Hospital (TR 1707-1714). The trial court denied said motion based on the arguments that were presented (TR 1714), and the jury was sworn (TR 1717). Opening remarks were made (TR 1718-1760), and the State commenced its case in chief.

Based on the above recited scenario, it is clear the trial court did not abuse his discretion in denying the numerous motions for continuance filed by the defense. The record

reflects that albeit the motions were denied, defense counsel was not thrown into the heat of adversarial battle but rather, following jury selection which ended July 12, 1991, a ten-day recess resulted for the commencement of Holland's trial on July 22, 1991. The record is also void of any allegations by Holland that a specific witness would have been called had more time been provided the defense to secure said witness. The best Holland can assert is that Dr. Abudabbeh (one of Holland's treating doctors when he was hospitalized in Washington, D.C.), was ill and unable to testify during the current trial. He speculates that trial counsel first acquired information on June 27, 1991, that there may have been a second suspect in the offense. Other than those two notations, the sum total of Holland's complaint is premised on the size of the case, his inability to subpoena witnesses and the receipt of reports of three medical health experts between June 21-28, 1991.

It is well recognized that a trial court's ruling upon a motion for continuance will not be reversed unless there is shown a palpable abuse of discretion. Magill v. State, 386 So.2d 1188 (Fla. 1990); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984). In Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976), the court went so far as to hold:

> While death cases command our closest scrutiny, it is still the obligation of the appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for continuance.

For example, in Bouie v. State, 559 So.2d 1113, 1114 (Fla. 1990), the court observed:

> Granting a continuance is within a trial court's discretion, and the court's ruling will be disturbed only when the discretion has been abused. (cites omitted). We find no abuse of discretion here. The State's good faith and diligence in this matter has been established. Moreover, having only days to develop the confession issue, defense counsel used his time well. He effectively cross-examined Edwards and brought Edwards' prior record to the jury's attention. His examination of the other inmates also cast doubt on Edwards' credibility and placed the question of whom to believe squarely to the jury. Bouie has shown no undue prejudice caused by the court's ruling. . . .
>
> Even if we were to find that the court erred in not granting a continuance, any such error would have been harmless, The record discloses that defense counsel performed adequately in regards to Edwards' testimony. Even without Edwards' testimony the evidence against Bouie clearly rebuts his trial testimony. We are certain, therefore, that the jailhouse confession, as recited by Edwards, did not contribute to Bouie's conviction. As stated previously, Bouie has failed to demonstrate prejudice, and we can say beyond any reasonable doubt that not granting a continuance did not affect the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

559 So.2d at 1114-1115.

~~See also~~ Gore v. State, 559 So.2d 978 (Fla. 1992), wherein the court reviewed Gore's claim that the trial judge erred in denying his motion for a continuance to secure the presence of a defense witness who was unable to travel to the trial due to her pregnancy. The court, after reviewing the facts, determined there was no abuse of discretion based on the circumstances of that case.

On Monday, July 29, 1991, the defense commenced the presentation of its case. Dr. William Love, a psychologist, was

called to the stand and testified regarding his observations of Holland (TR 2493-2606). Dr. Patterson, a psychologist who first met Holland in 1981, at St. Elizabeth's Hospital, was next called and testified regarding Holland's mental health history and the facts and circumstances surrounding Holland's hospitalization at St. Elizabeth's Hospital in Washington, D.C. (TR 2612-2667). Holland then called Dr. Thomas Polley, a psychologist at St. Elizabeth's Hospital, who detailed Holland's mental health history and the tests that were performed during his hospitalization at St. Elizabeth's Hospital (TR 2676-2740).

Holland presented no lay witnesses regarding either his mental health or any information concerning Holland's circumstances the day of the crime. The defense rested its case following the testimony of the aforenoted doctors. Holland was personally asked if he wished to testify or if he had anything to say at this juncture and he declined to make any remarks (TR 2741).

