IN THE

SUPREME COURT OF FLORIDA

ALBERT HOLLAND, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. *78,660*

REPLY 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

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 7

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTIONS TO THE TESTIMONY OF DR. STRAUSS. 14

POINT 111

THE TRIAL COURT ERRED IN REMOVING MR. HOLLAND'S ORIGINAL COUNSEL WITHOUT NOTICE AND A HEARING AND OVER MR. HOLLAND'S SUBSEQUENT OBJECTION. 20

POINT IV

THE TRIAL COURT FAILED TO MAKE *AN* ADEQUATE INQUIRY INTO MR. HOLLAND'S COMPLAINTS CONCERNING COUNSEL. 21

POINT V

THE TRIAL COURT ERRED IN HOLDING AN INADEQUATE INQUIRY INTO MR. HOLLAND'S DESIRE FOR SELF-REPRESENTATIONAND INREFUSING TO ALLOW MR. HOLLAND TO REPRESENT HIMSELF. **24**

POINT XIV

THE COURT ERRED IN DENYING A PENALTY PHASE CONTINUANCE. . 29

POINT XV

MR. HOLLAND'S ABSENCE FROM THE HEARING ON THE MOTION TO CONTINUE THE PENALTY PHASE IS REVERSIBLE ERROR. 29

POINT XVI

THE COURT ERRED IN DENYING A REQUESTED INSTRUCTION CONCERNING THE DOUBLING OF AGGRAVATING CIRCUMSTANCES. 30

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. . . . 31

CONCLUSION 35

CERTIFICATE OF SERVICE 35

AUTHORITIES CITED

CASES	PAGE
Campbell v. State, 571 So. 2d 415 (Fla. 1990)	34
Castro v. State, 597 So. 2d 259 (Fla. 1992)	30
Cheshire v. State, 568 So. 2d 908 (Fla. 1990)	33
D.J.S. v. State, 524 So. 2d 1024 (Fla. 1st DCA 1987)	32
Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)	16, 17
Faretta v. California, 422 U.S. 806, 95 S.Ct. 2545, 45 L.Ed.2d 562 (1975)	6, 25, 27
Finkelstein v. State, 574 So. 2d 1164 (Fla. 4th DCA 1991)	21
Garron v. State, 528 So. 2d 353 (Fla. 1988)	19
Godinez v. Moran, ___ U.S. ___, 113 S.Ct. 2680 (1993)	28
Hodse v. State, 315 So. 2d 507 (Fla. 1st DCA 1975)	32
Jones v. State, 612 So. 2d 1370 (Fla. 1992)	31
Kimble v. State, 429 So. 2d 1369 (Fla. 3d DCA 1983)	27
Kleinfeld v. State, 568 So. 2d 937 (Fla. 4th DCA 1990)	27
Livingston v. State, 565 So. 2d 1288 (Fla. 1988)	34
Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)	16, 17
Muhammad v. State, 494 So. 2d 969 (Fla. 1986)	28

Nibert v. State, 574 So. 2d 1059 (Fla. 1990) 33, 34

Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989) 27

Ponticelli v. State, 593 So. 2d 483 (Fla. 1991) 32

Powell v. Texas, 492 U.S. 2d 680, 109 S.Ct. 3146, 106 L.Ed.2d 55 (1989) 14, 15

Poynter v. State, 443 So. 2d 219 (Fla. 4th DCA 1983) 19

Rose v. State, 617 So. 2d 291 (1993) 29

Ross v. State, 474 So. 2d 1070 (Fla. 1985) 33

Schantz v. Eyman, 418 F.2d 11 (9th Cir. 1968) 15

Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934) 29

Songer v. State, 544 So. 2d 1010 (Fla. 1989) 33

State v. Cawetta, 216 So. 2d 749 (Fla. 1969) 27

Trucci v. State, 438 So. 2d 396 (Fla. 4th DCA 1983) 19

Ull v. State, 613 So. 2d 923 (Fla. 3d DCA 1993) 21

United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968) 15

United States v. Garcia, 739 F.2d 440 (9th Cir. 1984) 15

Valle v. State, 581 So. 2d 40 (Fla. 1991) 30, 31

Walls v. State, 580 So. 2d 134 (Fla. 1991) 17, 19

Weinstein v. State, 269 So. 2d 70 (Fla. 1st DCA 1972) 32

Wike v. State. 596 So. 2d 1025 (Fla. 1992) **30**

Wilson v. State. 493 So. 2d 1019 (Fla.1986) **33**

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.216 . . . . . **15**

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 symbols will be used:

