IN THE

SUPREME COURT OF FLORIDA

ALBERT HOLLAND,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,660

CORRECTED INITIAL BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

Counsel for Appellant

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AUTHORITIES CITED

UNITED STATES CONSTITUTION

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Albert Holland, Jr., was the Defendant and the State of Florida was the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit of Florida. In the brief, the parties will be referred to by name or as Appellant and Appellee.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

Albert Holland was indicted on August 16, 1990, for first-degree murder of a law enforcement officer, armed robbery, sexual battery, and attempted first-degree murder (R3315-16). A hearing was held on Mr. Holland's competency to stand trial on December 3, 1990 (R45-295). Both mental health experts appointed by the judge (Drs. Block-Garfield and Koprowski) testified that Albert Holland was incompetent (R153-226). However, a psychiatrist who works for the Broward County Jail testified that he was competent (R153-197). There was also lay testimony presented (R227-289). The trial judge found Mr. Holland competent on December 4, 1990 (R290,3443). The jury was selected on July 8-12, 1991, and the trial was then recessed without the jury being sworn (R875-1693). The evidentiary portion of the trial took place from July 22-August 2, 1991 (R1694-2918). The jury returned a verdict of guilty as charged (R4698-4703). The penalty phase was held on August 12, 1991 (R3098-3217). The jury recommended death by a vote of eleven to one (R4763). The trial judge sentenced Albert Holland to death for first degree murder, life for sexual battery, forty years for attempted first

degree murder, and seventeen years for armed robbery. All sentences were consecutive **(R4784-4816).**

STATEMENT OF THE FACTS

The case involves an alleged sexual battery and attempted first-degree murder of T J and an alleged first-degree murder and armed robbery of Scott Winters on July **29, 1990.** The defense in the case involved both insanity and intoxication.

T J stated that on July **29, 1990,** she was walking to her house at about 4:00 p.m. with a beer in hand **(R1763-64).** She met Albert Holland and he asked if she wanted to smoke crack cocaine **(R1765-66).** They walked together to a wooded area and he broke off half of a cocaine rock and started to smoke cocaine **(R1766).** He smoked the half rock by himself **(R1771).** He then smoked the other half of the rock and "he went aff." She stated he then threw her on the ground and began hitting her with a bottle **(R1773-74).** He then pulled her clothes off **(R1774-75).** She stated he unzipped his pants and put his penis in her mouth **(R1774-75).** She passed out **(R1774-75).** She had last smoked cocaine two days earlier and was regularly smoking crack cocaine at the time **(R1781,1784-85).** Albert Holland seemed like a nice person before he smoked cocaine **(R1789).** He told her that he had smoked a lot of drugs earlier in the day **(R1789-90).** After he smoked the second half of the rock "it was like he snapped" **(R1793).**

The prosecution called lay witnesses who claimed to witness Albert Holland during or near the time of either the alleged sexual battery or the alleged homicide. Angela Minion saw Albert Holland talking to T J **(R1801).** She saw T J about

thirty minutes later and she appeared to have been beaten (R1802). Audrey Canion testified that she was in her trailer when she heard a woman yelling for help (R1808-09). She stated she saw Albert Holland hit a woman with a green bottle (R1810). She called 911 (R1881). She saw them struggle (R1813). Her husband came out and said, "Man, you're gonna kill that woman" (R1813-14). The man ran (R1814).

Wesley Hill was playing cards on July 29, 1990, when Albert Holland walked by and they spoke (R1818-19). Mr. Holland continued on into a nearby woods (R1819). He came back about fifteen minutes later and was bloody (R1820). He stated someone had tried to rob him (R1820-21). James Edwards stated that he was in the group of card players and Albert Holland walked by and was sweaty and bloodied (R1823-24). His shirt was off and he looked like he had something wrapped up in it (R1825). Lloyd Pickett testified that he saw Mr. Holland walk by with blood on his chest (R1828). He heard sirens about an hour later (R1831).

Roland Everson stated that at 7:00 p.m. he saw a police officer and a black male on 26th Avenue in Pompano Beach (R1833). The police officer was strugglingwith Albert Holland (R1834). The officer had him in a headlock (R1835). He went to call 911 (R1835). He heard two shots after he hung up the phone (R1837). One shot immediately followed the other (R1841-42). He looked and saw the man kneeling on one knee about twenty feet from the officer (R1837-38). He stated that the man had every opportunity to fire more shots (R1842-43). The man then began jogging away (R1839).

Abraham Bell stated that he was in his truck and heard a police officer's PA call out, "Hey, you get over there" at a fellow walking on the street (R1970). The man walked to the police car (R1971). The officer told him to put his hands on the car, which he did (R1971). The officer walked up behind him, put a nightstick in his back and reached over to talk on the radio on his shoulder (R1971). The other man then swung at the officer's head (R1972). The officer then got the man in a headlock and had control of his left arm (R1973). The officer then hit him four or five times with his nightstick (R1973). They continued to scuffle and moved around towards the driver's side of the car (R1973). He atated that the man reached down and tried to get the officer's gun with his right hand, even though the officer still had him in a headlock and still had his left arm pinned (R1974). The officer was pushing down on the man's hand in the holster (R1975. They struggled back and forth (R1975). The officer finally released his hand and the gun came out (R1976). The officer still had the man in a headlock and the gun then went off twice (R1977). The man's head was in the officer's stomach (R1984). The shots were "right behind each other" (R1985). Albert Holland could not see where he was firing (R1986-87). The man then ran (R1986).

The next phase of the prosecution's case consisted of several Pompano Beach police officers. Officer Pepper Shaw stated that she received a call to respond to an assault at 6:29 p.m. on July 29, 1990 (R1848-49). She met with Officer Winters at the 2000 block of Hammondville Road at about 6:45 p.m. (R1853-56). Officer Winters had his dog with him (R1856). She stated that between 7:10

and 7:20 p.m. she heard Officer Winters come on the police radio saying he "has the subject in custody" (R1864). A few minutes later she heard a noise "like a scream" on the radio (R1864-65).

Officer O'Connell testified that he was dispatched to an assault call at 6:31 p.m. on July 29, 1990 (R1898-99). He arrived at the scene at 6:39 p.m. (R1899-1900). At 7:24 p.m., Officer Winters was trying to reach him on the radio (R1906-08). At 7:25 p.m., Officer Winters asked for backup (R1909). At 7:26 p.m. he called and said he'd been shot (R1920). Albert Holland was detained at 7:31 p.m. (R1930). He went to Winters' location. He saw two wounds on Winters just above his belt on the upper thigh (R1912). His gun was missing (R1913).

Officer Redpath went to 710 N.W. 19th Avenue and found a woman lying on the ground (R1998-1999). She was wearing white panties and was bloody (R2000). He saw clothing in the area (R2001). He participated in the arrest of Albert Holland (R2005).

Officer Garcia testified that he was involved in transporting Albert Holland to the jail (R2073-78). He stated that he asked him to remove his clothes in English and he didn't respond, but that he complied when he spoke to him in Spanish (R2074). He stated his name was Antonio Rivera (R2075).

Gene DeTuscan, a Broward County toxicologist, testified that he tested a sample of Albert Holland's vomit, which was obtained at 11:42 p.m. on July 29, 1990 (R2085-94). The sample tested positive for cocaine and ethanol alcohol (R2089-94).[1]

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[1] The ethanol alcohol may indicate drinking alcohol or stomach fermentation (R2090-91).

Officer McDonald stated that he found a gun in a rock pile at 2:00 p.m. on July 30, 1990 (R2193). Officer Cerat testified that the hammer was cocked and there was a live round in the chamber (R2207-08). Officer Meroff testified that the gun matched the serial number registered to Officer Winters (R2211).

Officer Holbrook, a fingerprint technician, testified that Albert Holland's thumb print matched a latent on Officer Winters' car's hood (R2227). Jeffrey Ban, a forensic serologist, testified that a blood lift from the exterior side of the driver's door on Officer Winter's car was a DNA match with a sample of Albert Holland's blood (R2281-88). He stated that blood on the back of Officer Winters' shirt also matched Albert Holland's blood (R2293).

Larry Tate, a Broward County medical examiner, testified that the deceased had received two gunshot wounds (R2327). One bullet wound was on the lower left abdomen and the other was where the abdomen meets the thigh (R2335). The gunshot wound to the abdomen was the cause of death (R2341-42). He could not determine the order of shots or the gun's position when fired (R2349-51,2358).

Officer Kevin Butler states that he interrogated Albert Holland on July 30, 1990 (R2369-70). The interrogation was taped. However, most of the tape is inaudible (R2372-73). He stated that he was confronted by a police officer who had a police dog in his car (R2377). The officer threatened to put the dog on him (R2378). He started to struggle with the officer (R2377-78). The officer had pulled his gun and pointed it at him and said he was going to shoot him (R2378). He got the gun and shot twice (R2378).

Firearms examiner Dennis Grey stated that Winters' gun holds one bullet in the chamber and nine in the magazine (R2405). The gun was found with seven cartridges with it (R2406). The magazine pouch had been struck by two projectiles (R2409). Both had gunshot residue, indicating firing fromthrea to six inches (R2411). This weapon was at the bottom end of the acceptable range of trigger pull (R2417,2423). The state rested and defense motions for mistrial and motions for judgment of acquittal were denied (R2463).

The defense case began with the testimony of Dr. William Love, a psychologist. Dr, Love is board certified in behavioral medicine and clinical neuropsychology (R2494-95). He was declared an expert in the fields of psychology and neuropsychology (R2496-97). He reviewed the hospital records of Albert Holland from Madison, Wisconsin, and from St. Elizabeth's in Washington, D.C. (R2497-98). He interviewed Albert Holland and his father, Albert Holland, Senior (R2498). He reviewed depositions concerning this incident (R2499-2500). Albert Holland had a seemingly normal childhood until age 16 (R2500-2501). He began to abuse drugs heavily, including heroin (R2501-02). He was eventually sent to federal prison, where he was severely beaten to the point where he lost consciousness for a long period and was in and out of consciousness for a long time (R2503). A CAT scan indicated a distortion of the right frontal ventricle (R2503-04). This injury could have been caused by the beating (R2505). The fact that a subsequent CAT scan doesn't show the defect merely means the matter has shifted back; it does not mean the damage is gone (R2506). It is also possible to have brain damage which does not show up on a CAT scan (R2506).

Albert Holland began to show symptoms of schizophrenia after the beating (R2507). These include thought disorders, paranoia, and a breakdown in reality testing (R2508-09). Stress can cause these people to show psychotic symptoms including hallucinations (R2511). Borderline schizophrenia often develops in individuals with a head injury (R2512). The area of the brain which showed injury can affect sex drive (R2516-17).

Albert Holland was a poly-drug abuser, including heroin, cocaine, Dilaudid, alcohol and Percodan (R2513-14). He was in St. Elizabeth's mental hospital for several years (R2518). He was often given Haldol and Thorazine (R2517-18). Dr. Love stated that during his interview with Albert Holland he exhibited distorted thinking, consistent with schizophrenia (R2521-22). Dr. Love testified that given his underlying problems, the smoking of the second half rock of cocaine caused a total change in personality, almost like flipping a light switch (R2519-20). The stress of the confrontation with the officer also caused him to lose control again (R2522-23). Dr. Love stated that a mixture of cocaine and alcohol can cause very unpredictable reactions (R2525). He did not feel that Albert Holland was malingering (R2526-27). His spending 5½ years in St. Elizabeth's mental hospital made malingering "highly unlikely" (R2529). Albert Holland had a pre-existing fear of being attacked by dogs which could be a triggering mechanism during the incident with the officer (R2602). Dr. Love stated that Albert Holland was legally insane during both incidents (R2606-07).

The defense then called Dr. Patterson, medical director of Forensic Services for the District of Columbia Mental Health Commission. He is a practicing psychiatrist, as well as being on the faculty at Howard University Medical School (R2609). He is board certified in psychology, neuropsychology and forensic psychiatry (R2509). He was a staff psychiatrist at St. Elizabeth's mental hospital when Albert Holland was first there. He was on Thorazine during this time (R2614). Dr. Patterson stated that for people who are not mentally ill, the level of Thorazine which he was on would act as a major tranquilizer (R2615-16). Prior to taking Thorazine, Albert's thinking seemed very disorganized and Thorazine seemed to help him (R2615-16).

Albert Holland was found not guilty by reason of insanity in the District of Columbia on January 8, 1982, and again on December 14, 1982 (R2617-18). Both of these judicial findings occurred after the hospital psychiatrists had rendered a medical opinion that he was insane (R2617-21). Dr. Patterson stated that the District of Columbia standard has

> two prongs are that either one does not know the difference between right or wrong based on mental illness or cannot control themselves.
>
> (R2616).[2]

Albert Holland was in St. Elizabeth's until June 12, 1986, and the diagnosis throughout that time was that he was suffering from schizophrenia, which at times reached the point of psychosis

[2] At both hearings the hospital doctors testified that they believed Albert knew right from wrong, but that he could not conform his conduct to the requirements of law due to mental illness (R2638-39).

(R2624-25). He was on psychotropic medication for much of that time (R2625-26). On June 10, 1986, a court again found that Albert Holland required hospitalization (R2630). On June 12, 1986, he ran away and did not return (R2631-32). He stated that the hospital rejected organic problems, but that an MRI could have changed this diagnosis (R2634).

Dr. Patterson stated that medical experts believe that an excess of the neurotransmitter dopamine is the cause of schizophrenia (R2635-36). This excess can cause hallucinations and delusions (R2636). Thorazine and other anti-psychotics are designed to block dopamine (R2636). Cocaine stimulates the production of dopamine (R2637). Cocaine can cause psychosis in a person without underlying problems (R2637). The likelihood of this is far greater in a person with a history of schizophrenia (R2637).

Dr. Thomas Polley, a clinical psychologist from St. Elizabeth's, testified concerning his psychological testing of Albert Holland. Albert Holland had a lot of chaos in his feelings (R2693). He viewed men as very threatening, fearful, and destructive (R2696). He had a lot of confusion concerning his relationship with his father (R2694). He also has intense dependency needs and experiences massive frustration when these are denied (R2695-96). He has no clear sense of self identity (R2692). His testing was also consistent with a person with sexual problems (R2697). He has few defenses and when stressed can be easily overwhelmed and become psychotic (R2698). His Rorschach test was consistent with a person with paranoid and psychotic thinking (R2698-99). Dr. Polley stated that Albert Holland was mentally ill when he saw him

(R2700). Dr. Polley stated that during Albert Holland's second 1982 incident he did not have the ability to conform his conduct to the requirements of law, but that he knew right from wrong (R2702). He required hospitalization (R2702-03). He had an underlying thought disorder the entire time he was at St. Elizabeth's (R2704). His five years at St. Elizabeth's indicated that he was not a malingerer (R2708).

Dr. Polley's tests indicated mild signs of organic brain impairment, but no gross signs (R2725). However, no neuropsychological testing was done at St. Elizabeth's (R2737). Dr. Polley felt that drugs reduced his ability to control his aggression (R2738-39). In a person with a thought disorder, drugs will worsen the problem (R2739). The defense then rested (R2742). Its renewed motion for judgment of acquittal was denied (R2743-44).

The prosecution called Oscar Mayers, an Assistant U.S. Attorney from the District of Columbia. He stated that in December, 1989, and March, 1990, he prosecuted Albert Holland under the name of Roberto Gomez (R2465). He did not pursue an insanity defense (R2465-67). He saw him in court on three occasions for 45 minutes and he was vocal about asserting his rights (R2469-81).

Martha Williams stated that she met Albert Holland in 1986, as Roberto Gomez (R2745). They dated for four to five months (R2748-49). Lee Smith stated that he met Albert Holland in 1986 in Maryland, just outside of the District of Columbia (R2752-53). He was a minister at that time (R2753). He met Albert Holland in August or September, 1986 (R2753). Albert Holland introduced himself in the front of his church (R2754). Albert eventually

moved into a camper on church property (R2754). Albert Holland worked around the church (R2755-56). He was there about three weeks (R2757). He went by Roberto Gomez (R2757). In January, 1988, Albert Holland told him that his name was not Roberto Gomez and that he had been a patient at St. Elizabeth's (R2757-60). Jerry Mahon, a pipe fitter foreman at Lawton Reformatory, stated that he supervised Albert Holland for four months in early 1990 (R2762-65). Mr. Holland went by Roberto Gomez (R2765).