Albeit Holland cites cases such as Robinson v. State, 561 So.2d 419 (Fla. 1st DCA 1990); Beechum v. State, 547 So.2d 288 (Fla. 1st DCA 1989), and Unruh v. State, 560 So.2d 266 (Fla. 1st DCA 1990), for the proposition that the trial court committed reversible error in denying Holland's motion to continue the trial, the State would submit each of the aforenoted cases are distinguishable based on the facts and circumstances of the instant case. While in a given case it may be reversible error far the trial court not to grant a continuance based on an abuse of discretion because the defense has not been given sufficient

opportunity to develop or investigate, for example, the defendant's psychiatric problems, the instant record is replete with opportunity and in fact Holland presented three doctors regarding his mental health defense. Holland has cited to no witness who may have been "belatedly provided" that he would have called or would have deposed with regard to this case. Certainly, the speculation on the part of defense counsel that he could have done more is neither new nor unique. The State would submit that in the instant case the trial court did not abuse his discretion in denying further continuances of Holland's trial.[2]

POINT XIV

WHETHER THE TRIAL COURT ERRED IN DENYING A PENALTY PHASE CONTINUANCE

Without regurgitating the caselaw with regard to whether a trial court abuses its discretion in denying motion for continuance, the State would note that this Court has previously considered and rejected claims of error in regard to the denial of a motion for continuance of a capital case penalty phase. See Williams v. State, 438 So.2d 781 (Fla. 1983); Rose v. State, 461 So.2d 84 (Fla. 1984). In Williams, this Court found no error in such ruling, stating that defense counsel had been on notice for several months since his appointment that the case would involve the death penalty. This Court further noted that there had been

[2] It is also interesting to note that throughout the proceedings whenever Holland personally had an opportunity to address the court, he complained about his lawyers' competency and complained that he was being denied a speedy trial as well as his privacy rights were being violated because of the use of an insanity defense.

a two hour recess to allow counsel to prepare, and concluded that the continuance request had been insufficient, in that counsel had failed to demonstrate due diligence in seeking to locate mitigating witnesses and had further failed to allege that the motion had been made in good faith.

The record reflects that pretrial, defense counsel was complaining that he needed a continuance because he had not commenced preparation for the penalty phase of Holland's trial. The record reflects however that the jury convicted Holland on all four counts on August 1, 1991 (TR 3084-3085). The trial court recessed the proceedings until August 12, 1991, the date set for the commencement of the penalty phase. On August 8, 1991, defense counsel informed the court that they were still having problems locating witnesses from Washington, D.C., and asked for more time to prepare for the penalty phase. Defense counsel desired a two week delay (TR 3092). The trial court denied same and on August 12, 1991, the penalty phase proceedings commenced. Following the State's one witness and the stipulation of the parties that Holland had a previous conviction of assault with intent to commit robbery while armed on March 6, 1979 (TR 3144), the defense called Holland's father, who testified in his son's behalf (TR 3144-3170). Holland's younger sister, Rebecca Holland, was also called to testify (TR 3175-3178), and following her testimony the defense rested. Holland now argues that he needed more time for the penalty phase as demonstrated by the colloquy between the judge and defense counsel concerning the number of witnesses that would testify (TR 3115-3116). Based on

Holland's representations to the trial court, the only witness who did not testify was Holland's mother yet, there was no explanation as to why she did not testify. The sole case upon which Holland relies, Wike v. State, 596 So.2d 1020, 1024-1025 (Fla. 1992), is clearly distinguishable from the instant case. In Wike, supra, the penalty phase was scheduled to commence the morning following the rendition of the guilty verdicts:

> . . . On that morning, defense counsel requested a one week continuance for the purpose of procuring additional mitigating witnesses, e.g., Wike's mother, who at the time could not testify due to health problems but might be able to testify in a week; a cousin who was due to arrive in town that night; and Wike's ex-wife, who had just been located and could provide important family background information, particularly about Wike's alcohol and drug abuse. After the State agreed to stipulate to Wike's mother's testimony, without her having to testify, the court denied the motion for a continuance.

596 So.2d at 1024-1025.

The court found that there had been an abuse of discretion because:

> . . . Given the circumstances of this case, we conclude that the trial court abused its discretion in denying Wike's motion for continuance. We emphasize that Wike's request for a continuance was for a short period of time and for a specific purpose. It is clear that Wike's family members, specifically, his cousin and ex-wife, could have provided admissible evidence for the jury to consider during the penalty phase had the continuance been granted. Ordinarily, we are reluctant to invade the purview of the trial judge; however, we find that the failure to grant a continuance, if only for a few days, under these circumstances was error. . . .