"R" Record on Appeal

"AB" Answer Brief of Appellee

Appellant will rely on his Initial Brief herein for Points II, VI-XIII, and XVIII-XXIV.

STATEMENT OF THE CASE

Mr. Holland will rely on his Initial Brief for his Statement of the Case and would add the following matters in reply.

Appellee's presentation of the situation concerning provision of counsel for Mr. Holland at AB1 is incomplete and misleading. 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 assigned Assistant Public Defender (R3320). The trial court sua sponte removed the Public Defender's Office and appointed private counsel on September 10, 1990. The court acted 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 words. 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 (R11-15). 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 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.
>
> **(Rll-12).**

Mr. Holland asked again and the trial judge refused to reappoint Mr. Laswell and refused to give Mr. Holland any reason (R13).

Months later, Mr. Giacoma moved for co-counsel. A different judge, Judge Green, not Judge Futch, appointed the Public Defender's Office as co-counsel on March **8, 1991** (R318-27). On March **15, 1991,** Steve Michaelson, of the Public Defender's Office, asserted a conflict of interest (R347-77). Judge Green granted his motion to withdraw and appointed Young Tindall **(R380-81).** No one ever questioned Mr. Holland as to whether he waived the conflict. There is no showing that Mr. Holland ever knew that Mr. Michaelson was from the same office as Mr. Laswell,

Appellee's assertion that Judge Futch's sua sponte removal was based on some sort of conflict revealed by discovery is false (AB1). Judge Futch removedthe Public Defender'soffice on September 10, 1990 (R3324). The first discovery response took place on September 11,

1990 (R3328-44). There was no assertion of a possible conflict until months later.

Appellee's summary of the facts concerning Albert Holland's complaints about the counsel picked by Judge Futch, and requests to go pro se are incomplete and somewhat misleading (AB3-9). On October 17, 1990, Mr. Holland asked for Mr. Laswell to be reappointed; but also made complaints concerning his new counsel:

Mr. Holland to described 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 I am scared to death. I think they're doing something up under the table. I really don't know what he is doing.

(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" (R11-12). The judge just told Mr. Holland that he could not have Mr. Laswell back **(R13).** The judge had a duty to inquire about counsel's failure to keep Albert Holland informed.

Mr. Holland asked to be heard concerning his counsel on July 1, **1991** (one week **before** trial) and the trial judge refused to hear him (R450). One week later, July **8**, 1991, the **trial** court finally agreed to hear Mr. Holland (R881). Mr. Holland stated his attorneys refused to give him copies of his depositions (R882). He stated they had ignored him throughout his case (R882). He disagreed with the insanity defense (R883). He stated he had been "ineffectively assisted by counsel" (R883). He 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 was

biased against him as 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). Re felt his attorneys were deceiving him and working with the prosecution (R886-87). He asked for 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 only 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. 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). Be mentioned counsel's failure to keep him informed (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 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:

> DEFENSE COUNSEL: We've really never had time to go throush the penalty phase because we were trying to get ready for the case itself.

(Emphasis supplied) (R3093).

Mr. Holland also made attempts to represent himself. 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). 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 stated that he would

rather appear pro se than be represented by his current attorney (R889,902-03). The judge made no inquiry and stated that Mr. Holland was not qualified to represent himself (R904).

Mr. Holland makes several other requests to represent himself, which the trial court ignored (R1171,1174-75). The prosecutor eventually brought 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.