Gregory Bailey, a District of Columbia policeman, stated that he participated in the arrest of Albert Holland for cocaine on November 28, 1989 (R2768-71). Mr. Holland attempted to flee and to grab his gun from his holster (R2771-72). He later threatened to kill him after he was arrested (R2774).

The prosecution called psychiatrist Dr. James Jordan (R2781). He first saw Albert Holland on March 16, 1991, for an hour (R2786). He saw him again on April 26, 1991 (R2786). He also reviewed records from St. Elizabeth's, police reports, and the report of the jail psychiatrist, and two psychologists, a videotape of Mr. Holland in the courtroom and a report by Dr. Love (R2786-88). He felt that Albert Holland was sane during the offenses, because his activity was "goal oriented" (R2790-95).

The prosecution then called Dr. Elizabeth Koprowski, a psychologist (R2808). She interviewed Mr. Holland on two occasions in September, 1990; once for 30 minutes and once for 45 minutes (R2811-12). She felt that he was incompetent to stand trial in December, 1991 (R2812-13). He could not challenge witnesses or testify (R2823). He did not understand the charges (R2821). She

later reviewed records from St. Elizabeth's, as well as material concerning the incident in question (R2814-15). In May, 1991, she interviewed him again for 50 minutes (R2815-16). Albert Holland reported having hallucinations when he smoked cocaine (R2816). She felt that he was competent in May, 1991, and that he was sane at the time of the offense (R2818-19). However, she continued to feel that he showed some signs of schizophrenia, such as social isolation and tangential thinking (R2829). She stated that he remained "deeply emotionally disturbed" (R2832).

Nathan Jones testified that he saw Albert Holland at about ten minutes after 5:00 p.m. at his church near Hammondville Road in Pompano Beach (R2836). Mr. Holland asked for food (R2838). He came in and played the piano (R2839). They gave him $5.00 and he left (R2839-40). He did not appear to be on drugs or alcohol (R2840). Albert Holland said afterward that he wanted to bless the church and that he would send $500 back to the church.

The prosecution then called Dr. Abbey Strauss, one of the psychiatrists at the Broward County Jail (R2849-50). He saw Mr. Holland for 15 minutes on August 3, 1990 (2853-56). He saw him again on August 10, 1990, and decided that he was malingering (R2856). During both of these interviews, there were five or six people in the room, including at least two deputies (R2884-2888). He was then hired by the prosecutor and reviewed records from St. Elizabeth's and material concerning the incident, and reports from Drs. Koprowski and Block-Garfield (R2858). He again attempted to see Mr. Holland in April, 1991, with the prosecutor's chief investigator (R2858). Mr. Holland refused to speak to them (R2858-

59). He stated that he feels Albert Holland is "not as sick as he was pretending to be" (R2860). He felt this because he felt his symptoms were inconsistent (R2861). He felt that Albert Holland was sane during both incidents (R2869). He confirmed that Albert Holland had been on Thorazine in the Broward County Jail (R2900). Dr. Strauss also stated that cocaine can make people hypersexual, even to the point of rape (R2905). Cocaine can also cause confusion (R2908). He stated that someone with mental problems can exaggerate their problems by malingering (R2912).

Both sides then rested and Mr. Holland's motions for judgment of acquittal and for mistrial were denied (R2913-16). The jury found Mr. Holland guilty as charged (R3084-85).

The prosecution recalled one witness in the penalty phase, Dr. Koprowski. She stated that she felt that Mr. Holland did not qualify for the statutory mental mitigating circumstances pursuant to Fla. Stat. 921.141(6)(b) ("the defendant was under the influence of extreme mental or emotional disturbance") and (6)(f) ("the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"). Dr. Koprowski testified that Albert Holland is mentally ill (R3134-35). She feels the fact that he functioned well on Thorazine for 3½ years is an indication that he had a serious mental problem (R3134-35). St. Elizabeth's diagnosed him as having schizophrenia (R3135). Cocaine has a strong effect on Albert Holland (R3137-38). She stated that he was not in a "rational" state at the time of the offense (R3140-41). The prosecution also entered into evidence a stipulation as to a

previous conviction of assault with intent to commit armed robbery from 1979 and rested (R3144).

The defense called Albert Holland, Sr. (Albert's father) (R3144). Albert seemed like a normal child until he was 16 when he began using drugs (R3146-47). Prior to age 16, he had been very good in sports and music and learned to speak Spanish (R3147-49). He moved away from home at age 17 (after he began using drugs) (R3149). He began to live with an older woman who was involved with drugs (R3149-50). He was sent to federal prison when he was 19 (R3151). The following took place when he was in the federal prison in Madison, Wisconsin:

> He was there for about a month when in October of '79, while waiting to go to work, he was attacked by a southern inmate who beat him with a mop wringer.
>
> He beat him in the face and broke the orbital bones around his ,eyes and his jaw, but at first they thought he had been killed 'till someone saw him breathing and exhaling and things, and they rushed him to the University of Wisconsin neurological department and they saved his life.

(R3151). He was in the hospital for several months (R3151-52).

After this beating and his release from prison, his behavior changed completely:

> He was very withdrawn, very depressive. He remained to himself, he would sit in the room with no lights on for long periods of time, and when I first brought him home, he wouldn't go out of the hose and he had contemplated suicide a couple times during this time.

(R3152). He also became very nervous, jumpy and edgy (R3152). "Anything upset him", even a dog barking (R3153). Albert was much better when he took Thorazine (R3154).

Rebecca Holland, Albert Holland's younger sister, confirmed that Albert Holland's change began with drugs (R3175). He then

changed "tremendously" after he was beaten (R3176). He became very hot tempered and argumentative and everything upset him (R3176). The jury recommended the death penalty by a vote of eleven to one (R3213-14). The trial court imposed the death penalty (R3240-43).

SUMMARY OF THE ARGUMENT

1. Mr. Holland was subjected to a compelled psychiatric exam by a jail psychiatrist, who became a key state witness on competency and sanity. This was done after he had invoked his right to counsel and right to remain silent and without notice to his counsel.

2. Extensive, irrelevant collateral crimes evidence was admitted over objection.

3. The trial judge sua sponte removed Albert Holland's appointed counsel without any reason.

4. The trial court conducted an inadequate inquiry into Mr. Holland's complaints about his subsequent counsel.

5. The court conducted an inadequate Faretta hearing and erred in refusing Mr. Holland's request to go pro se.

6. The court erred in granting the state's special instruction on felony-murder.

7. The court erred in proceeding without telephonic communications between Mr, Holland and his counsel,

8. Mr. Holland's statements should have been suppressed.

9. An inaudible videotape was admitted over objection.

10. The evidence of premeditation is legally insufficient.

11. The court erred in failing to release or review in camera grand jury testimony.

12. The court erred in allowing the state to proceed on felony-murder without proper notice.

13. The court erred in denying a continuance.

14. The court erred in denying penalty phase continuance.

15. Mr. Holland's absence from the hearing on the penalty phase continuance is reversible error.

16. The court erred in denying a requested instruction on duplicative aggravating circumstances.

17. The trial court improperly found an aggravator and in failed to consider: and find several non-statutory mitigators.

18. Death is disproportionate.

19. The court erred in failing to instruct on the use of intoxication during the offense as a mitigator.

20. The court erred in failing to instruct on Albert Holland's background and history of drug addiction as mitigation.

21. Aggravating circumstance 921.141(5)(d) (During an enumerated felony) is unconstitutional on its face and as applied.

22. Aggravating circumstance 921.141(5)(j) (Victim was a law enforcement officer) is unconstitutional on its face and as applied.

23. The court departed from the guidelines without a contemporaneous order.

24. The Florida death penalty is unconstitutional.

ARGUMENT

POINT I

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

The trial court overruled defense counsel's objections to the testimony of Dr. Strauss. This was reversible error as Dr. Strauss had examined Mr. Holland without notice to counsel, after he had invoked his right to remain silent and right to counsel. Powell v. Texas, 492 So. 2d 680, 109 S.Ct. 3146, 106 L.Ed.2d 55 (1989); Walls v. State, 580 So. 2d 131 (Fla. 1991). This was prejudicial as Dr. Strauss was the prosecution's only expert witness at the competency hearing and was a key prosecution witness on the issue of insanity. This denied Mr. Holland his right to counsel, right to remain silent, and rights to due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

On July 30, 1990, Mr. Holland appeared at a magistrate hearing (R3309-12). The judge found probable cause and ordered him held without bond (R3310-11). He told Mr. Holland:

> "You have a right to a lawyer. If you can't afford one the Court will appoint one for you. I'm going to appoint the Public Defender to defend you today."
>
> (R3310).

Mr. Holland's counsel then invoked his right to remain silent and right to counsel and cited 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, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). He stated that

Mr. Holland did not want to speak to anyone without an attorney from the Public Defender's Office present. The prosecutor was notified (R3311-12). The judge issued an order the same day which stated that no law enforcement officer speak to Mr. Holland without an attorney from the Public Defender's Office being present (R3300). On August 2, 1990, Mr. Holland filed a written notice of his invocation of his right to counsel and right to remain silent pursuant to the Florida and United States Constitutions (R3314).

Dr. Abbey Strauss, a contract psychiatrist with the Broward County Jail, saw Mr. Holland on August 3, 1990 (R94-95). He interviewed him in the presence of employees of Prison Health Services and jail deputies (R97-98). He interviewed him again on August 10, 1990, with four other employees of Prison Health Services and four deputies present (R103-04). His counsel was not present and did not have notice; and Mr. Holland was not warned of his right to remain silent and right to counsel (R78-152).

The prosecution moved for the release of all of Mr. Holland's mental health records and the right to interview his doctors in the District of Columbia on October 22, 1990 (R21-27). Defense counsel first objected to lack of notice for the hearing (R21). He stated that the release of this material would violate Mr. Holland's patient-psychotherapist privilege (R21-22). The prosecutor then expanded his motion to allow release of Mr. Holland's Broward County Jail records and the right to interview Mr. Holland's jail psychiatrist (R26). Defense counsel again objected (R26). The trial court issued an order that allowed the prosecution access to Mr. Holland's mental health records and the right

to interview Mr. Holland's treating psychotherapists including Dr. Strauss (R3368-73). The trial court's ruling was erroneous. Mr. Holland had filed no notice of insanity and he had not initiated the Competency hearing. The trial court sua sponte issued an order appointing psychotherapists to interview and evaluate Mr. Holland for competency and sanity on September 10, 1990 (R3325-27). (The court issued this order on the same day it was sua sponte removing Mr. Holland's counsel and appointing new counsel (R3324).) Mr. Holland was protected by the patient-psychotherapist privilege and it was error to rule that he had waived this privilege. In October, 1990, the only thing related to Mr. Holland's mental health the defense had done was to move far a confidential expert pursuant to Florida Rule of Criminal Procedure 3.216(a). This motion does not waive any other rights. Erickson v. State, 565 So. 2d 328, 332 n.5 (Fla. 4th DCA 1990).

Dr. Strauss was the prosecution's only expert witness at the competency hearing (R45-290). He based his testimony on his two interviews with Mr. Holland on August 3 and 10, 1990. He was paid $350.00 an hour by the State Attorney's Office (R130). Both of the court-appointed experts testified Mr. Holland was incompetent to stand trial (R153-196,198-223). The judge found Mr. Holland to be competent and stated he had never previously overruled the unanimous opinion of his court-appointed experts (R291).

Defense counsel filed a motion for a hearing to determine what information the prosecution had obtained from compelled psychiatric examinations (R4060-65). The motion invoked Mr. Holland's rights to remain silent and to counsel and to due process of law pursuant

to the Florida Constitution and the United States Constitution (R4060-65). At the hearing on the motion, defense counsel pointed out that he was especially concerned about Dr. Strauss and pointed out that Dr. Strauss initially saw his client as an employee of the jail (R577-78). Defense counsel also pointed out that the interviews predated the notice of insanity (R561).

The trial court deferred ruling (R582). In fact, the court never held the hearings requested by Mr. Holland's counsel. Prior to Dr. Strauss' testimony, defense counsel renewed his prior objections to Dr. Strauss' testimony (R2852). He objected that he first examined Mr. Holland as an employee of the state and became a state expert witness (R2853). The objection was overruled. Dr. Strauss then testified as an expert witness for the prosecution on the issue of sanity, relying (in part) on his two interviews of Mr. Holland (R2852-59). The admission of Dr. Strauss' testimony at the competency hearing and at trial was reversible error.

At the time of the competency hearing, Mr. Holland had not put his mental health in issue. He had not filed a notice of insanity and had not asked for a competency evaluation. The trial court had sua sponte appointed psychotherapists to evaluate his competency and sanity. Although, a trial court has authority to order a competency evaluation, it possesses no authority to sua sponte order a sanity evaluation, without a notice of insanity. This was reversible error. Defense counsel's objection to allowing the prosecution access to his Broward County jail mental health records and District of Columbia mental health records and allowing the prosecution to interview all of Mr. Holland's treating physicians

should have been sustained. At the time, he was clearly covered by the patient-psychotherapist privilege under Florida Statute § 90.503. The prosecution's argument that Mr. Holland had waived his patient-psychotherapist privilege by moving for a confidential defense expert pursuant to Florida Rule of Criminal Procedure 3.216(a) is simply false.

> It is clear therefore that a defense request for a[n] expert under rule 3.216(a) does not, by definition, operate to waive any of the defendant's rights, nor does it open the door for the state to present other psychiatric evidence.

Erickson, supra, at 332 n.5.

The purpose of the confidential expert is to allow defense counsel to freely explore the possibility of an insanity or intoxication defense or mental mitigation at the penalty phase. Defense counsel's objection should have been sustained.

Once a defendant actually invokes his right to counsel and right to remain silent, whether in custodial interrogation or in a court proceeding, the Fifth, Sixth, and Fourteenth Amendments prohibit further questioning. Edwards v. Arizona, supra; Michigan v. Jackson, supra. Under the Florida and Federal Constitutions the right to counsel attaches at first appearances. Phillips v. State, 612 So. 2d 557 (Fla. 1992).

On July 30, 1990, Mr. Holland went to a first appearance (or magistrate) hearing. The judge found probable cause, ordered him held without bond, and offered him counsel (R3309-12). He actually invoked his right to counsel and right to remain silent under both the Florida and United States Constitutions and the judge signed an order against law enforcement interviews. Dr. Strauss' testi-

mony at the competency hearing and at trial violated Mr. Holland's rights under the Florida and United States Constitutions.

It violates the Fifth and Sixth Amendments to the United States Constitution to introduce psychiatric evidence on future dangerousness based on an in-custody psychiatric exam conducted without notice to counsel. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 280 (1988). In Powell v. Texas, supra, the United States Supreme Court clarified that although introduction of defense evidence on insanity constitutes a partial waiver of a defendant's Fifth Amendment rights, the introduction of psychiatric evidence to support an insanity defense does not waive his Sixth Amendment right to consult with counsel. In Powell, supra, defense counsel had notice that his client would be examined for competency and sanity. However, he did not have notice that this would encompass the issue of future dangerousness. 109 S.Ct. at 3145.

The United States Supreme Court went on to hold this to be reversible error under Smith and Satterwhite. 109 S.Ct. at 3150. The Court stated:

> While it may be unfair to the State to permit a defendant to use psychiatric testimony without allowing the State a means to rebut that testimony, it certainly is not unfair to require the State to provide counsel with notice before examining the defendant concerning future dangerousness. Thus, if a defendant were to surprise the prosecution on the eve of trial by raising an insanity defense to be supported by psychiatric testimony, the court might be justified in ordering a continuance and directing that the defendant submit to an examination by a state-appointed psychiatrist. There would be no justification, however, for also directing that defense counsel receive na notice of this examination.