596 So.2d 1025.

Under no stretch of the imagination can Holland begin to suggest that the instant case is similar ta that of **Wike**. In fact, lay witnesses testified in Holland's case and there was no explanation presented as to why a third family member was not available to testify OK that she would have testified to samething other than what Holland's father and sister had already presented to the jury.

Additionally, a review of the motion for continuance admitted on July 8, 1991 (TR 4705-4707), reflects that no specific witness was listed nor any explanation as to why a certain witness was not available. See Williams **v.** State, supra. Said motion was completely unspecific as to the names of potential witnesses, as well as the due diligence which had been expended in seeking to **locate** them. Holland failed to fully discuss the substance of their expected testimony, and he further failed to even allege that this testimony could not be secured through other witnesses, i.e., his father and sister. See Smith v. State, 59 So.2d 625 (Fla. 1952) (continuance motion insufficient where, inter alia, not sworn to and lacking allegations that expected testimony material to cause and as such could not be proven by other available witnesses). See Lusk, supra; Williams, supra, and Rose, supra.

Based on the foregoing, all relief should be denied as to this claim.

POINT XV

WHETHER HOLLAND'S ABSENCE FROM THE HEARING ON THE MOTION TO CONTINUE THE PENALTY PHASE IS REVERSIBLE ERROR

The record reflects at the July 8, 1991, hearing, defense counsel stood up and informed the court that they were waiving their client's presence on the record (TR 3093). Defense counsel then stated that Holland had instructed defense counsel that he wanted them to find witnesses and they were having difficulty locating the witnesses for the penalty phase (TR 3093).

Holland now argues "fundamental error" occurred because he personally was not present at the time defense counsel waived his presence. Such an allegation is totally groundless. See Rose v. State, 617 So.2d 291, 296 (Fla. 1993), wherein the court recognized that a defendant has no right to be present when his presence would be useless or the benefit a shadow. See Snyder v. Massachusetts, 291 U.S. 97 (1934). Citing Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982), the court further noted that a defendant has a due process right "to be present at any stage of the proceedings that is critical to its outcome, if his presence would contribute to the fairness of the proceedings." 617 So.2d 296. However, the court reasoned in the instant case that the in-camera discussion would not have had any effect on the fairness of the proceedings against Rose. Therefore his absence from the in-camera discussions which "focused on the problems between Rousen and Rose and on Rousen's concern about his ability to provide a proper defense given those problems. Rose could not have added anything af benefit to this discussion. . . ." 617 So.2d at 296.

Similarly, in the instant case defense counsel affirmatively waived Holland's presence and stated the reason for a need for a two week continuance was because there had been difficulties in locating witnesses in Washington, D.C. (TR 3092). Beyond a shadow of a doubt, Holland could have contributed nothing more to defense counsel's request except to reassert his dissatisfaction with defense counsel, something the trial court already knew and had previously dealt with.

Based on the foregoing, no relief should be forthcoming as to this claim.

POINT XVI

WHETHER THE TRIAL COURT ERRED IN DENYING A REQUESTED INSTRUCTION CONCERNING THE DOUBLING OF AGGRAVATING CIRCUMSTANCES

Holland next complains that defense counsel's requested jury instruction (TR 4721):

> The prosecution may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance,

The jury in Holland's case was instructed on four aggravating circumstances, two of which were that the crime for which Holland was to be sentenced was committed for the purpose of avoiding or preventing the lawful arrest or effecting an escape from custody; and that the victim of the crime for which Holland was to be sentenced was a law enforcement officer engaged in the performance of his duties. Holland now argues that the

trial court should have given the aforecited instruction because both aggravators should not have been found based on the evidence presented and this Court's decision in Castro v. State, 597 So.2d 259, 261 (Fla. 1992).

The facts of the instant case support both statutory aggravating factors that the murder was committed to avoid or prevent a lawful arrest or effect an escape from custody and that the victim was a law enforcement officer engaged in the performance of his official duties. The trial court was correct in concluding that both aggravating factors were proven beyond a reasonable doubt and the trial court correctly instructed the jury with regard to same. The trial court found in his sentencing order that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody because:

> . . . The evidence proved beyond a reasonable doubt that Officer Winters was trying to effect an arrest of the defendant when the defendant acquired the officer's gun and then committed the capital felony.

(TR 4813).