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: 1 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 judge then asked the prosecutor about prior psychiatric hospitalization. He 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 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 game 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 penaltyphase (R3118-19,3128-29). The trial court denied this request without an inquiry (R3129).

STATEMENT OF THE FACTS

Mr. Holland reaffirms his original Statement of the Facts and adds the following matters in reply.

Appellee's statement that on July **25, 1992,** defense counsel **was** "ready to go to trial the following Monday" is misleading (AB9). Trial actually commenced on July **8, 1991,** after the denial of several defense continuances (R875). The prosecution rested on July 25, **1991** (R2426). Defense counsel's comment, that Appellee is referring to is highly ambiguous, but seems to be in reference to setting up the prosecution's deposition of Dr. Love (a defense expert) prior to the presentation of the defense case. The colloquy was:

MR. GIACOMA [Defense Counsel]: So what I've offered to Mr. Satz, because he wants to, of course, depose Dr. Love before that, and the minute that I get a report from him, and Mr. Nelson is going to give me a weekend number, I will call him this weekend the minute I get a report and give him a copy and depose him Sunday afternoon or whatever before we do the other officers, before the competency hearing, and we will do it in Mr. Satz's office or whatever is convenient.

And basically this is all out of my hands, but basically it looks like we are on the go for Monday unless some other lawyer from Washington has news that I don't have any knowledge of.

(R2430).

Some aspects of the prosecution's recounting of Dr. Love's testimony are misleading. Appellee quotes a statement concerning Albert Holland being a drug addict and an anti-social personality (AB12). However, this statement refers to his evaluation of Albert Holland prior to the near fatal beating he received and the development of his schizophrenia as is made clear by a review of his report (R4638). Appellee's characterization of Dr. Love's knowledge of Detective Butler's involvement is somewhat misleading (AB12). He had read Detective Butler's report, but had not viewed the videotape of the interrogation (R2558). He did not state that viewing the videotape would be "critical," but merely stated that it would be "helpful" (AB12,R2558). Dr. Love stated that "at the present time" he had one patient suffering from schizophrenia, but made no statements about his prior treatment of schizophrenia (R2563). Mr. Holland never told Dr. Love that he only "had a beer" (AB13). Dr. Love's testimony on this matter is as follows:

Q Now, you've indicated to Mr. Giacoma that Mr. Holland, Junior, was taking alcohol and cocaine at the time that he attacked T. S. J. ?

A That's what he stated, yes.

Q Do you know how much alcohol?

A **No.**

Q Do you know if it was more than a beer?

A I had the impression that he had been drinking for quite awhile.

Q How did you get that impression?

A You know, that's one of the things that you might wish you had the conversation on tape. The statements like will I have been drinking.

Q Did you ask him how much?

A But I didn't ask him how much.

Q Did you ask him what?

A I think he said beer.

Q How much cocaine did he ingest, do you know?

A From the statement of T J two half rocks I think it was.

(R2569).

Appellee's characterization of Dr. Love's testimony concerning the events with T J is misleading:

Q [Prosecutor]: Doctor, are you saying that Albert Holland. Junior, didn't know it was wrong to hit T J on the head with bottles?

A [Dr. Love]: If you would ask him afterward I'm sure he would have known it was wrong. At the time I think it was more like the kind of thing -- to put it in the experience of a layman when you wake up and find the house is on fire and jump through the window without even thinking about it I think it was that kind of thing.

Q Are you assuming that or is that your definite opinion?

A That's my opinion.

Q Okay. And are you also saying that when he took off her clothes that he didn't know that was wrong?

A I think it was all part of the same ongoing chain of events.

Q And when he placed his penis in her mouth do you feel that he didn't know that was wrong?

A I think it was all part of an ongoing chain of behavior.

(R2570).

Appellee's statement that Dr. Love did not know about the Randolph Canion statement is simply false (R13).

Q [Prosecutor]: And Audrey Canion said her husband said man you're going to kill that woman and he got up and ran?

A [Dr. Love]: Yes. I remember that line.

(R2571).

Appellee's characterization of Dr. Patterson's testimony concerning Albert Holland's use of Thorazine is misleading.