Id. at 3149.

The reasoning of Powell, supra, is consistent with Florida Rule of Criminal Procedure 3.216. This rule provides for compelled examination only after a defendant has filed notice of insanity and that counsel not only have notice of the exam, but have the right to be present. It violates the Sixth Amendment right to examine a defendant without notice to his counsel as to the exam and its scope. United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); United States v. Garcia, 739 F.2d 440 (9th Cir. 1984); Schantz v. Evman, 418 F.2d 11 (9th Cir. 1968).

The procedure here is more egregious than in Powell. Here, counsel had no notice of any evaluation, much less that Dr. Strauss would become a key state witness based on this interview.

The compelled exam by Dr. Strauss also violated Mr. Holland's Fifth Amendment rights. Although it is clear that the filing of a notice of insanity constitutes partial waiver of a person's Fifth Amendment rights to the extent necessary to rebut an insanity defense; this waiver does not occur until the notice is filed. This is implicitly recognized in Fla.R.Crim.P. 3.216's allowance of a compelled exam after the notice is filed. It is also implicitly recognized in State v. Burwick, 442 So. 2d 944 (Fla. 1983) and Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986). In Burwick, this Court held that it violated the Florida and United States Constitutions to allow the prosecution's use of post-arrest silence to rebut an insanity defense. Both courts held it to be fundamentally unfair to guarantee a

person the right to remain silent and then use his silence to impeach his insanity defense.

The same sort of unfairness occurred here. Mr. Holland had invoked his right to counsel and right to remain silent; a court had issued an order to this effect; yet, he was interviewed by a jail employee as to his mental state, and this became the basis for his testimony on competency and sanity. Indeed, Mr. Holland was explicitly penalized for exercising his right to remain silent. Dr. Strauss relied, in part, on Mr. Holland's remaining mute at his second interview for his diagnosis (R104-105,2856-57).

The conduct at issue violates the due process clauses of the Florida and United States Constitutions. Walls, supra. In Walls, a correctional officer approached the defendant and had conversations with him and used these to make notes as to his competency. Id. at 132. These were given to the prosecution's psychiatrists who relied on these at the competency hearing. Id. This Court held this to be a violation of the Due Process Clause of Article I, Section 9 of the Florida Constitution, The conduct at issue is equally egregious, It is improper to have a compelled examination by a jail doctor, in the guise of treatment, become the basis for that doctor's testimony on competency and sanity.

The error is harmful. Dr. Strauss relied on these two compelled interviews (with deputies present) to decide that Mr. Holland was competent and sane. He was the only prosecution expert witness at the competency hearing. Both court-appointed doctors stated he was incompetent. Dr. Strauss was also a key prosecution witness on the issue of sanity. Another prosecution expert witness

(Dr. Jordan) also reviewed Dr. Strauss' report before coming to his opinion (R2781). The defendant presented a strong case of incompetency and insanity. The court-appointed doctors both agreed he was incompetent. At trial, he presented the fact that he had twice been previously found not guilty by reason of insanity, and has been previously hospitalized. He presented an expert witness that he was insane. He also presented other experts to confirm his history of mental illness, severe head injury, and drug abuse. This case must be reversed and remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT COLLATERAL CRIMES TESTIMONY INTO EVIDENCE.

Mr. Holland was denied a fair trial by the admission, over objection, of irrelevant collateral crimes evidence. This evidence denied Mr. Holland due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. A new trial is required.

Mr. Holland filed a motion to exclude collateral crimes evidence (R4578-80). The motion was orally argued (R1704-07). Once the defense had completed its argument the prosecutor stated:

> MR. SATZ (The Prosecutor): Your Honor, if -- he's right if he doesn't raise the issue of insanity, once he raises the issue of insanity, if he puts on a defense, all those things are admissible and relevant because he's putting his whole -- whole mental status for years past into issue.
>
> (R1706).

Defense counsel again brought up this issue before the prosecution began to cross-examine defense witnesses regarding Mr.

Holland's alleged collateral offenses and the trial court denied the motion (R2583).

The prosecutor cross-examined Dr. Love about an alleged 1989 case where he was arrested for possession of cocaine with intent to sell and that he tried to grab the officer's gun and threatened the officers (R2483-84). Objections and motions for mistrial concerning this evidence were denied (R2584-89). He then proceeded to bring out a car theft, escape from St. Elizabeth's, and a robbery over objection (R2591-93). He then brought up the 1989 incident again (R2598).

This theme continued in the cross-examination of Dr. Patterson. He brought out a 1981 robbery, unlawful use of a motor vehicle, grand theft, and grand theft in 1981 (R2640-41). He also brought out a March, 1982, robbery where he supposedly stole the car and jewelry of two women in an underground garage (R2645). (He was also later found not guilty by reason of insanity on these offenses.) He also brought out an attempted robbery (that he was never charged with) from 1982 (R2648). The prosecutor: cross examined Dr. Polley about the March, 1982, incident (R2719,2722).

The prosecution's rebuttal case consisted heavily of collateral bad acts. The prosecution called a District of Columbia prosecutor solely to testify concerning his prosecution of Albert Holland, under the name of Roberto Gomez, for an alleged November, 1989, offense of possession of cocaine with intent to distribute and battery on a law enforcement officer (R2464-88). He brought out the fact that Mr. Holland was accepted in a pre-trial program and then did not show up for trial (R2472-78). The prosecutor

brought out that there was no notice of insanity filed (R2466-67).[3] He claimed Mr. Holland was "extremely vocal about asserting his rights" (R2469). He testified that Mr. Holand was concerned about bond (R2470-71). All of this was improper commentary on Albert Holland's exercise of his legal rigths in an unrelated case. The prosecution called Jerry Mahon, a pipefitting foreperson who allegedly supervised Mr. Holland for four months, in Lawton Reformatory under the name of Roberto Gomez (R2762-66).

The prosecution also called District of Columbia police officer Gregory Bailey to testify concerning an alleged incident which took place in November, 1989. Defense counsel objected to this testimony and his motion for mistrial was denied (R2767-75). He claimed that he and his partner received a call that someone was soliciting a minor to sell drugs (R2768). He claimed he saw three people, including Mr. Holland, involved in a drug traneaction (R2769). He claimed Mr. Holland dropped thirteen ziplock bags which he "believed to be rock cocaine" (R2770). He claimed that he and another officer tried to detain Mr. Holland and a fight ensued (R2771). He claimed that Mr. Holland tried to reach down and grab his gun (R2772-73). He claimed that Mr. Holland was then subdued and searched again and three other ziplock bags were found with what he believed to be cocaine in them (R2773). He said that Mr. Holland used the name Roberto Gomez (R2774). He claimed that Mr. Holland threatened to kill them after they had arrested him (R2774). He also claimed that Mr. Holland said that it took two

[3] Indeed, the case never went to trial, an insanity defense may ultimately have been pursued (R2478).

police and next time he'd have a gun (R2774). Officer Bailey claimed that Mr. Holland did not appear intoxicated (R2774).

This evidence was improper in several respects. First, the mandatory written notice was not filed. § 90.404(b)(1), Fla. Stat. (1989). Secondly, two of these collateral offenses were cases which Mr. Holland was found not guilty by reason of insanity. The introduction of evidence concerning collateral offenses of which a defendant has been acquitted is improper. Burr v. State, 576 So. 2d 278 (Fla. 1991); State v. Perkins, 349 So. 2d 161 (Fla. 1977).

This evidence was not relevant. The prosecutor admitted that this evidence would not normally be admissible (R1706). He then stated that when a person raises the defense of insanity his entire life is admissible, as he has put his mental status for his whole life at issue (R1706). The fact that a person is pursuing a valid defense recognized by Florida law should not lead to throwing out the restrictions of Florida Statute § 90.404 and Williams v. State, 110 So. 2d 654 (Fla. 1959) and its progeny.

An analysis of the collateral offenses in question shows that they are not relevant. The testimony concerning the facts of two collateral offenses which Mr. Holland was found not guilty by reason of insanity of are not relevant here. These offenses occurred 8 and 9 years before this offense, and bear no similarity to the current offense.

The testimony of Mr. Mahon, the prison pipe fitting foreperson, was irrelevant. It added nothing to the issue of whether Mr. Holland was sane at the time of this incident. It was solely designed to bring out Mr. Holland's prior incarceration.

The alleged collateral offense involving Officer Bailey was irrelevant. This testimony was solely designed to show some kind of propensity to struggle with a police officer when arrested. The Florida courts have rejected the admission of collateral offense evidence in analogous circumstances. Bolden v. State, 543 So. 2d 423 (Fla. 3d DCA 1989) (Improper to admit evidence of a battery on a law enforcement officer one year before the incident in a battery on a law enforcement officer case. The evidence was obviously designed to "show a propensity"). The evidence of the District of Columbia altercation is analogous to that in Bolden, supra.

Assuming, arguendo, this Court finds some relevance to this evidence, the prejudice of this evidence outweighs its probative value. Fla. Stat. 90.403. The most common purpose for introducing collateral crimes evidence is to show identity. The defenses in this case were insanity and intoxication. Any possible relevance of the underlying facts of collateral crimes which occurred months or even years before the current incident is highly questionable.

Assuming, arguendo, that this Court feels that this evidence was admissible, it was error to allow it to become a feature of the trial. The bulk of the prosecution's rebuttal case was devoted to witnesses concerning three prior violent incidents and the unrelated imprisonment. It was error to allow this evidence to become a feature of the case.

This was harmful error. Collateral offense evidence is presumed to be harmful. Keen v. State, 504 So. 2d 396, 401 (Fla. 1987). Mr. Holland produced a substantial case of insanity. Indeed, he had been found not guilty by reason of insanity on two

previous occasions and he had been involuntarily hospitalized in a psychiatric hospital for years. There was testimony concerning his use of cocaine and an immediate mood swing. The evidence concerning three collateral incidents and an unrelated imprisonment, may well have influenced the jury to ignore the substantial evidence of insanity.

Assuming, arsuendo, this Court finds this evidence to be harmless in the guilt-innocence phase, it is independently prejudicial in the penalty phase. Mr. Holland had not been convicted of any of the three collateral incidents. None of them were admissible in the penalty phase. The unrelated incarceration was inadmissible in the penalty phase. All of this improper evidence from the guilt phase may well have caused the jury to ignore the substantial psychiatric evidence in mitigation. At the very least, Mr. Holland's sentence must be reversed for a resentencing.

POINT III

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

The trial court removed Mr. Holland's original counsel, Mr. Bill Laswell of the Broward County Public Defender's Office without notice and an opportunity to be heard and without any explanation. This denied Mr. Holland due process of law and the effective assistance of counsel pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The Broward County Public Defender's office was appointed to represent Mr. Holland for purposes of the Magistrate Hearing on

July 30, 1990 (R3309-12). It was appointed for all purposes at his arraignment on August 27, 1990 (R1-5,3319). Mr. William Laswell was the Assistant Public Defender assigned to the case (R3320). The trial court sua sponte removed the Public Defender's Office and appointed private counsel on September 10, 1990. The court did this without a hearing, without notice to Mr. Holland or his counsel and without any grounds being given.

On September 19, 1990, Mr. Holland wrote the judge, asking that Mr. Laswell be reappointed (R3412). He stated:

> I, Albert Richard Holland, Jr., write to respectfully ask you to re-appoint Mr. William Laswell, as my attorney. I have established a good relationship with Mr. Laswell and his legal staff of workers. I prefer not to start all over again, with someone new to my case. I would like to have a speedy trial and I feel that the change in my legal counseling will hinder my chances to a speedy trial. Mr. Laswell also cares about me, more than I may explain in a few wards. I always feel that I am able to trust Mr. Laswell and that's important to me. Please carefully consider my request, that Mr. Laswell is real important to my case. Thank you very much.
>
> (R3412).

The trial judge never responded to Mr. Holland's letter.

On October 17, 1990, Mr. Holland again asked to have Mr. Laswell reappointed to his case (Rll-15). He stated:

> I know it's not appropriate right now, but I want to say that I had a lawyer by the name of Bill, he told me to call him Bill Laswell, and that was the best lawyer that I could have. I really like him and I trust him. I don't know what he [Mr. Giacoma] is trying to do. I don't like him or dislike him because of a person, but I don't think he is right for to handle to talk to me because I don't know what he is trying to do and I am scared to death. I think they're doing something up under the table.
>
> I would like to have Mr. Laswell back. Please, I beg you, I really do, and I pray to the Lord that you do that for me. I don't know what he is trying to do.

(R11-12).

Mr. Holland later asked again and the trial judge refused to reappoint Mr. Laswell and refused to give Mr. Holland any reason (R13). Mr. Holland made other complaints about his subsequent counsel and numerous requests to have Mr. Laswell reappointed to his case (R881-904). He had no attorney-client relationship with his new counsel. It was reversible error for the trial court to remove Mr. Laswell.

The well reasoned decision in Finkelstein v. State, 574 So. 2d 1164 (Fla. 4th DCA 1991), controls this case. In Finkelstein, the trial court removed the Public Defender's Office as the Assistant Public Defender refused to proceed on substantive motions until his client's competency was determined. The Fourth District Court of Appeals held this to be a departure from the essential requirements of law. Id. at 1167.

The reasoning of Finkelstein has been applied by other courts. In Ull v. State, 613 So. 2d 928 (Fla. 3d DCA 1993), a county court judge appointed the Public Defender's Office to a misdemeanor. Id. The prosecution later certified that it would not seek jail time; thus the appointment of counsel was not required under Argesinger V. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). The trial court then removed the Public Defender's Office from the case. The Third District reversed and held that once a Public Defender's Office is appointed an attorney-client relationship is entered into that can not be ended by a trial court without good cause. Id. at 929.

Other courts have held that once an indigent has appointed counsel, the court may not sever this relationship without good cause. Harling v. United States, 387 A.2d 1101 (D.C. App. 1978); Smith v. Superior Court of Los Angeles County, 68 Cal.2d 547, 68 Cal.Rptr. 1, 44 P.2d 65 (1968). In re M.R.J., 400 N.W. 147 (Minn.Ct.App. 1987); Stearnes v. Clinton, 780 S.W.2d 216 (Tex.Ct. App. 1989). Here, the trial court removed Mr. Holland's counsel without a hearing. Mr. Holland complained about this procedure by letter and at the next court proceeding. The trial court gave absolutely no reason for his action. This was reversible error. Mr. Holland had a very close attorney-client relationship with Mr. Laswell. He never developed such a relationship with his subsequent counsel. This case must be reversed for a new trial.

POINT IV

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

Mr. Holland made numerous complaints about the adequacy of his court-appointed counsel. The trial judge did not conduct an adequate inquiry into these complaints. This denied Mr. Holland due process of law and the effective assistance of counsel pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

Mr. Holland was originally represented by Mr. William Laswell of the Broward County Public Defender's Office. The trial judge sua sponte removed the Public Defender's office from the case, without a hearing. Mr. Holland made a series of complaints about

his new court-appointed counsel which the trial judge often totally ignored and never adequately investigated.

On October 17, 1990, Mr. Holland asked for Mr. Laswell to be reappointed, but also made complaints concerning his new counsel:

> MR. HOLLAND: I know it's not appropriate right now, but I want to say that I had a lawyer by the name of Bill, he told me to call him Bill Laswell, and that was the best lawyer that I could have. I really like him and I trust him.

Mr. Holland went on to describe his current counsel:

> I don't know what he is trying to do. I don't like him or dislike him because of a person, but I don't think he is right for to handle to talk to me because I don't know what he is trying to do and 1 am scared to death. I think they're doing something up under the table. I really don't know what he is doing.
>
> I would like to have Mr. Laswell back. Please, I beg you, and I pray to the Lord that you do that for me. I don't know what he is trying to do.

(R12-13).

The judge made no inquiry concerning his complaint about trial counsel (R12-13). Mr. Holland said that his counsel had failed to keep him informed about his case and that this had caused him to be "scared to death" (Rll-12). The judge just told Mr. Holland that he could not have Mr. Laswell back (R13). The trial court had a duty to inquire about counsel's failure to keep Albert Holland informed about his case. This failure is reversible error.