With regard to the aggravating factor that the victim of the capital felony was a law enforcement officer, the court held:

> . . . The evidence proved beyond a reasonable doubt that the victim, Officer Scott Winters, was a duly qualified law enforcement officer of the city af Pompano Beach Police Department and was engaged in the official duty of attempting the arrest of the defendant for sexual battery.

(TR 4813).

In Castro v. State, 597 So.2d 259, 261 (Fla. 1992), this Court stated:

> When applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

597 So.2d at 261.

In the instant case, the trial court properly ruled that a doubling instruction was not applicable. If, however, this Court should somehow construe the facts of the instant case as warranting such an instruction, it is submitted any failure to give such instruction is harmless error beyond a reasonable doubt. See Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992), wherein a similar circumstance, this Court found the failure to tell the jury to merge the pecuniary gain and felony murder factors harmless error beyond a reasonable doubt.

Based on the foregoing, no relief should be forthcoming as to this claim.

POINT XVII

WHETHER THE TRIAL COURT ERRED IN ITS FINDING OF AGGRAVATING CIRCUMSTANCES AND ON ITS FAILURE TO FIND AND/OR CONSIDER UNREBUTTED NONSTATUTORY MITIGATING CIRCUMSTANCES

Holland's sole complaint with regard to the trial court's finding that four statutory aggravating factors existed to support the death penalty is that the trial court improperly doubled §921.141(5)(e), and §921.141(5)(j). As previously argued, the State would submit that both §§(5)(e) and (5)(j) were

proven by independent facts as noted by the trial court in its sentencing order. As such, no error resulted. Even assuming for the moment that there was a "improper doubling", said error was harmless error beyond a reasonable doubt in that three statutory aggravating factors remained and the mitigation did not exist that outweighed the aggravation proven. *See* Valle v. State, 581 So.2d 40, 47 (Fla. 1991).

With regard to nonstatutory mitigating circumstances, Holland argues that a number of factors were presented at trial that the trial court failed to address in his sentencing order pursuant to Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), and therefore a new sentencing hearing is required. Such a contention is without merit.

The trial court, in its sentencing order regarding mitigation (TR 4813-4815), concluded as to §921.141(6)(b), Fla.Stat., that:

> There was no sufficient evidence to show that this defendant committed the capital felony while under the influence of extreme mental or emotional disturbance. In fact, in the penalty phase, Dr. Koprowski testified to the contrary, that the defendant was not under such influence. This circumstance is therefore rejected by the court.

(TR 4813).

With regard to the applicability of §921.141(6), that Holland could not appreciate the criminality of his conduct or conform his conduct to the requirements of law, the court held:

> There was no sufficient evidence to show this as a mitigating factor. The defendant, according to the evidence, knew that what he was doing was wrong and he had the ability to conform his conduct to the requirements of

> law. This was evidenced by the fact that the defendant fled from the crime scene, hid the victim's firearm, used an assumed name when apprehended and even used the Spanish language, indicating that he could not speak English. Therefore, this proposed mitigating circumstance is rejected by this Court.

(TR 4814).

With regard to the applicability of §921.141(6), regarding any other aspect of the defendant's character or record or any other circumstance of the offense, the court held:

> The evidence shows a history of drug abuse. Defendant obviously was born into a good family and had a better than average family life until approximately the age of sixteen when he began using drugs. Since, the defendant has been in various jails and mental hospitals.
>
> There was no evidence to show the defendant was under the under the influence of drugs when he committed the capital felony. The actions taken by the defendant immediately after the murder point to the contrary conclusion. This circumstance is therefore rejected.

(TR 4814).

The court further opined:

> This Court has considered the remaining enumerated mitigating circumstances and finds that they do not apply.
>
> In summary, as to Count I, this Court finds beyond a reasonable doubt that the State has proven four (4) aggravating circumstances and that by any credible evidence, the defense has proven no mitigating circumstances, either statutory or nonstatutory, from the evidence at the trial or the penalty phase procedure.
>
> After weighing all of the proven aggravating circumstances as against the evidence and argument presented during the guilt phase and penalty phase procedure, it is the opinion of the court that there are sufficient

aggravating circumstances to justify the sentence of death on Count I.

(TR 4815).