Q [Defense Counsel]: You prescribed medication for him?

A [Dr. Patterson]: Yes, sir.

Q For a period of time that he was on Thorazine, correct?

A That's correct.

Q Do you know how long a period of time he was on Thorazine?

A He was on for the entirety of that first admission. He received medication from that time until he discharge and after his discharge he returned to us several months later. So from September or rather from July 1st or 2nd to about September 16th when he was discharged he was receiving Thorazine.

Q How much?

A 250 milligrams four times a day initially and that was subsequently reduced to three times a day.

Q What does Thorazine do to somebody that doesn't need it? Somebody that was faking it and they were just in good health, like 1 am, and you gave me Thorazine. What would happen?

A For most people it would be a very sedating drug. Thorazine is a major tranquilizer. A thousand milligrams is about right in the middle. It's considered a moderate dose. At this time I think that the Physician's Desk Reference, the PDR that we use for guidelines, recommends no more than 2,000 a day for any individual. So a thousand

would be a moderate dose, and for most of us sitting in the room without mental illness it would put us to sleep. To me it's a major tranquilizer as opposed to Valium.

Q What effect did it have on Albert Holland? Did he go to sleep?

A No, he did not. With Mr. Holland our impression was that it improved his mental state.

(R2614-15).

Dr. Patterson specifically testified that he thought Mr. Holland had been legally insane under the Washington, D.C. standardbecause of his inability to control his behavior (R2622,AB15). Appellee's statement that Mr. Holland's records reflecting a lack of psychosis in 1982 is somewhat misleading (AB16). Dr. Patterson actually stated that Albert Holland suffered from "chronic schizophrenia" with periods of remission (R2654). He was also on anti-psychotics for much of the time (R2625-26). It is true, that Dr. Patterson stated that Saint Elizabeth's found no evidence of organic injury, but he also testified that an MRI could have changed this (R2634,AB16).

Appellee completely ignores a key aspect of Dr. Patterson's testimony: the influence of cocaine on a person with schizophrenia. 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 any underlying problems (R2637). The likelihood **of** this is far greater in a person with a history of schizophrenia (R2637).

Appellee's recounting of Dr. Polley's testimony is incomplete. Dr. Thomas Polley, a clinical psychologist from St. Elizabeth's,

testified concerning his psychological testing of Albert Holland. 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 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 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).

Appellee's statement that Dr. Jordan saw Mr. Holland as a result of a court order is misleading (AB21-22). Dr. Jordan was retained by the prosecution, not appointed by the court (R2797). The Court order he refers to is merely to compel Mr. Holland to be examined by the prosecution's retained doctors, Strauss and Jordan (R3500).

Appellee's recounting of Dr. Koprowski's testimony is somewhat incomplete (AB22-24). She stated that 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 and that he remained "deeply emotionally disturbed" (R2829,2832).

Appellee's recounting of Dr. Strauss' testimony is incomplete and somewhat inaccurate (R25-27). Dr. Strauss decided that Albert Holland was exaggerating his symptoms based on two fifteen-minute interviews,

on August 3, 1990, and August 10, 1990 (R2853-56). Dr. Strauss never said that Mr. Holland was "not sick" (AB26). He actually said that he is "not as sick as he was pretending to be" (R2860). Dr. Strauss also 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). He stated that people with mental problems can exaggerate their problems by malingering (R2912).

Appellee's summary of Mr. Holland's statement to the Court at the beginning of the penalty phase is somewhat misleading (AB28). Mr. Holland never suggested that he should have been shackled and gagged (AB28,R3120-21). He merely stated that the judge's actions were more prejudicial than shackling and gagging (R3120-21).

Appellee's characterization of Dr. Koprowski's testimony is incorrect (AB29). Although Dr. Koprowski stated that although Mr. Holland did not meet the statutory criteria for extreme mental or emotional disturbance; she stated that he was mentally ill at the time of the offense and at the time of the trial (R3133-34).