Mr. Holland asked to be heard concerning his counsel on July 1, 1991 (oneweek before trial) and the trial judge refused to hear him (R450). This was reversible error. One week later, July 8, 1991, the trial court finally agreed to hear Mr. Holland (R881). Mr. Holland stated that his attorneys refused to give him copies of his depositions (R882). He stated that they had ignored him

throughout his case (R882). He stated that he disagreed with the insanity defense (R883). He stated that he had been "ineffectively assisted by counsel" (R883). Be had requested his attorneys file a motion to recuse the judge and they had refused to do so (R884). He felt that the judge specially kept the case after retirement and felt that the judge was biased against him as the judge was an ex police officer (Mr. Holland was charged with killing a police officer.) (R884-85). He stated the judge had pre-judged the sentence (R886-87). He felt his attorneys were deceiving him and working with the prosecution (R886-87). He asked far new counsel and he stated he had a conflict with his attorneys (R889,893-94).

The trial court then asked counsel to respond (R898). Trial counsel confirmed that Mr. Holland had requested a recusal motion be filed but that the attorney felt that the motion was not proper (R898-99). Both trial counsel confirmed that Mr. Holland anly had a small portion of the depositions, but that they had been "rushing to finish discovery" (R899-900). As to the claim of ineffective assistance, counsel responded as follows:

> So, as I think we have previously indicated to the Court that we did ask for a continuance and I do think that -- I've only been on the case three-and-a-half months and I do feel that I would benefit in defending Mr. Holland, we all would benefit Mr. Holland by some additional time to prepare the case.
>
> That's all I have to say as to that, the Court's ruled on a motion for continuance, but as far as anything else goes, I don't have any comment.

(R899).

Mr. Holland also asserted that the defense investigator had lied to him (R903-03). The trial court denied his motion for new counsel without any further inquiry. This was reversible error.

Mr. Holland made several other attempts to raise complaints about his counsel, which the court refused to hear (R919-20,1039-40,1148,1150,1166-72,1227-29,1235,2169-70).

Immediately after the verdict, Mr. Holland asked for new counsel for the penalty phase (R3090). The trial court ignored his request (R3090). Immediately prior to the penalty phase, he again asked for new counsel (R3118-29). He stated that his counsel had not provided effective assistance (R3118). He pointed out that the judge has two sons who are police officers (R3119). He stated that his attorneys had selected too many women on the jury, over his objection (He was charged with sexual battery and attempted murder of a woman) (R3120,3122). He stated that there were other witnesses that should have been called (R3118,3121). He complained that he had never consented to an insanity defense (R3123). He mentioned counsel's failure to keep him informed on this case (R3126). He pointed out that one of his attorneys was a former prosecutor and the other is a former police officer (R3128-29). The trial court denied the motion without any inquiry (R3129). The trial court made no inquiry into the allegations that his attorneys could not provide effective assistance of counsel even though on August 8, 1991 (four days earlier), his counsel argued for a continuance of the penalty phase (R3093-94). His counsel stated that:

> DEFENSE COUNSEL: We've really never had time to so through the Penalty phase because we were trying to set ready for the case itself.
>
> (Emphasis supplied) (R3093).

The trial court erred in failing to inquire concerning Mr. Holland's statement that his counsel could not provide him effective assistance; especially in light of counsel's admission that he was not prepared for the penalty phase. This was reversible error, requiring a new penalty phase.

The trial court committed reversible error in four respects. First, the court erred in failing to make any inquiry whatsoever concerning Mr. Holland's original complaint concerning counsel; which was made months before trial. Second, when Mr. Holland attempted to again voice complaints about his counsel, one week prior to the trial, the trial court refused to even hear him. Third, when the trial judge finally made an inquiry into Mr. Holland's request for new counsel; it was inadequate. Indeed, the limited information revealed during the inquiry supported the ineffective assistance allegation, or at the very least, required a further inquiry. Finally, the trial court completely ignored Mr. Holland's requests for new counsel prior to the penalty phase.

When a defendant wishes to discharge his court-appointed counsel, the trial court has a duty to inquire into the complaint. Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988); Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973).

Mr. Holland moved to discharge his court-appointed counsel in October, 1990, months before trial (Rll-13). He stated his counsel was not keeping him informed concerning his case (Rll-13). The judge made no inquiry whatsoever. This was reversible error. Brooks v. State, 555 So. 2d 929 (Fla. 3d DCA 1990); Black v. State, 545 So. 2d 498 (Fla. 4th DCA 1989); Chiles v. State, 454 So. 2d 726

(Fla. 5th DCA 1984). The trial court again committed reversible error when it refused to hear Mr. Holland's request to discharge counsel on July 1, 1991 (R450). Brooks, supra, at 930; Williams v. State, 532 So. 2d 1341, 1342 (Fla. 4th DCA 1988).

The trial court conducted an inadequate inquiry when it finally allowed Mr. Holland to speak on July 8, 1991 (R881). Mr. Holland stated that he was receiving ineffective assistance (R883). He had not given him copies of discovery and had ignored him throughout the case (R887). He had not agreed with the insanity defense (R883). He also complained that they had failed to file a motion to recuse the judge (R884). He stated that his attorneys were deceiving him and working with the prosecutor (R886-87). The trial court conducted an inadequate inquiry as to these concerns. His attorney confirmed that he had requested a motion to recuse, but he did not feel it was merited (R898-899). He confirmed that Mr. Holland only had a small portion of the discovery, but that they had been "rushing to finish discovery" (R899-900).

The most important complaints of Mr. Holland were not investigated. The complaint concerning the insanity defense was not investigated. The complaints that counsel had not kept him informed and had deceived him were not inquired into. As to the core complaint of ineffective assistance, counsels' answer actually supported this complaint. Counsel stated that they had requested a continuance and needed more time to prepare (R899). The court had a duty to do one of two things at this point. (1) Grant the motion to appoint new counsel or (2) inquire further. The court did neither. This was reversible error.

The trial court must make an adequate inquiry of both the defendant and counsel. Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991); Kearse v. State, 605 So. 2d 534, 536 (Fla. 1st DCA 1992). Here, the trial court failed to inquire into several serious complaints and the only information it had supported the complaint of ineffective assistance. Reversal is required.

The trial court again committed reversible error when it failed to inquire concerning Mr. Holland's complaint prior to the penalty phase. Mr. Holland again asked for new counsel prior to the penalty phase (R3090, 3118-29). The trial court made no inquiry whatsoever into his serious complaints despite counsel's previous admission that he was unprepared for the penalty phase (R3093). A defendant's request for new counsel for sentencing must be investigated, just as one prior to trial. Lockwood v. State, 608 So. 2d 133 (Fla. 4th DCA 1992). Assuming, arguendo, that the trial court's prior actions were appropriate, this error mandates a jury resentencing.

POINT V

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

Albert Holland made consistent requests to represent himself. The trial court made an inadequate inquiry into his ability to represent himself and in refusing to allow him to represent himself. This denied Mr. Holland due process of law and his right of self-representation pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The Office of the Public Defender was originally appointed to represent Mr. Holland (R3319). Mr. William Laswell was the Assistant Public Defender assigned to the case. The trial judge removed the Public Defender's Office and appointed private counsel (R3324). On October 17, 1990 (months before the eventual July, 1991, trial), Mr. Holland specifically asked to have Mr. Laswell back and then stated:

> If I can't have Mr. Laswell, I would like to try to represent himself.
>
> (R15).

The trial court asked Mr. Holland about his education, made no further inquiry, and never ruled on his request for self-representation (R15-16). This was error. On July 1, 1991, Mr. Holland's attorney stated that he wanted *to* speak to the court concerning counsel (R450). The judge refused to hear him (R450). On July 8, 1991 (one week later), the trial court agreed to hear Mr. Holland. He made numerous complaints about his counsel (**See** Point IV). He stated that he would rather appear **pro se** than be represented by his current attorney (R889,902-03). The trial court makes no inquiry whatsoever and states that Mr. Holland is not qualified to represent himself (R904).

Mr. Holland makes several other explicit requests to represent himself, which the trial court ignored (R1171,1174-75). The prosecutor eventually brings up the need to have some sort of inquiry, pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2545, 45 L.Ed.2d 562 (1975) (R1212-14). The trial court obviously felt such an inquiry was unnecessary (R1214):

THE COURT: Well, I think then we've gotten to the point where we have court by magic words. We have to stop and ask him every day how old are you. That's the first question. We've got to ask him his age every day whether he says something.

(R1214).

Subsequent inquiry was an after-the-fact rationalization of the judge's prior decision to ignore and/or deny Mr. Holland's request to appear pro se.

The trial court began its inquiry as follows:

THE COURT: And we had a matter yesterday -- the day before yesterday you told me that you felt you weren't competent to defend yourself. You weren't qualified.

THE DEFENDANT: I would like to clear that up.

THE COURT: And yesterday now you said you want to fire your lawyers and defend yourself.

THE DEFENDANT: I just want to clear that one term up that you said about competent. What I meant qualified in terms of -- I don't know what depositions or anything. I'm saying as far as mentally competent I'm competent. They're [his lawyers] incompetent.

THE COURT: Well, I think you're mentally competent, too. I made that finding that you are mentally competent.

(R1227) (italicized material supplied).

The court later continued an inquiry:

THE COURT: How old are you?

THE DEFENDANT: How old am I?

THE COURT: Yes, sir.

THE DEFENDANT: I'm 33 years of age.

THE COURT: 33. How many times have you been hospitalized for mental health, Mr. Holland?

THE DEFENDANT: I don't know. I don't know about that.

THE COURT: You don't know how many times? How much education do you have?

THE DEFENDANT: I've been to school. I have a high school education.

THE COURT: High school. Where did you graduate?

THE DEFENDANT: I didn't graduate.

THE COURT: How far did you get?

THE DEFENDANT: I have a high school education. I have a GED.

THE COURT: GED. Okay.

(R1229-30).

The judge then asked the prosecutor about prior psychiatric hospitalization who stated that there had been two in the early 1980's (R1231-33). The court then asked Mr. Holland if he had ever represented himself in court and if he understood the seriousness of the charges (R1232). Mr. Holland stated that he had not represented himself in court previously and that he understood the seriousness of the charge (R1239).

The trial court's findings are as follows:

THE COURT: Okay. I'm going to make a finding, Mr. Holland, that you are not qualified to represent yourself. The fact that you've been committed for mental health problems at or on at least three occasions for the last decade, the fact that you're apparently under some illusion now that we are playing some type of game, I think you're competent. I think you know right from wrong. I think that you're very eloquent. You certainly are very literal. Literal, but if you think we are playing some gave you are under some illusion ..

(R1237).

Mr. Holland asked to represent himself on other occasions during the trial which the court ignored (R1234,1249-50).

Mr. Holland again asked to represent himself, prior to the penalty phase (R3118-19,3128-29). The trial court denied this request without an inquiry (R3129).

The trial court erred in holding an inadequate hearing and in denying Mr. Holland's right of self-representation. The right to self-representation is implicated by both the United States and Florida Constitutions. Faretta, supra, and State v. Casetta, 216 So. 2d 749 (Fla. 1969). Both Faretta and Capetta hold that there is a right of self-representation by a competent defendant who knowingly and intelligently waives his right to counsel. 422 U.S. at 836-37; 216 So. 2d at 750. See also Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989).

The trial court initially ignored Mr. Holland's request to represent himself months before trial. He then denied his request the week before trial without any inquiry. The failure to conduct any inquiry whatsoever on these two occasions was reversible error. Kimble v. State, 429 So. 2d 1369 (Fla. 3d DCA 1983); Kleinfeld v. State, 568 So. 2d 937 (Fla. 4th DCA 1990).

The trial court's ultimate "inquiry" was a post hoc rationalization. It was only at the insistence of the prosecution and with great reluctance that the trial court made an inquiry. Both the prosecutor and the judge thought that such an inquiry was unnecessary and was being done "for the record." The prosecutor stated:

> I would ask the Court, you know, in an abundance of caution, for the record, if the court would make that inquiry of the defendant.
>
> (R1213).

The judge then expressed his belief that such an inquiry was a waste of time (R1213). The following colloquy occurred:

> PROSECUTOR: And that's what Faretta talks about to. And I agree with you. I don't think it's really necessary, but the Supreme Court of the United States -- Supreme

Court of Florida says every time that he says that it is necessary it's very brief.

THE COURT: Well, I think then we've gotten to the point where we have court by magic words.

(R1214).

The judge was just following the prosecutor's lead to do something "for the record," that they both considered a waste of time. In essence, this was no inquiry at all, as the judge had already pre-determined the result. This was reversible error.

The trial court's ultimate decision to deny Mr. Holland his right of self-representation was also error. Mr. Holland was 33 years old with a GED degree. The trial court's sole basis for denial was the fact that Mr. Holland had been hospitalized for mental health problems in 1981 and 1982. The trial court made no effort to find out what effect these problems had on Mr. Holland at the time of his trial. This refusal to allow Mr. Holland to go pro se was contrary to other actions of the judge and the decisions of this Court. In Coode v. State, 365 So. 2d 381 (Fla. 1979), this Court held that it was proper to allow Mr. Goode to represent himself. This Court reached this conclusion even though the defendant had filed a notice of insanity and all four psychiatrists who testified said that he had "a mental disorder" and one of them stated he was incompetent to stand trial. 365 So. 2d at 389.

This Court reached a similar result in Muhammad v. State, 494 So. 2d 969 (Fla, 1986), even though Muhammad's counsel had filed a notice of insanity. He had been previously hospitalized for schizophrenia and there had been several diagnoses of schizophren-

ia. Id. at 971. In Muhammad, this Court expressed the application of Faxetta to a mentally ill defendant:

> The Faretta standard does not require a determination that a defendant meet some special competency requirement as to his ability to represent himself. The *Faretta* Court noted that the question of whether the defendant had sufficient technical legal skills to represent himself was irrelevant to waiver of counsel. If one may be intellectually incompetent in legal skills yet waive counsel, then no standard of mental competence beyond competence to stand trial is required. Mental competency in the context of *Faretta* only relates to the ability to waive the right to counsel.

Id. at 975.

This Court's decisions in Muhammad and Goode require that Mr. Holland be allowed to represent himself.

The trial court's reliance on the prior hospitalizations to deny the right of self-representation is contrary to other rulings the trial court made in the case. The judge found Mr. Holland competent to stand trial. He also found no statutory or non-statutory mitigation concerning Mr. Holland's mental state at the time of the offense (even though he was under the influence of cocaine at the time). If Mr. Holland's mental problems do not even rise to the level of mitigation, how can they be so great to deny him his right of self-representation? These findings are contradictory.

The trial court also erred in failing to make any inquiry into Mr. Holland's right of self-representation when he again request to represent himself prior to the penalty phase. Sentencing is a critical stage of the proceedings for counsel purposes. Mempa v. Ray, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). The trial

court had a duty to make an inquiry concerning Mr. Holland's desire to exercise his right of self-representation at the penalty phase.

POINT VI

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

The trial court erred in granting the prosecution's special jury instruction concerning felony-murder. This instruction relieved the prosecution of its burden on crucial elements of felony-murder. This denied Mr. Holland due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The prosecution requested the following special jury instruction be added to the felony-murder instruction.

> It is also not necessary for the state to prove that the defendant had a specific intent to commit a sexual battery in order for you to find that the death of Scott Winters occurred a3 a consequence of, and while the defendant was engaged in, or attempting to commit or while escaping from the immediate scene of a sexual battery, since specific intent is not an element of sexual battery.
>
> If you find that the death of Scott Winters occurred as a consequence of and while Albert Holland was engaged in or attempting to commit or while escaping from the immediate scene of a robbery, you must find the defendant had the specific intent to commit the robbery, and specific intent is an essential element of the offense of robbery.

(R3048-49).