Albeit appellate counsel argues a number of "facts" that could have been considered as nonstatutory mitigating circumstances (Appellant's Brief, **pgs. 78-83**), it is important to compare the mitigation he now says should have been found by the trial court ta that argued at trial before the jury and at sentencing before the trial judge.

Holland first takes issue with the trial court's finding that there was no evidence to show the defendant was under the influence of drugs. (Appellant's Brief, **pg.** 78). Holland is incorrect. Albeit there was testimony by T J that Holland smoked crack cocaine that day (TR 1771, 1793), and there was some traces of cocaine in Holland's vomit analyzed by the Broward County Toxicologist (TR 2088-2092), Dr. Koprowski rebutted any influence of cocaine usage on cross-examination by the defense at the penalty phase (TR 3141-3143).

The trial court therefore had every right to reject Holland's contention that he was under the influence of cocaine during the incident. See Jones **v.** State, 612 So.2d at 1375, wherein the court observed:

> The defense's mental health expert specifically testified that Jones did not meet the criteria for the statutory mitigators of substantially impaired capacity or extreme emotional disturbance. That expert also testified that Jones was of at least average intelligence and appreciated the criminality of his actions. Neither alcohol or drugs used contributed to these murders. Thus, the record contained competent substantial evidence supporting the

> trial judge's refusal to instruct the jury on and his refusal to find the statutory mental mitigators.

See also Ponticelli v. State, 593 So.2d 483 (Fla. 1991), and Sireci v. State, 587 So.2d 450 (Fla. 1991), where, as here, there was competent substantial evidence to negate Holland's use of cocaine had any impact on the murder, the trial court's finding cannot be disturbed.

Holland points to the fact that he was a long-term poly drug abuser and states boldly, "The State conceded that this is nonstatutory mitigation." (Appellant's Brief, pg. 80). The record reflects that in the State's sentencing memorandum (TR 4779), the State observed that, "While the defendant's long history of drug abuse may be considered a nonstatutory mitigating factor, the State would urge this Court to give it little weight.'' Certainly nothing in the State's sentencing memorandum mandates that the trial court find said factor. However, even assuming for the moment Holland was a long-term poly drug abuser, the facts remain that the murder of Officer Winters was not a result of any drug influenced state. In fact the jury, as well as the trial court, had substantial competent evidence to reject this factor as mitigation since Holland's 1989 encounter with the Washington, D.C., police demonstrated similar conduct and Holland stipulated to a previous conviction for assault with intent to commit robbery while armed on March 6, 1979. (TR 3144). His drug habit had nothing to do with his prior criminal conduct.

Holland also points to the fact that the trial court did not consider as mitigation the offense was committed with little or

no Premeditation. To the extent Holland is arguing lingering doubt as to whether premeditation existed, such an argument is non-persuasive as well as not authorized by caselaw. Holland further argues that the trial court failed to consider as mitigation his mental illness. This record is replete with evidence to reflect that competent substantial evidence existed that negated a finding that Holland suffered from mental illness. A number af doctors testified as to Holland's mental health and there was certainly evidence from which both the jury and the trial court could conclude that Holland's "mental illness" did not influence his conduct in committing the murder of Scott Winters nor should it constitute mitigation since Holland had not been hospitalized or medicated since 1986 when he escaped from St. Elizabeth's Hospital in Washington, D.C. See Dr. Koprowski's testimony, the lay witnesses testimony presented on rebuttal, and the testimony of Dr. James Jordan and Dr. Strauss. Holland's attempt to align the instant case with that of Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), is misplaced.

Terminally, Holland suggests that the trial court should have considered as mitigation to this murder the fact that Holland was badly beaten when he was twenty years old, citing Livingston v. State, 565 So.2d 1288 (Fla. 1988); Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990).

The fact that Holland may have suffered a severe beating when he was in Oxford Prison in Wisconsin was so remote in time to the instant crime that that fact alone lessens or eliminates

it as a non-statutory mitigating circumstance. Additionally, the record rebutted the fact that Holland's conduct and acts of violence stemmed from said beating because the crime for which Holland was incarcerated at the time of his beating was a crime of violence specifically an assault with the intent to commit armed robbery (TR 3162).

Even assuming for the moment that the trial court erred in failing to consider this horrible beating Holland received when he was in Wisconsin Federal Prison, any error was harmless error beyond a reasonable doubt. That fact alone paled completely in light of the valid aggravating factors found. Based on the foregoing, all relief should be denied as to this claim.