> Q [Defense counsel]: Doctor, you testified on several occasions that Mr. Holland's mentally ill, correct?
>
> A [Dr. Koprowski]: Yes.
>
> Q Still is?
>
> A Yes.

(R3133-34).

Appellee's Statement of the Facts also ignores substantial mitigation presented by lay witnesses (AB29). 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 and 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 federal prison:

> 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 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). 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).

ARGUMENT

POINT I

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

Appellee's argument ignores the unanimous United States Supreme Court opinion, directly on point, Powell v. Texas, 492 U.S. 2d 680, 109 S.Ct. 3146, 106 L.Ed.2d 55 (1989). In Powell, the United States

Supreme Court clarifiedthat although introduction of defense evidence on insanity constitutes a partial waiver of a defendant's Fifth Amendment rights, the introduction of psychiatric evidence 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 held this to be reversible error under. **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 no notice of this examination.

Id. at **3149.**

The reasoning of Powell 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 have notice of the exam and 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. Eyman, 418 F.2d 11 (9th Cir. 1968).

The procedure here is more egregious than in Powell. 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 written notice of his invocation of his right to counsel and right to remain silent (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, Mr. Holland was not warned of his right to remain silent and right to counsel (R78-152).

The error here is far more egregious than in Powell. In Powell, counsel put his client's competency and sanity in issue. 109 S.Ct. at 3148. He had notice that he was going to be examined as to competency and sanity and the right to be present. However, he did not know that

examination would cover future dangerousness, a penalty phase issue in Texas. Here, Mr. Holland had specifically invoked his right to counsel and right to remain silent and the trial court had specifically ordered that no state agent speak to him, yet Dr. Strauss, clearly a state agent (a jail psychiatrist) had a compelled interview of him concerning his competency and his sanity. He was not warned of his right to remain silent or his right to counsel.

Appellee also attempts to argue that Walls v. State, 580 So. 2d 134 (Fla. 1991) is somehow distinguishable because of a lack of subterfuge (AB39-40). However, the subterfuge in this case is no less serious than in Walls, supra. In Walls, a correctional officer had engaged Walls in conversation; took detailed notes concerning her observations about the conversation and his behavior. Id., at 132. She then turned these over to the prosecution and its mental health experts. Id. This Court reversed and ordered a new trial with evaluations that had no access to this material. Id., at 135.

Here, the trial court had issued an order that no state agent speak to Mr. Holland. Dr. Strauss, a correctional employee, just like the guard in Walls, comes to see him, in the guise of mental health treatment. Instead, he became the key witness in eventually having Mr. Holland found competent, convicted and sentenced to death.

Appellee states that no violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and Michigan v. Jackson, 475 U.S. 625 (1986), occurred (AB40). Appellee then states:

> Simplybecause counsel has been appointed to assist Holland in his defense does not mean that every observation made by a doctor can only be made in the presence of a defendant's lawyer.
>
> (AB40).

Not only did Mr. Holland have counsel, he had invoked his right to remain silent and right to counsel and a court had issued an order to this effect. Additionally, Dr. Strauss did not testify based on his "observation" of him, but based on his interrogation of him concerning his mental state.

This Court found similar conduct to violate the right to counsel as embodied in the Florida and United States Constitutions in Walls. 580 So. 2d at 134. This Court stated:

> The state conceded at trial that this trickery violated *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and Malone v. State, *390* So. 2d 338 (Fla. 1980), *cert. denied*, 450 U.S. 1034, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981); and in this assessment, we must wholeheartedly agree. Here, as in Malone, we are confronted with a state-sponsored subterfuge designed in part to trap Walls and circumvent the clear requirements of the Constitution. *See id.* at 340. Thus, the trial court properly concluded and the state conceded that none of the information obtained by Beck could be used against Walls in the state's case at trial or in the penalty phase.
>
> As a matter of Florida law, however, we believe the trial court erred in not excluding Beck's information from all aspects of trial. We do not agree with the state's argument that it now may have the advantage of Beck's subterfuge on matters relating to Walls' competency to stand trial. The clear requirements of article I, section 9 of the Florida Constitution have been violated, as well as this Court's prior holding in *Malone.*
>
> When the state employs an illegal subterfuge, the Florida Constitution forbids it from using the fruits of that subterfuge for any purpose that will work to the detriment of the defense's case, including determination of Competency or insanity. Any other conclusion would encourage the use of such subterfuges and run against every basic conception of fairness embodies within article I, section 9 of our Constitution. The procedure employed by the police in this instance flouted these standards and directly resulted in a court ruling on the competency issue that is now tainted by the illegal subterfuge. The court order and all that followed it thus cannot be allowed to stand under the Florida Constitution. Art. I, § 9, Fla. Const.