The prosecution requested this instruction, ostensibly to clarify which underlying felonies are specific intent crimes for purposes of voluntary intoxication **(R2945-49)**. Defense counsel pointed out how this was already spelled out in the voluntary

intoxication instruction (R2943-49). Indeed, the instructions spelled this out elsewhere (R3072-74,4691-93). The trial court gave the instruction over objection (R2949,3048-49,4661-62).

This instruction is prejudicial, as it relieved the prosecution of its burden of proof on an essential element under several theories of felony-murder. The complete instructions on felony-murder were:

> Now, as to felony murder, before you can find the defendant guilty of that, first degree felony murder, the state must first prove the following three elements beyond a reasonable doubt.
>
> Number one, Scott Winters is dead. Number two, the death occurred as a consequence of and while Albert Holland was engaged in the commission of a sexual battery and/or robbery.
>
> Or the death occurred as a consequence of and while Albert Holland was attempting to commit sexual battery and/or robbery.
>
> Or the death occurred as a consequence of and while Albert Holland was escaping from the immediate scene of a sexual battery and/or robbery.
>
> Number three, Albert Holland was the person who actually killed Scott Winters.
>
> In order to convict of first degree felony murder, it is not necessary for the state to prove that the defendant had a premeditated design or intent to kill.
>
> It is also not necessary for the state to prove that the defendant had a specific intent to commit a sexual battery in order for you to find that the death of Scott Winters occurred as a consequence of, and while the defendant was engaged in, or attempting to commit or while escaping from the immediate scene of a sexual battery, since specific intent is not an element of sexual battery.
>
> If you find that the death of Scott Winters occurred as a consequence of and while Albert Holland was engaged in or attempting to commit or while escaping from the immediate scene of a robbery, you must find the defendant had the specific intent to commit the robbery, and

specific intent is an essential element of the offense of robbery.

Okay. I will define the crimes sexual battery and robbery for you at a later time in just a few minutes.

(R3047-49,4661-62).

The special instruction relieves the prosecution of its burden of proof on an element. The paragraph concerning sexual battery specifically tells the jury that "It is also not necessary for the state to prove that the defendant had a specific intent to commit a sexual battery" in order to prove attempted sexual battery (or escape from an attempted sexual battery). This is a misstatement of the law. Attempted sexual battery requires "specific intent to commit the crime." L.J. v. State, 421 So. 2d 198 (Fla. 3d DCA 1982); Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980). This relieved the state of its burden to prove intent on a felony-murder theory of attempted sexual battery (or escape from an attempted sexual battery).

The robbery paragraph is also inaccurate and relieves the prosecution of its burden to prove intent. The instruction tells the jury that if they find the death occurs during a robbery, attempted robbery, or escape from a robbery, they "must find the defendant had the specific intent to commit the robbery and specific intent is an essential element of the robbery." The jury is correctly told that specific intent is an element. However, immediately before they are told this they are told they must find the defendant had this intent if they find the death occurred during a robbery, attempted robbery, or escaping from a robbery. This instruction thus told the jury if there was a robbery,

attempted robbery, or escape from a robbery there was specific intent. There is a "reasonable likelihood" that the jurors understood this to be a mandatory conclusive presumption which relieves the prosecution of its burden of proof on intent.

Specific intent is an element of robbery that the jury must be instructed on. Daniels v. State, 587 So. 2d 460 (Fla. 1991); Bell v. State, 394 So. 2d 979 (Fla. 1981). Jury instructions which relieve the prosecution of its burden of proof on an element violate due process. Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 2420, 105 L.Ed.2d 218 (1989); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

These improper instructions on both prongs of felony-murder were harmful error. Appellant has argued that the evidence of premeditation is legally insufficient. See Point X. At best, it was very weak. Felony murder was crucial to the prosecution's case for first-degree murder. The issue of intent was also a crucial issue in the case given the evidence of insanity and intoxication. A new trial is required on first-degree murder.

A new trial is also required on robbery and sexual battery. Although these instructions were given in the context of felony-murder instructions, they may well have also misled the jury an the substantive offenses of robbery and sexual battery.

These instructions are also prejudicial on the offense of attempted first-degree murder (Count IV) as the attempted first-degree murder instructions do not preclude the theory of felony-murder (R3061-69,4677-78).

POINT VII

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

The trial court forced counsel to continue the trial withaut any means of communication between counsel and Mr. Holland. This denied Mr. Holland due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

During jury selection, the trial judge removed Mr. Holland for disrupting the proceedings (R1249-50). Defense counsel objected to continuing without any ability to communicate with his client (R1251-52). That trial court stated that it was having telephone communication set up, but that it would not wait until that was done (R 1252). Jury selection continued without any ability to consult with Mr. Holland. Telephone communication was established later in the jury selection process (R1414).

The United States Supreme Court has held that a trial judge may remove a defendant from the courtroom who persists in disruptive conduct. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). In a concurring opinion, Justice Brennan stated:

> I would add only that when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible.

397 U.S. at 352 (opinion of Brennan, Jr. concurring).

This Court has recognized the importance of immediate communication between a defendant and his counsel. Myles v. State, 602 So. 2d 1278 (Fla. 1992). In Myles, supra, a trial court properly allowed a child victim to testify in chambers, via a closed-circuit television. The trial court forced the defendant to communicate with his lawyer through messages delivered via the bailiff. This Court held this to be error, as Article I, Section 16's guarantee of the right to counsel requires immediate communication via electronic means. Id. at 1280.

In the context of shackling a defendant, whether for disruption or security reasons, the courts have consistently held that a judge can only pursue this alternative if there are no "less restrictive alternatives." Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); Elledge v. Dugger, 823 F.2d 1439, 1452 (11th Cir.), modified on other grounds, 833 F.2d 250 (11th Cir. 1987). In Jones v. State, 449 So. 2d 253 (Fla. 1984), this Court approved the shackling of a defendant because "it was the least restrictive means available to the trial court." Id. at 262.

There was easy capability of 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. This was "the least restrictive means available" to maintain courtroom decorum and to maintain a defendant's right to consult with his counsel.

Jury selection is a stage of the trial, where a defendant's absence thwarts "fundamental fairness." Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982). A defendant's improper absence is

reversible error. Francis, supra. Here, the trial court erred in proceeding with trial before establishing telephonic communication between Mr. Holland and his counsel.

POINT VIII

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

Mr. Holland's police statements were involuntary and were taken after he had invoked his right to counsel. The admission of this evidence violated Mr. Holland's right to counsel and right to remain silent pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Defense counsel filed a pre-trial motion to suppress, specifically alleged a violation of the rights to counsel and self-incrimination (Appendix).[4] The prosecution filed a written response (R4186-94). A hearing was held on the motion, which the court denied (R447-524,4531-32). Defense counsel renewed his objections when the statements were introduced (R2382). He had also objected to Detective Butler's testimony at the competency hearing on similar grounds (R970).

The evidence presented at the hearing demonstrates that Mr. Holland invoked his right to counsel and the police subverted it. Albert Holland was arrested at 7:30 p.m. on July 29, 1990 (R452). At 8:57 p.m. he was interrogated (R454-55). He spoke Spanish and gave his name as Antonio Rivera (R453-55). He invoked his right to counsel and the interrogation ceased (R456-57).

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[4] The written motion is not in the current record. A copy is attached as an appendix.

Later, two Spanish-speaking officers, Officer Rios from the Broward Sheriff's Office and Officer Perez of the Pompano Beach Police Department, interrogated him for half an hour "to get background information on the defendant" including "anything that's required on the booking sheet" **(R457-62).** Officer **Rios** conducts seminars in interrogation (R459-60). Officer Juan Cabrera, a bilingual officer, was placed outside Mr. Holland's cell **"in** case he would **say** something" (R471). This **was** an unusual procedure **(R471).**

Officer Butler was assigned to be one of the investigating detectives on the **case** at 8:00 p.m. on July **29,** 1990 (R469). At 1:00 a.m. on July 30, **1990,** he went to Albert Holland's cell. He stated that because the name Antonio Rivera didn't show any prior criminal history, he assumed it was a false name **(R470).** He also stated that because witnesses stated that the perpetrator spoke English, he felt the defendant spoke English (R471). Officer Butler then went to Mr. Holland's cell at 1:00 a.m. on July 30, 1990 (R472). He testified that the following took place:

> Q (Prosecutor): Okay. What happened when you went down to the jail?
>
> A (Officer Butler): I went down to the jail, Albert **was** sitting in a cell, and I went in, I told him who I **was,** and I told him that -- I didn't believe that he had given the right name and I told him it was important, you know, for him to tell the truth **and just** give us his real name so we know who he is, and basically, that was it.
>
> And I told him I wasn't there to talk to him about what happened, I said that **was** all over, I was just there for the one purpose was to find out his true identity. **...**
>
> I basically asked, you know, if you -- you know -- if you tell the truth, it will certainly look favorable in the sense that at least if he's honest about his name, and, you know, I told him, you know, again, I said that I

can't talk to you about what happened, I said, you've already asked for an attorney.

I said, I just need you to be truthful. I said, eventually, we're gonna find out who you are through fingerprints, you're not gonna be released, and that was basically it.

Q. So, what did he say?

A. He said, my name is Albert Holland.

Q. And then what happened?

A. I said okay, fine, I appreciate you being honest with me. I gave my card and I said if you ever want to talk to me, you can call me and I left.

Q. All right. He had already been booked?

A. I believe he was, I'm not positive. I know they did get fingerprints from him, but I don't know if he had been fully booked or not.

(R472-73).

At 2:30 a.m. Mr. Holland was again brought to the booking area to obtain additional photographs and fingerprints under the name of Albert Holland (R474). Officer Butler was standing in the area and they made eye contact (R475-76). Mr. Holland allegedly said, "Can I talk to you?" (R476). Officer Butler took him to an interrogation room, read him his Miranda rights and proceeded to interrogate Albert Holland, after he signed a waiver form (R476-82). During the interview, Mr. Holland threw up (R515). The vomit smelled like alcohol. Mr. Holland was extremely tired (R515-16). He stated that Mr. Holland stopped two or three times and asked if he was going to be beaten (R486).

A person who invokes his right to counsel may not be interrogated by law enforcement. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

> Interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1989).

The police actions in this case, especially the actions of Detective Butler, constituted continued interrogation designed to undermine Mr. Holland's invocation of counsel.

Questions concerning background and identity can constitute interrogation. State v. Madruga-Jiminez, 485 So. 2d 462 (Fla. 3d DCA 1986) (Questions concerning background, employment history and trip from Cuba to the United States constitute interrogation); United States v. Poole, 794 F.2d 462 (9th Cir. 1986) (Background questions that led to defendant giving a false name constitute interrogation); united States v. Hinkley, 672 F.2d 115 (D.C. Cir. 1982) (25 minute background interview constitutes interrogation to rebut an insanity defense).

Mr. Holland invoked his right to counsel. The officers then conducted a thirty minute background interview. Then Detective Butler approached Mr. Holland. The actions of Detective Butler were designed to undermine Mr. Holland's previously invoked right to counsel. Detective Butler was one of the investigating detectives assigned to this case. He was **not** a jailer routinely assigned to book people into the jail. In Hinkley, **supra**, the Court found it significant that the FBI was conducting the background interview and not a routine booking officer. 672 F.2d at 122-123. Officer Butler testified that witnesses had told him that the perpetrator spoke English. His express purpose of establishing

that the person in custody spoke English was designed to invoke an incriminating response. Indeed, if the person in custody did not speak English, he could not be the perpetrator. His comments to Mr. Holland were also designed to undermine his previously invoked right to counsel. He said it was "important to tell the truth" and "if you tell the truth, it will certainly look favorable" (R472-73). Although these remarks were in terms of Mr. Holland's name, they may well have left a double message in terms of being "truthful" about the offense.

Detective Butler's giving Mr. Holland his card and saying to call him if he wanted to talk about it was designed to undermine Mr. Holland's right to counsel. Zeigler v. State, 471 So. 2d 172 (Fla. 1st DCA 1985); Cannady v. Dugger, 931 F.2d 752 (11th Cir. 1991). In Zeigler, supra, the defendant invoked his right to counsel in Quincy, Florida. Id. at 173. He was transported to Jacksonville without interrogation. As the van pulled up to the jail, the officer stated:

> If he wanted to make a statement or say anything he could at this time because there wasn't going to be no tomorrow, the ballgame was over, he was going to be booked in jail.

Id. at 173-74.

The court held this to be an improper undermining of the defendant's Edwards rights.

In Cannady, supra, the defendant invoked his right to counsel and the police asked him, "if he wanted to talk about it." 931 F.2d at 754. The Court held this to be an improper derogation of his Edwards rights. Zeigler and Cannady make clear that police "invitations" to speak further about the case are improper after

an invocation of the right to counsel. Detective Butler was trying to undermine Mr. Holland's previously invoked right to counsel.

The 2:30 a.m. meeting with Detective Butler was also highly suspicious. Mr. Holland had previously been fingerprinted and photographed and he was brought out to have this done again and Detective Butler "just happened'' to be in the area. The fact that Mr. Holland spoke to Detective Butler was a product of Butler's 1:00 a.m. interview; discussions on the virtues of being truthful; and leaving his card and offering to talk. He was then brought in Detective Butler's presence 1½ hours later. His speaking to the officer was a product of the earlier violation of Edwards, supra, Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (Police tell defendant benefits of giving a statement and leave. Three hours later the defendant approaches the police. This is a product of the earlier violation).

The statements were involuntary. Officer Butler testified that Mr. Holland repeatedly expressed a fear of being beaten. Butler said Mr. Holland was "extremely tired," he vomited in his presence, and that the vomit smelled of alcohol. Indeed, the vomit tested positive for alcohol and cocaine. Mr. Holland had smoked cocaine earlier (R1793). He was exhausted, in fear, nauseous, and had alcohol and cocaine in his system. He invoked his right to counsel, yet his will was overborne. Mr. Holland's statements must be suppressed as violative of Edwards and as involuntary.

The admission of this evidence was harmful error. Mr. Holland introduced a substantial case of insanity. His statements and his

conduct during the interview was used to rebut this. This case must be reversed for a new trial.

Assuming, arguendo, this Court feels the statements were harmless in the guilt phase, they were independently prejudicial in the penalty phase. The jury may well have relied on these to find aggravating factors and/or to not find or weigh mitigation, especially mental mitigation.

POINT IX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO THE ADMISSIBILITY OF THE INAUDIBLE VIDEOTAPE.

A videotape of the interrogation of Mr. Holland was admitted over Mr. Holland's objection that it is inaudible. The admission of this evidence denied Mr. Holland due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. A new trial is required.

Defense counsel objected to the admission of the videotape as inaudible (R2382). The prosecution did not contest the audibility of the tapes, but stated that "the tape is coming in to show his demeanor and voluntariness of what he told this officer." (R2383). The court overruled the objection.

An inaudible tape is inadmissible. **Carter** v. State, 254 So. 2d 230 (Fla. 1st DCA 1971).

> At first blush, we questioned how a recording so unintelligible could have been detrimental to appellant. We concluded, however, that individual jurors might have speculated upon the various isolated portions of the recording which could be understood. Such speculation cannot be a basis for conviction. The recording was of such poor quality that it was reversible error for the trial judge to allow the recording to be heard by the jury.

Id. at 231.

The fact that this case involves a videotape rather than an audiotape does not change the analysis. This is not a videotape of a bank robbery or a drug transaction wherein the video alone would have probative value on the issue of the identity of the perpetrator. Here, the important issue is the words spoken. Even as to demeanor and voluntariness the appearance of Mr. Holland during the interrogation is only meaningful when one knows the words being spoken. For example, it would be normal to be agitated in describing certain things. Agitation in describing other things could be a sign of mental illness. It is normal to be calm during everyday conversations. An appearance of calm during certain conversations, or even portions of certain conversations, could actually be a sign of clinical depression or a "crash" after a cocaine "high." Without knowing **all** of the words being spoken, the appearance is more misleading than revealing.

Assuming, arsuendo, there is some marginal relevance to this videotape; the prejudice from the tape outweighs any probative value. Fla. Stat. 90.403. The predominantly inaudible portions of the tape could lead to all sorts of surmise and speculation on the part of the jury. The officer had already testified to the essence of Mr. Holland's statement. This inaudible videotape added nothing but prejudice and confusion.