POINT XVIII

WHETHER THE DEATH PENALTY IS PROPORTIONATE

Citing to Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), Holland argues that because this case was not premeditated and the entire incident was the product of an extremely strong effect of cocaine usage upon a person with underlying mental illness, death is disproportionate. Such an argument is without merit and Holland's reliance on Kramer v. State, So. 2d (Fla. 1993), 18 Fla.L.Weekly S266, S267, is misplaced.

In Kramer v. State, supra, this Court determined that death was not an appropriate sentence where only one statutory aggravating factor remained and the trial court found four factors in mitigation regarding Kramer's emotional condition, the ability to conform his conduct to the requirements of the law and the fact that Kramer suffered from alcoholism and had some prior

drug abuse. Those facts do not fit the instant circumstances. Death is the appropriate sentence sub judice. See Grossman v. State, 525 So.2d 833 (Fla. 1988); Jones v. State, 440 So.2d 570 (Fla. 1983); Clarence Jones v. State, 580 So.2d 143 (Fla. 1991), and Jackson v. State, 498 So.2d 406 (Fla. 1986).

POINT XIX

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE A JURY INSTRUCTION ON HOLLAND'S USE OF INTOXICANTS DURING THE OFFENSE

Holland next argues that the standard jury instruction given did not adequately inform the jury with regard to his use of intoxicants during the offense. His proposed instruction at the penalty phase would have set forth a special instruction that the jury may consider the influence of marijuana, alcohol or other intoxicants during some or all of the offense as a mitigating circumstance. This Court, in Jones v. State, 612 So.2d at 1375, has rejected the idea of individualized jury instructions as to every piece of evidence submitted as non-statutory mitigating evidence:

> Finally, the standard jury instruction on non-statutory mitigators is sufficient, and there is no need to give separate instructions on individual items of non-statutory mitigation. Randolph v. State, 562 So.2d 331 (Fla.), cert. denied, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); Jackson v. State, 530 So.2d 269 (Fla. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989).

612 So.2d at 1375-1376. See also Henry v. State, 613 So.2d 429 (Fla. 1992); Robinson v. State, 574 So.2d 108 (Fla. 1991); Mendyk v. State, 545 So.2d 846 (Fla. 1989), and Sochor v. State, 580 So.2d 595 (Fla. 1991).

POINT XX

WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE INSTRUCTIONS ON HOLLAND'S BACKGROUND AND HISTORY OF DRUG ADDICTION

Holland is simply rearguing in this point the issue presented in Point XIX, that the trial court should have instructed the jury as to his special jury instruction dealing with Holland's background and history of drug addiction. Jones v. State, 612 So.2d at 1375-1376, controls.

POINT XXI

WHETHER THE AGGRAVATING CIRCUMSTANCE, §921.141(5)(d) (DURING AN ENUMERATED FELONY) IS UNCONSTITUTIONAL ON ITS FACE AND UNCONSTITUTIONALLY APPLIED

Holland argues that §921.141(5)(d), Fla.Stat., is unconstitutional because it fails to narrow the class of those eligible for death and presumably provides for a presumption that death is the appropriate penalty. §§(5)(d), Fla.Stat., is constitutional and this Court has rejected a similar claim in Menendez v. State, 419 So.2d 312 (Fla. 1982). §921.141(5)(d), Fla.Stat., does not create a presumption that death is the appropriate penalty for a person convicted of first-degree murder under the felony murder theory. See Clark v. State, 443 So.2d 973 (Fla. 1983); Mills v. State, 476 So.2d 172 (Fla. 1985); Swafford v. State, 533 So.2d 270 (Fla. 1988). See also Lowenfield v. Phelps, U.S. ___, 108 S.Ct. 546 (1988). Holland is entitled to no relief as to this claim.