Id. at 134 (emphasis supplied).

Appellee's argument that the admission of Dr. Strauss' testimony at the competency hearing and at trial is harmless beyond a reasonable doubt is hard to fathom. At the competency hearing, both mental health experts appointed by the court found Mr. Holland to be incompetent (R153-266). Dr. Strauss was the only mental health professional to testify Mr. Holland was competent. The trial court stated, "I have never previously gone against one of my court appointed psychologists or doctors in my career" (R291). Dr. Strauss' testimony at the competencyhearing clearly can not be considered to be harmless beyond a reasonable doubt. In Walls, supra, this Court found the error to be harmful even though the correctional officer did not testify, but merely passed along notes to the prosecution's experts.

Absent the inadmissible testimony, the expert testimony would have been unrebutted that Mr. Holland was incompetent. A trial court is required to give great weight to unrebutted expert testimony that a person is incompetent. Trucci v. State, 438 So. 2d 396, 397 (Fla. 4th DCA 1983); Poynter v. State, 443 So. 2d 219, 220 (Fla. 4th DCA 1983). Much of the lay testimony presented by the prosecution was based on limited contacts, which were remote in time. These were of questionable admissibility and of little weight. Garron v. State, 528 So. 2d 353, 356-57 (Fla. 1988). The admission of Dr. Strauss' testimony at the competency hearing was harmful error.

The admission of his testimony was also harmful at the trial itself. Dr. Strauss was 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 insanity. At trial, he presented the fact that he had twice been previously found not guilty by reason

of insanity. He also presented other experts to confirm his history of mental illness, severe head injury, and drug abuse. Mr. Holland has been hospitalized for 5½ years in the District of Columbia and no one had suggested the possibility of malingering. Dr. Strauss was the first person to ever suggest this. His compelled interviews of Mr. Holland changed the entire complexion of this case. The error is harmful.

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.

Appellee argues that Judge Futch removed Assistant Public Defender William Laswell because a conflict became apparent in the initial discovery exchange (AB48). This is impossible. Judge Futch sua sponte removed the Public Defender's Office on September 10, **1990** (R3324). The first discovery response took place on September 11, **1990** (R3328-3344).

The assertion of a possible conflict took place months later. Mr. Giacoma moved for co-counsel, commonly known as "second chair" counsel. A different judge, Judge Green, not Judge Futch, appointed the Public Defender's Office as co-counsel on March 8, 1991 (R318-27). On March 15, 1991, Steve Michaelson, of the Public Defender's Office, asserted a conflict of interest (R347-77). Judge Green granted the motion to withdraw and appointed Young Tindall (R380-81). No one ever questioned Mr. Holland as to whether he waived the conflict of interest. There is no showing that Mr. Holland ever knew that Mr. Michaelson was from the same office as Mr. Laswell.

Appellee also attempts to distinguish the cases cited by Mr. Holland in his Initial Brief by saying that there was no "nefarious

basis" for the removal. Neither, Finkelstein v. State, 574 So. 2d 1164 (Fla. 4th DCA 1991) nor Ull v. State, 613 So. 2d 923 (Fla. 3d DCA 1993) rely on any nefarious basis of the judge in reversal. In Ull, supra, there is absolutely no mention of any improper motives on the judge's part. In Finkelstein, there is some mention, but it is not the basis of the decision.