POINT X

THE EVIDENCE **OF** PREMEDITATION IS **LEGALLY INSUFFICIENT.**

The trial court allowed the prosecution to **proceed** on the theory of premeditation when the evidence was legally insufficient.

Jackson v. State, 575 So. 2d 181 (Fla. 1991); Douglas v. State, 10 So. 2d 731 (Fla. 1942); Forehand v. State, 171 So. 241 (Fla. 1936); Weaver v. State, 220 So. 2d 53 (Fla. 2d DCA 1969); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Mr. Holland's motion for judgment of acquittal of the prosecution's case and at the close of all the evidence were denied (R2458-63,2742-2744,2913-2916). This denied Mr. Holland due process of law pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Prosecution witness T J testified that Albert Holland approached her at about 4:00 p.m. and she walked into the woods (R1763-66). She stated that Mr. Holland seemed like a nice person before he smoked cocaine (R789). She stated that Albert Holland smoked half of a cocaine rock. She then stated he smoked the second half of the rock "it was like he snapped" (R1793). She stated that he then began attacking her.

Prosecution witness, Roland Everson, stated that at 7:00 p.m. he saw a police officer struggling with Albert Holland (R1836). The officer had him in a headlock (R1835). He heard two shots, which were virtually simultaneous (R1841-42). He stated that Albert Holland had every opportunity to fire more shots, after the officer went down; but that he did not (R1842-43).

Prosecution witness, Abraham Bell stated that he was in his truck and heard a police officer's PA call out, "Hey, you get over there" at a fellow walking on the street (R1970). Albert Holland walked to the police car (R1971). The officer told him to put his

hands on the car, which he did (R1971). The officer walked up behind him, put a nightstick in his back and reached over to talk on the radio on his shoulder (R1971). The officer moved his hand down towards his belt (R1972). The other man swung at the officer's head (R1972). The officer then got the man in a headlock and had control of his left arm (R1973). The officer hit him four or five times with his nightstick (R1973). They continued to scuffle and moved around towards the driver's side of the car (R1973). He stated that the man reached down and tried to get the officer's gun with his right hand, even though the officer still had him in a headlock and still had his left arm pinned (R1974). The officer was pushing down an the man's hand in the holster (R1975). The officer finally released his hand and the gun came out (R1976). The officer still had the man in a headlock and the gun then went off twice (R1977). The man's head was in the officer's stomach (R1984). The shots were "right behind each other" (R1985). The man could not see where he was firing (R1986-87).

Several undisputed facts are clear from the testimony. First, a struggle occurred, before any shots were fired. Second, in this struggle, the officer hit Albert Holland four or five times with a night stick. Third, the officer had Mr. Holland in a headlock. Fourth, he had no ability to aim or see where he was firing. Fifth, the two shots were virtually instantaneous, Sixth, Mr. Holland fired no shots when the headlock was released. It is clear that this shooting was not premeditated. Premeditation

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit a reflection....
>
> It must exist for 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 the life of the victim is concerned.

Jackson, supra, 575 So. 2d at 186.

The facts in Forehand, supra, contained a stronger case of premeditation than the current case. In Forehand, the appellant (Pleas Forehand) and his brother began an altercation at a dance-hall. 171 So. at 241-242. A police officer (Pledger) intervened. The following ensued.

> Pledger thereupon undertook to take both the accused and his brother Lonnie away from the place. He suggested that they go with him. The accused struck Pledger in the face and Pledger replied with a blow from his blackjack. Thereupon the difficulty arose in which the accused shot and killed Pledger.
>
> In the struggle which ensued between Pledger and the two Forehand brothers and William Burke. Lonnie Forehand secured the blackjack and attempted to strike Pledger with it. They grappled, and Lonnie Forehand and Pledger fell to the ground, after the accused had seized the pistol worn by Pledger in a holster. He fired upon the two men on the ground four or five times, the last shot being the one which struck Pledger in the back because from that moment he began to make exclamations indicative of pain.
>
> As a result of the difficulty, both Lonnie Forehand and Pledger died from wounds received by them in the altercation.

171 So. at 242. This Court reduced the conviction to Second Degree Murder.

In Weaver, supra, the Court held the evidence of premeditation to be insufficient during an altercation with a police officer. In Weaver, supra, a police officer was answering a call concerning

a domestic disturbance. 220 So. 2d at 55. The officer attempted to enter the home and a struggle ensued, which included the officer spraying mace. Id. at 55-56. The eyewitness then fled the area. Id. at 56. Two police officers arrived and saw the following:

> When Officers Lee and Harrell arrived, they both heard a woman scream; Lee heard a man's voice, which he identified as that of the deceased officer, exclaim: "No! No!"; and each then heard a sporadic series of shots. As the two officers approached the immediate scene they saw the appellant standing in front of an automobile pointing a revolver toward the ground, and both officers testified they saw the flash of the last shot as appellant held the gun pointed toward the ground under the car. Officer Lee said he then heard the gun clicking several times on empty cylinders. He further testified that as he approached the appellant the latter threw the gun to the ground and said, "Yes, G--- D---- it, I killed him.", at which point Officer Lee then noticed Officer Eustis' body lying under the aforementioned car. The revolver involved was later positively identified as belonging to the deceased officer, and it was established that the fatal bullets were fired from that gun. Three bullet wounds were found in the body: two, significantly, having entered in the back. It was also established by an expert that there were nitrate deposits on the deceased officer's right hand which could have been caused by a discharging firearm.

Id. at 56. The evidence of premeditation is insufficient here as in Weaver and Forehand.

Appellant has separately argued in Point XII, the theory of felony murder should be legally barred due to a lack of notice. Thus, this case must be reduced to second degree murder. Assuming arguendo, this Court rejects Mr. Holland's issue concerning felony murder, the case must still be reversed for a new trial. We cannot know if one or more jurors relied on a premeditation theory. Thus, the error is harmful and at the very least a new trial is required.

POINT XI

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

Appellant moved for release or in camera review of the grand jury testimony in this case (R3933-37). The trial court's failure to grant release or in camera review of the grand jury testimony denied Mr. Holland due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Defense counsel filed a motion for release or in camera review of grand jury testimony (R3933-37). The trial court denied the motion (R553-55).

The right to in camera review of otherwise confidential materials was extended by the United States Supreme Court in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In Ritchie, the defendant, charged with sexual assault an his daughter, moved to have her Children and Youth Services file produced as it "might contain the names of favorable witnesses as well as other, unspecified exculpatory evidence." Id. at 995. The Supreme Court held the defendant was entitled to in camera review despite public policy reasons and specific statutes making the material confidential. 107 S.Ct. at 1001-02.

Miller v. Dugger, 820 F.2d 1135, 1136 (11th Cir. 1987) and Hopkinson v. Schillinger, 866 F.2d 1185 (10th Cir. 1989), modified 888 F.2d 1286 (10th Cir. 1989) (en banc) apply the principles of Ritchie to grand jury testimony. In Hopkinson, supra, the Court held the defendant was entitled to in camera review because

"exculpatory evidence could have been presented'' and in camera review preserves state confidentiality interests.

The trial court erred in failing to at least conduct in camera review of grand jury testimony for exculpatory materials. A new trial is required.

POINT XII

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.

The indictment in this case only charged premeditation as a theory of first-degree murder. This lack of notice denied Mr. Holland due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The indictment in this case only charged premeditated murder (R3315-16). Defense counsel filed a motion to prohibit the use of a felony-murder theory due to lack of notice (R4056-59). The trial court denied this motion (R573-74). The jury was instructed on two different theories of felony-murder (robbery and sexual battery).

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defendant against. Russell v. United States, 369 U.S. 749, 763-69, 82 S.Ct. 1038, 8 L.Ed.2d 249 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir. 1986). In Givens, the Ninth circuit held that it was a Sixth Amendment violation to allow a jury instruction and prosecutorial

argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder). The failure to prohibit the felony-murder theory was harmful as there is virtually no evidence of premeditation (See Paint X).

Assuming, arguendo, the Court agrees that the evidence of premeditation is insufficient, the first-degree murder conviction must be reduced to second-degree murder. If the Court rejects Appellant's argument in Point X, a new trial is required as we cannot know if one or more of the jurors relied on felony-murder.

POINT XIII

THE TRIAL COURT ERRED IN DENYING A CONTINUANCE OF TRIAL.

The trial court erred in denying defense counsel's motion for continuance of the trial. This denied Mr. Holland due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

On June 7, 1991, defense counsel filed a motion to continue the trial set for July 8, 1991 (R3801-09). The motion outlined the difficulty he had experienced in obtaining materials concerning Mr. Holland's prior psychiatric hospitalization in Washington, D.C. (R3805). The case involves the analysis of over twenty psychotherapists who had seen Mr. Holland (R3806). Counsel was still receiving new witness lists (R3808). He also had not received reports from three doctors listed as prosecution experts an

insanity (R3807). A hearing was held an this motion on June 10, 1991, and it was denied (R428-39).

On July 1, 1991, defense counsel filed an additional motion far continuance (R4301-14). There are 229 names on the witness list (R4382). On June 6, 1991, the prosecution placed 18 new names on the witness list (R4302). After the June 10, 1991, hearing the prosecution had turned over 1,480 pages of additional discovery which counsel had not read (R4302). Counsel had been unable to get a hearing in Washington, D.C., on his subpoenas of material witnesses until July 12, 1991 (after the trial was to start) (R4304). He received the transcript of 80 depositions on June 28, 1991 (R4305). He received the reports of three mental health experts between June 21-28, 1991, and had not deposed them (R4306). On June 18, 1991, he received a report of blood testing (R4307). He had been unable to retain a firearms expert (R4307-08). Counsel had been unable to obtain medical records concerning Mr. Holland's hospitalization from a severe head injury (R4309). Dr. Abudabbeh (one of Mr. Holland's treating doctors when he was hospitalized in Washington, D.C.) was ill and unable to testify during the current trial (R4311). Counsel first acquired information on June 27, 1991, from a deposition of the medical examiners that there had been a second suspect in the offense (R4312). No work had been done on the penalty phase (R4313).

A hearing was held an the motion far continuance on July 2, 1991 (R661-712). Counsel pointed out that aver twenty-five doctors had seen Mr. Holland over a ten year period (R669). He also stated that the neurological expert appointed to assist him had recom-

mended that a CT scan be performed on Mr. Holland and he had been unable to do this (R669-70). He stated that he had done nothing to prepare for potential Williams rule evidence and had done nothing on the penalty phase (R673). Counsel had been unable to depose the prosecution's blood expert (R673). The trial court denied the motion (R712,4315).

The denial of the continuance was reversible error. Although a ruling on a motion to continue is governed by an abuse of discretion standard, it has been held to be an abuse of discretion to deny such a motion under several different scenarios. It has been held to be an abuse of discretion to deny a continuance in order to obtain a crucial defense witness. Robinson v. State, 561 So. 2d 419 (Fla. 1st DCA 1990); Beachum v. State, 547 So. 2d 288 (Fla. 1st DCA 1989); Mitchell v. State, 580 So. 2d 852 (Fla. 2d DCA 1991). In Unruh v. State, 560 So. 2d 266 (Fla. 1st DCA 1990), the court reversed for failure to grant a continuance to investigate the defendant's psychiatric problems. Failure to grant a continuance based on late disclosure of a key prosecution witness is reversible error. Griffin v. State, 598 So. 2d 254 (Fla. 1st DCA 1992). It is reversible error to deny a continuance to obtain expert assistance and/or to defend against expert testimony. Hill v. State, 535 So. 2d 354, 355 (Fla. 5th DCA 1988).

The present case involves many of the elements discussed in the above-cited cases. Mr. Holland had been hospitalized for mental illness in the District of Columbia. One of his treating doctors, Dr. Abudabbeh, was ill and would be unavailable for the trial. Defense counsel had been unable to even obtain a hearing

on his motion to obtain material witnesses until during the trial itself. The District of Columbia Corporation counsel was opposing subpoenas of hospital employees. Thus, many of the concerns that led to reversals in Robinson, Beachum, and Mitchell apply here.

The problems of late prosecution discovery and the need to obtain expert assistance and/or investigate scientific evidence exist in the case as in Hill, supra, and Griffin, supra. The prosecution had added 18 names to the witness list soon before trial and had also provided 1480 pages of discovery. Additionally, defense counsel was only receiving the reports of prosecution expert mental health witnesses the week before hearing. The prosecution had recently placed the name of a blood expert on the witness list. Indeed, the prosecution ended up using DNA evidence to match Mr. Holland's blood (R2227-93). The need to obtain expert assistance is similar to that in Hill, supra. Additionally, the need to obtain expert assistance as to the trigger pull of the firearm is an important issue as to premeditation. Finally, counsel stated that he had not done work in preparation for the penalty phase. The trial court abused its discretion in denying the motion for continuance. A new trial is required.

POINT XIV

THE COURT ERRED IN DENYING A PENALTY PHASE CONTINUANCE.

Defense counsel moved for a brief continuance of the penalty phase. The prosecution made no objection to this motion. The trial court erred in denying this motion. This denied Mr. Holland due process of law and the effective assistance of counsel at the penalty phase pursuant to Article I, Sections 2, 9, 16, and 17 of

the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

On July 1, 1991, defense counsel filed a motion to continue the trial (R4301-14). In the written motion, it was explicitly stated that no preparation had been undertaken for the penalty phase (R4312). Defense counsel reiterated this at the hearing on the motion to continue (R673). The verdict of guilt was received on August 2, 1991 (after a month of virtually continuous trial and motion hearings in Florida and Washington, D.C.) (R4698-4703). On August 7, 1991, defense counsel filed a motion to continue the penalty phase which was schedule for August 12, 1991 (R4705-07). In the motion, counsel detailed the fact that due to the nature and size of the guilt phase case, counsel had been unable to prepare for the penalty phase (R4705-07). He stated that he needed additional time to investigate Mr. Holland's background and early life and to locate witnesses (R4076). A hearing was held on the motion on August 8, 1991. Counsel asked for a continuance for two weeks (R3093). The State had no objection (R3093). The trial court denied the motion (R3093).

An appeal from a denial of a continuance is generally reviewed under an abuse of discretion standard. However, in a situation where the request is for a brief continuance of the penalty phase and the opposing party interposes no objection, this Court should review the denial in a different light. Time to properly prepare for the penalty phase directly implicates the special due process concerns of Article I, Section 17 and the Eighth Amendment. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51

L.Ed.2d **393 (1977);** Tillman v. State, **591** So. 2d **167 (Fla. 1991).** The brief nature of the continuance and the fact that it was unopposed makes it clear that there would be no prejudice to the prosecution.

The need for more time to prepare the penalty phase is demonstrated by a colloquy between the judge and defense counsel, which took place immediately before the penalty phase:

> THE COURT: How many witnesses?
>
> **DEFENSE COUNSEL:** Judge, two or three, the family. I haven't talked to the mother yet, they just came in last night, I talked to two of them this morning but the mother wasn't down, so, I have to talk to her.
>
> Hopefully, we won't get her 'till after lunch if the Court is gonna take lunch. I just need **a** few minutes to talk to her in any event.

(R3115-16).

Counsel had not spoken to any penalty phase witnesses until the night before the hearing. He had not even spoken to Mr. Holland's mother (certainly a basic start of any life history investigation) until the middle of the penalty phase. There was virtually no investigation beyond Mr. Holland's immediate family.

The denial of the continuance in this case is reversible error. Wike v. State, 596 So. 2d 1020, 1024-25 (Fla. 1992). This case is similar to Wike, supra. Both cases involve a request for a brief continuance in order to investigate and obtain crucial witnesses. Additionally, in this case there was no objection from the prosecution. Thus, it was clear that granting the continuance would involve no prejudice to the opposing party.

POINT XV

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

The trial court erred in hearing (and denying) a motion to continue the penalty phase in Mr. Holland's absence. This denied him due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The hearing on the motion to continue the penalty phase begins with the following colloquy from defense counsel:

> (Defense Counsel): Your Honor, first of all, we will waive our client's presence on the record, but I would point out that he has instructed Mr. Tindall and I that he wanted to find witnesses that we're having difficulty in locating in Washington for his penalty phase.