POINT XXII

WHETHER THE AGGRAVATING CIRCUMSTANCE, §921.141(5)(j) (VICTIM WAS A LAW ENFORCEMENT OFFICER), IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

Holland next argues that §921.141(5)(j), Fla.Stat., is unconstitutional because it inevitably doubles other aggravating circumstances and does not narrow the class of persons eligible for the death penalty. Such a contention is without merit. First, the killing of a law enforcement officer while engaged in the performance of his official duty may very well be the only basis upon which a trial judge determines death is an appropriate sentence. Under the Florida death penalty scheme, in order to impose the death penalty, the trial court must find at least one statutory aggravating factor proven beyond a reasonable doubt. To suggest that because this "aggravating circumstance will always duplicate two others" is an incorrect statement of law and not necessarily an accurate assumption based on the facts of the instant case. Moreover, with regard to the fact that said factor does not narrow the class of persons eligible for the death penalty, the State would submit such an argument is without merit. See Swafford v. State, supra.

POINT XXIII

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE WITHOUT A CONTEMPORANEOUS DEPARTURE ORDER

The record reflects that the trial court and all parties believe that a guidelines sentence was imposed on August 19, 1991. In fact, the trial court specifically denied the State's

request to aggravate the sentences and depart from the guidelines sentences (TR 3245). On August 20, 1991, the State filed a motion for clarification, noting that the trial court had imposed consecutive sentences for Counts 11, III and IV, and thus the sentence was a departure sentence. The trial court stated that he intended to provide consecutive sentences and stated that his reasons for departure in giving consecutive sentences was due to the unscored capital felony (TR 3263). On August 23, 1991, the trial court, in the presence of the defendant and without objection by defense counsel, entertained the State's motion for clarification in open court. At that point, he informed the defendant that imposition of consecutive sentences constituted a departure guideline sentence (TR 3297).

While it is clearly stated in Harris v. State, 556 So.2d 769 (Fla. 2nd DCA 1990), and Robinson v. State, 520 So.2d 1 (Fla. 1988), that a consecutive sentence constitutes a departure sentence, no violation occurred sub judice, where the trial court prepared a contemporaneous written order of departure. Padilla v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S181, S183, is neither controlling nor applicable since a valid sentencing order occurred sub judice.

Even assuming for the moment this Court in some manner construes the order as not a contemporaneous written order of departure, no resentencing is required in that the sentences imposed absent their consecutive nature are within the guidelines and therefore any relief as to this claim is de minimis at best. *See* Sweet v. State, 18 Fla.L.Weekly S447 (Fla. August 5, 1993).

POINT XXIV

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Holland's last point on appeal raises a number of constitutional challenges to Florida's death penalty statute, some of which are not even applicable to his case. For example, Holland challenges the appropriateness of the aggravating factors of heinous, atrocious or cruel, and cold, calculated and premeditated murders. Neither of these instructions were either read to, considered by, or found by the trial court in the instant case.

With regard to Holland's contention that Florida's death penalty scheme is infirmed because it places "great weight on margins for death as slim as a bare majority," the record reflects the jury voted eleven to one to recommend the death penalty in the instant case. Since unanimity is not required, the State would submit that an eleven to one vote is far from a slim or bare majority. See Brown v. State, 565 So.2d 304 (Fla. 1990); Alford v. State, 322 So.2d 533 (Fla. 1975); James v. State, 453 So.2d 786 (Fla. 1984), and Rose v. State, 425 So.2d 521 (Fla. 1983).

Holland next argues that standard jury instructions do not inform the jury of the great importance of its penalty verdict. The record in this instance refutes that the trial court clearly inform the jury of their role.

With regard to Holland's attack on the trial judge, Holland asserts the trial judge has an ambiguous role which has been unclear at times. The United States Supreme Court, in Parker v.

Dugger, U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), clearly set forth what the role of the trial judge was in Florida's capital sentencing scheme.

With regard to appellate review, Holland complains about the ability of the Florida Supreme Court to perform its role. The United States Supreme Court has, in a number of decisions, affirmed the sentencing scheme adopted by Florida. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

With regard to Holland's contention that the death penalty statute creates a presumption of death and that Florida's method of execution is cruel and unusual, both have been rejected as a basis for striking Florida's death penalty scheme. See also Young v. State, 579 So.2d 721 (Fla. 1991); Sochor v. State, supra; Van Poyck v. State, 564 So.2d 1066 (Fla. 1990), and Robinson v. State, 574 So.2d 108 (Fla. 1991)

CONCLUSION

Based on the foregoing, the state would urge this Court to affirm the judgment and sentence of death imposed for the first-degree murder of Officer Scott Winters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Richard B. Greene, Assistant Public Defender, 15th Judicial Circuit, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, this 19th day of August, 1993.

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