In this case, we can never know what the basis of the judge's action was because he refused Mr. Holland's repeated request to give some reason for the removal (R11-15,3412). However, the trial judge's actions were disastrous to Mr. Holland's case. First, it removed counsel who had been working on Mr. Holland's case and who had developed a close attorney-client relationship with him. Secondly, the trial court sua sponte issued an order appointing psychotherapists to interview and evaluate Mr. Holland for competency and sanity on the same day it was sua sponte removing Mr. Holland's counsel and appointing new counsel (R3324). This gave the prosecution a tremendous head start on preparing for the key issues of competency and sanity. (Perhaps this is the nefarious motive.)

POINT IV

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

Appellee's argument ignores Mr. Holland's complaints about counsel which the judge ignored. On October 17, 1990, Mr. Holland made complaints concerning his new 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 I am scared to death. I think they're doing something up under the table. I really don't know what he is doing.
>
> (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" (R11-12). The trial court had a duty to inquire about counsel's failure to keep Albert Holland informed about his case. This is reversible error.

Appellee also seems to be arguing that Mr. Holland did not make specific enough complaints about counsel to merit judicial inquiry. However, a review of the record belies this claim. 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). He 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 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 for new counsel and stated he had a conflict with his attorneys (R889,893-94).

Appellee never comes to grips with the fact that the trial court's inquiry never answered the core complaint of ineffective assistance. The trial court eventually asked counsel to respond (R898). 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).

This did not answer the complaint of ineffective assistance. If anything, it confirmed it. The trial court had a duty to either grant Mr. Holland's request for new counsel or inquire further.

The trial court ignored Mr. Holland's request for new counsel after the penalty phase. 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). Re mentioned counsel's failure to keep him informed on the 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 go throush the penalty nhase because we were trying to get 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.

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.

Appellee fails to lay out the complete factual scenario concerning Mr. Holland's requests to represent himself and the trial court's response. 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 made no inquiry and stated 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 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 penaltyphase (R3118-19, 3128-29). The trial court deniedthis 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. Capetta, 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 ruling conflicts with the recent decision of the United States Supreme Court in Godinez v. Moran, ___ U.S. ___, 113 S.Ct. 2680 (1993) and this Court's decision in Goode v. State, 365 So. 2d 381 (Fla. 1979) and Muhammad v. State, 494 So. 2d 969 (Fla. 1986). The trial court in this case specifically found Mr. Holland to be mentally competent; yet denied him the right to self-representation. This is preciselywhat the United States Supreme Court rejected in Godinez. The Ninth Circuit had held that a higher level of mental competence was required to waive the right to counsel than that to stand trial. The United States Supreme Court overruled this decision and stated:

> Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires anappreciablyhigher level of mental functioning than the decision to waive other

> constitutional rights. Respondent suggests that a higher competency standard is necessary because a defendant who represents himself "'must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.'" Brief for Respondent 26 (quoting Stilten & Tullis, Mental Competency in Criminal Proceedings, **28** Hastings L.J. **1053,** 1068 **(1977)).** Accord, Brief for National Association of Criminal Defense Lawyers as ***Animus Curiae*** 10-12. But this argument has a flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive ***the*** *right,* not the competence to represent himself. In *Faretta* V. ***California,*** **422 U.S.** ***806,*** **95** S.Ct. **2525,** 45 L.Ed.2d **562** (1975), we held that a defendant choosing self-representation must do so "competently and intelligently", ***id.,*** at **835,** ***95*** S.Ct. at 2541, but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, id., at **836,** 95 S.Ct. at 2541, and we emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," id., at **834, 95** S.Ct. at **2541.** Thus, while "[i]t is undeniable that in most criminal prosecutions defendant could better defend with counsel's guidance than by their own unskilled efforts," *ibid.,* a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.
>
> 113 S.Ct. at **2686-87** (footnotes omitted).

This was precisely the trial court's error in this case.

POINT XIV

THE COURT ERRED IN DENYING A PENALTY PHASE CONTINUANCE.

Appellant would point out that Appellee's position on appeal is inconsistent with its position below. In the trial court it explicitly stated it did & oppose the continuance (R3093).