(R3093).

Defense counsel then made the following argument in support of the motion:

> Basically, Judge, the trial has been big. It was long. We asked for time throughout. We've really never had time to go through the penalty phase because we were trying to get ready for the case itself. And we'd ask for an extension of two weeks at this time, Your Honor. With that, we'd stand on the motion.

(R3093).

The prosecution stated that it had no objection (R3093). The trial court denied the motion and stated:

> THE COURT: All right. Okay. I've read your motion. Actually I don't see any showing of any particular need in any particular way.

(R3093).

A cardinal principle of our legal system is "after indictment is found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed.2d 1011 (1892); Deans v. State, 180 So. 2d 178, 179 (Fla. 2d DCA 1965); Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986). This principle is triggered whenever a defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defendant against the charge," unless the presence would be "useless, or the benefit but a shadow." Snyder v. Massachusetts, 291 U.S. 97, 105-07, 54 S.Ct. 330, 332, 78 L.Ed.2d 674 (1934). The courts have applied these principles to find reversible error in a wide variety of situations. Francis v. State, 413 So. 2d 1175 (Fla. 1982) (absence from the exercise of peremptory challenges); Ingraham v. State, 502 So. 2d 987 (Fla. 3d DCA 1987) (absence from questioning of a juror about a view of the defendant in handcuffs).

It is apparent from the face of the record that Mr. Holland's absence is harmful. Counsel pointed out that there were mitigation witnesses who Mr. Holland wished to have called. Mr. Holland could have assisted his counsel in explaining the significance of the witnesses and the likelihood that they could be located. This may well have led to the granting of a continuance. Wike v. State, 596 So. 2d 1025 (Fla. 1992). The granting of a continuance may have led to a far more substantial case for mitigation.

POINT XVI

THE COURT ERRED IN DENYING A REQUESTED INSTRUCTION CONCERNING THE DOUBLING OF **AGGRAVATING CIRCUMSTANCES.**

Defense counsel requested the following instruction:

> 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.

(R4721).

The trial court refused to give the instruction (R3101).

In Castro v. State, 597 So. 2d **259**, 261 (Fla. 1992), this Court held it to be error to refuse to give an identically worded instruction. (The only difference is that the Castro instruction **said** "state" instead of "prosecution".)

The error in this case was harmful, The jury in this **case was** instructed on four aggravating circumstances (R3205-06). Two of the aggravating circumstances were as follows:

> Number three, the crime for which he is to be sentenced was committed for the purpose of avoiding or preventing the lawful arrest or affecting an escape from custody.
>
> Number four, the victim of the crime for which he is to be sentenced is a law enforcement officer engaged in the performance of the officer's official duties.

(R3206).

The prosecution argued both aggravators to the jury (R3189-90). The trial court found both (R4813).

This Court has recognized that these aggravating factors double. Valle v. State, 581 So. 2d 40, **47** (Fla. 1991). In Valle, the appellant was arguing the application of the killing of a law

enforcement officer aggravator was a violation of the prohibition against ex post facto laws. Id. at 47. This Court stated:

> At the time Valle committed this crime the legislature had established the aggravating factors of murder to prevent lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of laws. §§ 921.141(5)(e), (g), Fla. Stat. (1977). By proving the elements of these two factors in this case, the state has essentially proven the elements necessary to prove the murder of a law enforcement officer aggravating factor.

Id. at 47.

The error here is harmful as the jury was instructed on both aggravators, the state argued both aggravators, and the judge found both. There is substantial evidence in mitigation. Albert Holland was twice found not guilty by reason of insanity and spent years in a mental hospital (R2609-32). He was on Thorazine, a major anti-psychotic, much of the time (R2625-26). Ha had a long history of drug abuse (R2513-14). He smoked cocaine at the beginning of this incident and his behavior completely changed (R1793). He was nearly beaten to death, lost consciousness and spent months in the hospital (R2503, 3151-52). His behavior completely changed after this (R3152-53). He was nervous, edgy, withdrawn, and anything could set him off (R3152-53). In light of the duplicative aggravating circumstances and the substantial mitigation, this error is harmful.

The refusal to give this required jury instruction denied Mr. Holland due process of law and subjected him to an unconstitutional punishment pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. A new penalty phase is required.

POINT XVII,

THE TRIAL COURT ERRED IN ITS FINDING OF AGGRAVATING CIRCUMSTANCES AND ON ITS FAILURE TO FIND AND/OR CONSIDER UNREBUTTED NON-STATUTORY MITIGATING CIRCUMSTANCES.

The trial court erred in doubling aggravating circumstances and in failing to find and/or consider several non-statutory mitigating circumstances.

A. Aggravating Circumstances

The trial court found the following aggravating circumstances:

(1) Section 921.141(5)(b) The defendant has been previously convicted of a felony involving the use or threat of violence to the person.

(2) Section 921.141(5)(d) The capital felony was committed while the defendant was ensased in the commission of or flight after committing the crime of Sexual Battery and Attempted First Degree Murder.

(3) Section 921.141(5)(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectins an escape from custody.

(4) Section 921.141(5) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(R4812-13).

Aggravating circumstances 3 and 4 double and must be considered as one circumstance. Point XVI. This is harmful error given the substantial mitigation in the case.

B. Non-Statutory Mitigating Circumstances

The trial court erred in failing to find non-statutory mitigators for which the evidence was unrebutted and in failing to consider other non-statutory mitigators.

A trial court's duty to evaluate mitigation is clear.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, is it truly of a mitigating nature. See Rogers v. State, 511 So. 2d **526** (Fla. **1987)** ***cert. denied,*** **484 U.S. 1020, 108 S.Ct.** 733, 98 L.Ed.2d **681 (1988).** The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.
>
> Campbell v. State, **571 So.** 2d **415, 419** (Fla. **1990).**
>
> "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor."
>
> Maxwell v. State, **603** So. 2d **490, 491** (Fla. **1992).**

The trial judge's consideration of non-statutory mitigating evidence is **as** follows:

> **(3)** Section **921.141(6)** Any other aspects of the defendant's character or record, and any other circumstances of the offense.
>
> 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 16 when he began using drugs. Since then, the defendant has been in various jails and mental hospitals.
>
> There **was** no evidence to show the defendant was 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.
>
> **(R4184).**

The trial court's statement that "there was no evidence to show the defendant was under the influence of drugs" is false. The evidence is uncontroverted that he was under the influence of drugs. Prosecution witness T J testified that when she first met Albert Holland he seemed like a nice person **(R1789).** Albert Holland smoked half of a cocaine rock **(R1771).** He then

smoked the second half of the rock and "it was like he snapped" (R1793). She testified that Albert Holland had told her that he had smoked a lot of drugs earlier in the day (R1789). Prosecution witness Gene DeTuscan, a Broward County toxicologist, testified that Albert Holland vomited in the jail after the incident and he tested a sample (R2085-94). The sample tested positive for alcohol and cocaine (R2089-94). The state's witnesses established that Albert Holland was under the influence of cocaine during the incident.

The trial court's failure to consider the fact that Albert Holland was under the influence of cocaine was prejudicial. Use of intoxicants during the offense is a recognized mitigator. Smith v. State, 492 So. 2d 1063, 1067 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Masterson v. State, 516 So. 2d 256, 268 (Fla. 1987). This is an extremely strong mitigator in two respects. (1) The uncontroverted testimony by prosecution witness T J that Albert Holland "snapped" when he smoked the second half of the cocaine rock and it was at this point that the violence began. (2) The extreme impact that cocaine has on a person with Albert Holland's underlying mental illness. Dr. Polley testifiedthatwhen Albert Hollandwas hospitalized in the District of Columbia for five months the consistent diagnosis was that he was suffering from schizophrenia (R2624-25). He stated that the working theory of schizophrenia is that it is caused by an excess of dopamine in the brain (R2635-36). Cocaine stimulates the production of dopamine in the brain (R2637). Although cocaine can cause psychosis in a normal person, it is far more likely in a

person with schizophrenia (R2627). This evidence corroborates Ms. J 's lay testimony that Albert Holland snapped when he used the second half of the cocaine rock. This error is prejudicial.

The trial court also erred in failing to find Albert Holland's long term drug abuse in mitigation. The trial court made two errors in this respect. First, the court was wrong in finding that Mr. Holland was not under the influence of drugs at the time of the incident. Secondly, the court was wrong to pre-condition this mitigator upon the fact that Albert Holland was or was not under the influence of cocaine. Long-term use of intoxicants is a recognized mitigator. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

The failure to find long-term drug abuse in mitigation is prejudicial. Albert Holland was a child with achievements in music and sports and had learned to speak Spanish (R3147-49). At age 16 he began using drugs and his life changed (R3146-47,3175). Albert Holland was a long-term poly drug abuser, including heroin, cocaine, Dilaudid, alcohol and Percodan (R2513-14). The State conceded that this is non-statutory mitigation (R4779).

The trial court erred in failing to consider and find other non-statutory mitigators. The trial court failed to consider the fact that this was an offense with little or no premeditation. See Point X. This Court has stated if the "killing, although premeditated, was most likely upon reflection of a short duration" it is a significant mitigator. Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985).

The trial court also failed to consider in mitigation the unrebutted testimony that Albert Holland was mentally ill. In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court reversed in part because of the failure to consider mental or emotional disturbance, which does not rise to the statutory level of "extreme." Id. at 912. This Court stated:

> Florida's capital sentencing statute does in fact required that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say.

Id. at 912.

The trial judge made the same error as in Cheshire, supra. The State in its sentencing memorandum relied on the testimony of Dr. Koprowski that Albert Holland was mentally ill, but was not under "extreme mental or emotional disturance" (R4776-77). It made no mention of mental illness as a non-statutory mitigator (R4778-79).

The trial judge's order made the same mistake. He made the following finding concerning the statutory mental mitigator.

> (1) Section 921.141(6)(b) The capital felony committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 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.

(R4813).

The trial court then made no mention of mental illness in its discussion of non-statutory mitigation (R4814).

The trial court's failure to consider and find a mental or emotional disturbance as non-statutory mitigation is prejudicial. The defense presented substantial unrebutted evidence of mental illness. Albert Holland had twice been found not guilty by reason of insanity and had been involuntarily hospitalized in a mental hospital for 54 years (R2617-18,2624-26). He was on Thorazine, a major anti-psychotic, for much of this time (R2615-16). The working diagnosis during his entire hospitalization was that he suffered from schizophrenia, which at times reached the point of psychosis (R2624-25). Persons suffering from schizophrenia are unusually vulnerable to the effects of cocaine (R2637).

The prosecution called one witness in the penalty phase. Dr. Koprowski testified that she felt he did not qualify for the statutory mental mitigating circumstances (R3133-34). However, she testified that he is "mentally ill" as well as being a "substance abuser of long standing" (R3133-34). She also testified in the guilt phase that he is "deeply emotionally disturbed" (R2832).

The trial court here made the precise error as in Cheshire, in failing to consider mental illness that does not rise to the statutory level in mitigation. This was prejudicial as there was unrebutted testimony that Albert Holland was mentally ill.

The trial court also failed to consider and find in mitigation the fact that Albert Holland had been badly beaten and that his behavior completely changed after this. Albert Holland was sent to federal prison when he was 19 (R3151). He was there for about

a month when he was attacked and beaten about the head with a mop handle (R3151). A witness described this incident.

> He beat him in the fact and broke the orbital bones around his eyes and his jaw, but at first they thought he had been killed 'till someone saw him breathing and exhaling and things, and they rushed him to the University of Wisconsin's neurological department and they saved his life.

(R3151). He was in the prison hospital for several months (R3151-52). He lost consciousness for a period of time and was in and out of consciousness for a long time (R2503).

After this beating, his behavior changed completely:

> He was very withdrawn, very depressive. He remained to himself, he would sit in the room with no lights an far long periods of time, and when I first brought him home, he wouldn't go out of the house and he had contemplated suicide a couple times during this time.

(R3152). He also became very nervous, jumpy and edgy (R3152). "Anything upset him," even a dog barking (R3153).

Being a victim of a severe beating in one's youth is a non-statutory mitigator. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The failure to consider this evidence in mitigation is prejudicial.

The trial court's errors in finding aggravators and failing to consider and/or find non-statutory mitigation requires resentencing. The current sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

POINT XIII

DEATH IS DISPROPORTIONATE.

The homicide in this case was not premeditated and the entire incident was the product of the extremely strong effect of cocaine usage upon a person with underlying mental illness. Under this combination of facts the death penalty is disproportionate. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). The death sentence in this case violates Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

In Fitzpatrick, supra, this Court reduced the death penalty to life imprisonment based an proportionality. In Fitzpatrick, the trial court found five aggravating circumstances. Id. at 811. This Court did not strike any of the aggravating circumstances but still reduced the sentence to life. Id. at 811-12. This Court stated:

> The aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent. Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. We do not believe that this is the sort of "unmitigated" case contemplated by this Court in *Dixon*.

Id. at 812.

In the present case, the trial court found four aggravating circumstances. Two of these are duplicative and must be merged into one circumstance. See Point XVI. Thus, there are three potential aggravating circumstances. Fitzpatrick involves the same three aggravating circumstances and also involves two more aggravators (great risk of death to many persons and pecuniary gain).

The homicide was the product of intoxication and mental illness. Albert Holland was a child with positive achievements until he began abusing drugs at age **16 (R3146-47)**. His drug usage led to his being sent to federal prison at age 19 (R3151). In prison, he was nearly beaten to death **(R3151)**. He was in the prison hospital for several months **(R3151-52)**.

Subsequent to the beating, his behavior changed completely (R3152). His father described him as follows:

> He was very withdrawn, very depressive. He remained to himself, he would sit in the room with no lights on for long periods of time, and when I first brought him home, he wouldn't go out of the house and he contemplated suicide a couple of times during this time.
>
> **(R3152)**.

After the beating he was twice found not guilty by reason of insanity in the District of Columbia **(R2617-18)**. He was involuntarily hospitalized in St. Elizabeth's Hospital for 5½ years (R2959). During his time in St. Elizabeth's, the working diagnosis was that he was suffering from schizophrenia which reached the point of psychosis **(R2624-25)**. He was on Thorazine for much of the time, which seemed to help him **(R2615-16)**.

Experts believe that an excess of the neurotransmitter dopamine is the cause of schizophrenia **(R2635-36)**. Cocaine stimulates the production of dopamine (R2637). Cocaine can cause psychosis in a person without underlying problems (R2637). This is far more likely in a person with a history of schizophrenia **(R2637)**.

Prosecution witness **T J** testified that Albert Holland seemed like a nice person when she first met him **(R1789)**.

He smoked half of a cocaine rock and still seemed alright. Then, he smoked the second half of the rock and "it was like he snapped" (R1793). It was at this point violence began. This was an incident with little or no premeditation. See Point X.

Albert Holland had a long term history of drug abuse. He was nearly beaten to death and his behavior completely changed. He had a history of mental illness which was greatly aggravated by the effects of cocaine. The violence in the current offense was the result of a complete personality change after the ingestion of cocaine. The homicide in this case was not premeditated, but was the result of grabbing a gun during a struggle. These facts show the same sort of irrational homicide that is the product of mental illness as in Fitzpatrick. Death is disproportionate. See also Kramer v State, ___ So. 2d ___, 18 Fla. L. Weekly S266 (Fla. April 29, 1993) (Death disproportionate due to alcaholism and mental illness, despite prior conviction of attempted murder).

POINT XIX

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

Defense counsel requested the following special jury instruction:

> If you find that Albert R. Holland, Jr., was under the influence of marijuana, alcohol, or any other intoxicant during some or all of the offense you may consider this as a mitigating circumstance.
>
> **(R4754).**

Defense counsel cited Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106

L.Ed.2d 256 (1989). The trial court denied the instruction (R3112).

The trial court gave the following instructions on mitigation:

> Among the mitigating circumstances I told you already, if established by the evidence, are one, the crime for which the defendant is to be sentence was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Number two, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> And number three, any other aspect of the defendant's character or record and other circumstances of the offense.

(R3207).

Under the unique facts of this case, these instructions were inadequate to allow consideration of the effect of cocaine on Albert Holland, due to this underlying mental illness.

In Penry, supra, the United States Supreme Court recognized that standard jury instructions on mitigation, which are constitutional on their face, may operate unconstitutionally in a given case to restrict jury consideration of mitigating evidence. In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court recognized that the word "extreme" in the statutory mental or emotional mitigating circumstance can lead to the failure to consider disturbances which are less than extreme. Id. at 912.

Prosecution witness T J stated that when she met Albert Holland he seemed like a nice person (R1789). She said that when he smoked the second half of a cocaine rock "it was like he snapped" (R1793). It was at this point that violence began. Dr. Polley testified that when Albert Holland was hospitalized in the

District of Columbia for 5½ years the consistent diagnosis was schizophrenia **(R2624-25)**. The working theory of schizophrenia is that it is caused by an excess of dopamine in the brain **(R2635-36)**. Cocaine stimulates the production of dopamine in the brain (R2637). Although cocaine can cause psychosis in a normal person, it is far more likely in a person with schizophrenia **(R2637)**. The prosecution called only one witness in the penalty phase. She stated the fact that he functioned well on Thorazine for 3½ years is an indication he has a serious mental problem **(R3134-35)**. She stated that cocaine had an extreme effect on him **(R3137-38)**.

The jury in this case was left with unrebutted evidence that violence only began here after cocaine use and that cocaine had an extreme effect on a person suffering from schizophrenia. They were faced with disputed testimony as to whether he met the criteria for the statutory criteria for extreme mental or emotional disturbance. The jurors may well have felt that they could not consider the effect of cocaine on him, with his undisputed mental illness unless it rose to the level of extreme mental or emotional disturbance. The giving of the special jury instruction which would have told the jury that they could consider the effect of alcohol or other intoxicants in mitigation without regard to whether it rose to an extreme mental or emotional disturbance.

The refusal to give this instruction denied Mr. Holland due process of law in the penalty phase pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution.

POINT XX

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

The trial court erred in failing to give special jury instructions concerning Albert Holland's background and history of drug addiction. This denied Mr. Holland due process of law in the penalty phase pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

Defense counsel requested three separate jury instructions concerning Albert Holland's history of drug addiction and background and early life. The three instructions are as follows:

DEFENDANT'S PENALTY PHASE SPECIAL REQUESTED JURY INSTRUCTION NUMBER 11

If you find that Albert R. Holland, Jr., was adversely affected (physically or emotionally) by the use of drugs or alcohol during his youth you may consider this as a mitigating circumstance.

DEFENDANT'S PENALTY PHASE SPECIAL REQUESTED JURY INSTRUCTION NUMBER 20

If you are reasonably convinced that Albert Holland, Jr., was dependent upon drugs, during his lifetime, you may consider this as a mitigating circumstance.

DEFENDANT'S PENALTY PHASE SPECIAL REQUESTED JURY INSTRUCTION NUMBER 24

You may consider as a mitigating circumstance Albert R. Holland, Jr., background and early life.

(R4728,4738,4742).

The trial court denied all of these requested instructions (R3103,3108,3109). The trial court gave the following instructions on mitigation.

Among the mitigating circumstances I told you already, if established by the evidence, are one, the crime for

> which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Number two, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> And number three, any other aspect of the defendant's character or record and other circumstances of the offense.

(R3207).

Albert Holland had been a good child who succeeded in sports and music until his involvement with drugs (R3147-49,3175). He became a long-time drug abuser.

The jury instructions on mitigation would not allow the jury to consider this as mitigation. The jury instructions on the two statutory mental mitigators clearly relate to mental state at the time of the offense. The so-called "catch-all" instruction also does not allow for jury consideration of this evidence. This instruction tells the jury it can consider the "defendant's character, record, or circumstances of the offense." "Circumstances of the offense" relates to the time of the offense. "Character" would also be taken to be current character. "Record" is interpreted by most people to mean criminal record or lack thereof. There is nothing in this instruction to allow the jury to consider Albert Holland's positive achievements as a child and how drug addiction destroyed his life.

In Penry v. Lynaugh, supra, the United States Supreme Court recognized that standard jury instructions on mitigation, which are constitutional on their face, may operate unconstitutionally in a given case to restrict jury consideration of specific mitigating

evidence in a given case. This is the error here. This is reversible error and a new penalty phase is required.

POINT XXI

AGGRAVATING CIRCUMSTANCE 921.141(5)(d) (DURING AN ENUMERATED FELONY) IS UNCONSTITUTIONAL ON ITS FACE AND UNCONSTITUTIONALLY APPLIED.

Defense counsel filed a motion to declare Fla. Stat. 921.141 (5)(d) unconstitutional on its face and as applied (R4005-11). The trial court's denial of this motion denied Mr. Holland due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

It is well-settled that aggravating circumstances

> must genuinely narrow the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990).

The aggravating circumstance at bar stated:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141(5)(d).

These offenses duplicate the underlying felonies in the first degree murder statute. It serves no limiting function whatsoever. It violates the Florida and Federal Constitutions on its face.

Assuming, arguendo, this Court feels this aggravator is constitutional on its face, it can not be applied to a case, such as this, where there is insufficient evidence of premeditation.

See Point X. The underlying felony is essential to make this a first-degree murder. Thus, in this case, it serves no limiting function whatsoever. The jury was instructed and the trial court found the aggravator (R3206,3240). There was substantial evidence in mitigation. This error is harmful and resentencing is required.

POINT XXII

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

Defense counsel filed a motion to declare Fla. Stat. 921.141 (5)(j) unconstitutional (R3962-67). The trial court denied this motion. The reliance on this aggravating circumstance is reversible error requiring resentencing.

The aggravating circumstance at issue here states:

> The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

Fla. Stat. 921.141(5)(j).

This aggravating circumstance violates the Florida and United States Constitutions for two reasons: (1) it inevitably doubles other aggravating circumstances and (2) it does not narrow the class of persons eligible for the death penalty as required by the United States Supreme Court and this Court. Zant v. Stephens, supra. This aggravating circumstance will always duplicate two other aggravating circumstances. Fla. Stat. 921.141(5)(e) (the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody); (5)(g) (the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of

laws). See Valle v. State, 581 So. 2d 40, 47 (Fla. 1991). Thus, this aggravator impermissibly skews the weighing process.

Mr. Holland was charged with first-degree murder of a law enforcement officer acting in the scope of his duties (R3315). The deceased's status as a law enforcement officer is bath an element of the offense and an aggravator. It does not narrow the class of persons eligible for the death penalty as it duplicates an element of the offense. The jury was instructed on this aggravator and the trial judge found the aggravator (R3206,4813). The error was harmful and a jury resentencing is required.

The use of this aggravating circumstance denied Mr. Holland due process of law in the penalty phase pursuant to Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XXIII

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

The trial court erred in departing from the guidelines sentence without a contemporaneous order of departure. The scoresheet reflects a recommended sentence of 27-40 years in prison, with a permitted sentence of 22 years to life imprisonment (R4801-02). On August 19, 1991, the trial court imposed a death sentence for first-degree murder, a life sentence for sexual battery; a forty year sentence for attempted first degree murder, and a 17-year sentence for robbery; all of which were consecutive (R3246). The trial court gave no reasons for departure. On August

20, 1991, the trial court entered its order of departure (R3261-64,4854-55).

Consecutive sentences following a life sentence are a departure, even if a life sentence is within the permitted range. Harris v. State, 556 So. 2d 768 (Fla. 2d DCA 1990); Junco v. State, 540 So. 2d 898 (Fla. 3d DCA 1989). There must be a contemporaneous written order of departure. Padilla v. State, ___ so. 2d ___, 18 Fla. L. Weekly S181, S183 (Fla. March 25, 1993). Resentencing within the guidelines is required.

POINT XXIV

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional for the reasons set forth below.

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness.

i. Heinous, atrocious, or cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Mavnard v. Cartwright, 108 S.Ct. 1853 (1988); Shell v. Mississippi, 111 S.Ct. 313 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous,"

"atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra.

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[5] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application, See Rogers v. State, 511 So. 2d 526 (Fla. 1987) (condemning prior construction as too broad). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. These clauses require accurate jury instructions during the sentencing phase of a capital case. See Cartwright, supra.

b. Majority verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clauses.

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). The same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

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[5] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states indicating that an anomalous practice violates due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states, Only Florida allows a death penalty verdict by a bare majority.

c. Advisory role

The standard instructions do not inform the jury of the great importance of its penalty verdict. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

2. The trial judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

3. Appellate review

a. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwrisht, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). Cases construing our aggravating factors have not complied with this principle. Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious,

or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion. The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).[6]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[7] it has been broadly

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[6] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases WIthout Making it Smaller, 13 Stetson L. Rev. 523 (1984).

[7] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

b. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[8] cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

4. Other problems with the statute

a. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case)[9]. In addition, HAC applies to any murder. Thus, Florida imposes a presumption of death which is to be overcome only by mitigating evidence sufficient to outweigh the presumption. This systematic presumption creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I,

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[8] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

[9] See Justice Ehrlich's dissent in Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984).

Sections 9 and 17 of the Florida Constitution require striking the statute.

b. Electrocution is cruel and unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96, 125 n.217 (1978). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 88 U.S. 130, 136 (1879); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georsia, 408 U.S. 239, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

CONCLUSION

For the foregoing reasons, Mr. Holland's convictions and sentences must be reversed.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROLYN SNURKOWSKI, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by U.S. Mail this 11th day of June, 1993.

Richard B. Greene
Of Counsel

A P P E N D I X

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

STATE OF FLORIDA,

vs.

ALBERT R. HOLLAND, JR.,

Defendant.

CASE NO: 90-15905CF10A

JUDGE: M. DANIEL FUTCH, JR.

MOTION TO SUPPRESS STATEMENTS AND VIDEO TAPE OF THE DEFENDANT

The Defendant, Albert R. Holland, Jr., by and through the undersigned attorney, pursuant to Rule 3.190(i), Florida Rules of Criminal Procedure, moves this Honorable Court to suppress as evidence at the trial in the above-styled cause, all written, oral arid video taped statements made by the Defendant to the police or other agents of the State. As grounds for the Motion, the Defendant would *state* the following:

1. The Defendant was arrested by the Pompano Beach Police Department an July 29, 1990 and charged with the Murder of a Pompano Beach Police Officer, Scott Winters, as well as other crimes.

2. The Defendant was taken to the Detective Bureau of the Department and was interrogated by Detectives Gooding and Wesolowski, with Officer Juan Cabrera acting

as an interpreter.

3. As the Detectives were reading a Miranda Rights form to the Defendant, through the trarislator, the Defendant requested an attorney and all questioning was stopped, as is appropriate for police interrogations.

4. However, even after the request for the attorney, the police went ahead arid sent other spanish-speaking officers (Robert Rios, B.S.O. arid Nelson Perez of the Pompano Beach Police Department) in to confront the the Defendant and attempt to obtain additional information. This act was a blatant violation of all existing State and Federal case law in the area of voluntariness.

5. The purpose for this revisiting of the Defendant was that the police "felt" he was riot using his real name. (See, Report of Det. Scott Gooding, 10/17/90, page two)

6. The initial interview of the Defendant began at approximately 8:57 p.m. with Gooding and Wesolowski.

7. At approximately 1:00 a.m. Detective K. Butler went to the holding cell of the Defendant and stated that he wanted to know the Defendant's true identity. At that point in time the Detective was aware of the Defendant's earlier request for an attorney, as were Perez and Rios at the time of their interview, but he went forward regardless,

8. Detective Butler's report, at page 4, states, "I continued to state that lying about his identity would only injure him when he came to trial."

9. This statement reveals some significant insight regarding the length of time that this interview must have lasted for this Detective to admit in a report that he "continued *to* state".

10. This interview is concluded, as per Butler, with this Defendant allegedly admitting, without prodding, that his true name was Albert Holland and he further gives the Detective his proper original address and his D.O.B.. Butler then claims that he told the Defendant he could not talk with him about the case, since the Defendant had requested an attorney previously, but he provides him with a business card and says, "call me if you want to talk".

11. After hours of police custody, and numerous attempts at interrogation by various officers, the Defendant allegedly "requests" to speak to Detective Butler while he is being processed. This is, of course, right after the Defendant allegedly volunteers his critical data to Butler while confined in another location.

12. It is at this point, approximately 2:30 a.m., when the Defendant "waives" his right to counsel and begins a statement. This Defendant had been in *custody* for over seven hours, had been under interrogation since 8:57 p.m. (over 5.5 hours) and suddenly just gives up and makes a complete waiver.

13. This subsequent statement is video-taped and notes are taken throughout by Butler.

14. The Defendant, after this period, makes additional statements, even to the point of attempting to locate the firearm of Ofc. Winters, without success, and spends the early hours of the morning giving data to his captors,

15. The police, in summary, attempt to question him arid he invokes his right to counsel. They then send in two spanish-speaking officers because they "feel" they don't have his right name. They are unsuccessfull in their attempts to obtain information. Then, Kevin Butler just wants to know his name so it will go easier in Court for the Defendant. Then, after five and a half hours of interrogations the Defendant voluntarily "waives" his right to counsel and makes statements.

16. The written, oral and videa-taped statements were obtained from the Defendant in violation of the Defendant's privilege against self-incrimination and the Defendant's right to counsel guaranteed by the Fifth, Sixth and the Due Process Clause of the Fourteenth Amendments to the United States *Constitution* as interpreted by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, *86* S.Ct. 1602, 16 L.Ed.2d 694 (1966).

17. The case of Jones v. State, 497 So.2d 1268 (3rd

DCA 1986) deals with the issue of this type of police involvement almost directly on point with this case. Jones tracks the Miranda, supra, case through its interpretation by the Supreme Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and still further through the case of Innis v. Rhode Island, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

18. The summary of these arguments is best found in the Jones case, supra, at page 1270, where the Court says,

"Recognizing that a Defendant may choose to waive his rights and respond to police interrogation, the Court established safeguards to insure that post-Miranda waivers are voluntary. The Court provided that the state may not prove a waiver merely by introducing a defendant's response to police-initiated interrogation; instead, the state must demonstrate that the defendant abandoned an earlier request for counsel arid resumed or initiated communication with police of his own volition."

19. The Court went on to cite the Florida cases that afforded the same rights to defendants in our State:

a. Smith v. State, 492 So.2d 1063 (Fla. 1986)

b. State v. Madruga-Jiminez, 485 So.2d 462 (3rd DCA 1986)

c. State v. Echevarria, 422 So.2d 53 (3rd DCA 1982)

d. Tierney v. State, 404 So.2d 206 (2 DCA 1981)

20. Our own Fourth District Court of Appeals has held the exact same in Harris v. State, 396 So.2d 1180 (4th DCA 1981). In this case the Court held that Miranda would be followed and cited Miranda at page 1181 as,

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent."

21. In addition, the statements and admissions made later by the Defendant should also be suppressed since all of his later statements came as a direct result of the police actions in the beginning that were illegal. *See,* Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

WHEREFORE, the Defendant respectfully requests this Honorable Court to grant this Motion to Suppress all of his Statements and Video Tapes.

I HEREBY CERTIFY that a true arid correct copy of the foregoing Motion to Suppress Statements has been furnished by Hand Delivery to the Office of the State Attorney, to both the office *of* Michael J. Satz and to Carolyn McCann, Broward County Courthouse, Fort Lauderdale, Florida, this 28th day of June, 1991.

BY: _____

PETER J. GIACOMA, JR., P.A.
Attorney for the Defendant, SPD
One Financial Plaza, Suite 1910
Ft. Lauderdale, Florida 33394
(305) 763-4041
Florida Bar No. 293040

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROLYN SNURKOWSKI, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by U.S. Mail this 11th day of June, 1993.

Richard B. Greene

Of Counsel