POINT XV

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

Appellee argues that Mr. Holland's presence at the hearing on his motion for continuance on the penalty phase would be "useless" pursuant to Snyder v. Massachusetts, **291** U.S. **97, 54** S.Ct. **330, 78** L.Ed.2d **674** (1934). Appellee relies on Rose v. State, **617** So. 2d **291** (1993), for this argument. In Rose, this Court held that the defen-

dant's absence for an in camera discussion of the problems between defense counsel and his client was not reversible error as nothing was discussed that could affect the ultimate sentence. Id. at 296.

Here, Mr. Holland's absence was 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).** Indeed, the trial court relied on the lack of showing of a particular need in denying the motion (R3093). Mr. Holland could have provided the names of the witnesses and why they were not located. He could have provided the court the particular need. The granting of the continuance could well have led to more mitigation. A new penalty phase is required.

POINT XVI

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

Appellee argues that Mr. Holland was not entitled to the doubling instruction required by this Court in Castro v. State, 597 So. 2d 259, **261 (Fla.** 1992), **as** the aggravating factors at issue do not actually double. However, Appellee cites no caselaw to this effect. This argument is contrary to this Court's decision in Valle v. State, 581 So. 2d 40, 47 (Fla. 1991). 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.

Thus, this Court has held that these factors double.

Appellee relies on Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992), to argue that this error was harmless. However, in Jones this Court specifically relied on the judge's failure to double to hold the jury error harmless. Id. at 1375. Here, the trial judge also doubled his consideration.

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.

As previously stated, the trial court doubledthese circumstances in violation of Valle, supra. Appellee relies on Valle to argue that the doubling error is harmless. However, in Valle the trial court did not double the factors. ("In any event, Valle is not disadvantaged because the trial court merged these three factors into one aggravating factor.") 581 So. 2d at 47.

Non-Statutory Mitigating Circumstances

The trial court erredin failing to findunrebuttednon-statutory mitigating factors and failing to considers other. Appellee argues that the trial court properly rejected drug usage. However, 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, testifiedthat Albert Hollandvomited 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. It is clear that the state is bound by its own evidence. D.J.S. v. State, 524 So. 2d 1024 (Fla. 1st DCA 1987); Hodge v. State, 315 So. 2d 507 (Fla. 1st DCA 1975); Weinstein v. State, 269 So. 2d 70 (Fla. 1st DCA 1972).

Appellee also agrees that the testimony of Dr. Koprowski rebuts any cocaine intoxication (AB89). This is not true. Dr. Koprowski specifically testified that an hour before encountering Officer Winters he had smoked cocaine (R3142). Appellee also relies on Ponticelli v. State, 593 So. 2d 483 (Fla. 1991) to support the trial court's rejection of drug usage as a mitigating factors (AB90). However, in Ponticelli this Court stated "there was no evidence of drug usage on the evening of the murder." 593 So. 2d at 491. Here,

the prosecution's own witnesses testified to the drug usage and immediate change in behavior.

The state below did concede that Albert Holland was a long-term drug abuser (R4779). Long-term usage of intoxicants is a recognized mitigator. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Sonser v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

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 1070, 1074 (Fla. 1985). This is not "lingering doubt" as Appellee argues (AB91).

Appellee argues that Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) does not apply (AB91). However, 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 disturbance" (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 penaltyphase, Dr. Koprowski testifiedtothe contrary, that the defendant was not under such influence. This circumstance is therefore rejected by the Court.
>
> (R4813).

Appellee argues the trial court could properly reject the near fatal beating Mr. Holland received when he was in prison as non-

statutorymitigation (AB91-92). However, there was undisputed evidence that Albert Holland's behavior changed dramatically after the beating. 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 on for 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-statutorymitigator. 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.

Appellee also completely fails to respond to the independent error of the trial court's failure to consider many of the these non-statutory mitigators. This is an independent error requiring resentencing.

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 23rd day of November, 1993.

Richard B. Greene
Of Counsel