IN THE SUPREME COURT FLORIDA

ALBERT HOLLAND,

Appellant,

VS. CASE NO. 89,922

STATE OF FLORIDA,

Appellee..

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the circuit court. The volume of the current record will be referred to by number. The following symbols will be used.

R Record on Appeal

SR Supplemental Record on Appeal

IR Record of Original Trial

STATEMENT OF THE CASE

This case involves a retrial. Holland v. State, 636 So. 2d 1289 (Fla. 1994). Mr. Holland was charged with first degree murder of a law enforcement officer, robbery with a firearm, sexual battery with great force, and attempted first degree murder with a weapon 96R7000. He was found guilty as charged on counts I, II, and IV and was convicted of the lesser included offense of attempted sexual battery with great force on count III 101R8031-8. The jury recommended the death penalty by a vote of eight to four 101R8084-5. The trial court sentenced Mr. Holland to death on count I, to life imprisonment on count II consecutive to count I, to 15 years on count III consecutive to counts I and II, and to 30 years on count IV consecutive to counts I and II and concurrent to count III 102R8203-15.

STATEMENT OF THE FACTS

This case involves an alleged attempted sexual battery and attempted murder on [redacted] and the alleged murder and robbery of Officer Scott Winters. These incidents occurred on July 29, 1990 in Pompano Beach, Florida. The defense contested the

facts of the case as well as introducing evidence of insanity and intoxication by the use of cocaine and alcohol.

The State's case opened with the testimony of [redacted] 56R3295-3343. Ms. [redacted] stated that she met Albert Holland and he asked if she had a hitter, a device for smoking cocaine 56R3297-8. She said that she did not and then led Mr. Holland to a wooded area so that they could smoke cocaine together 56R3299-3300. He began to smoke cocaine off a beer can and she didn't smoke because she didn't like to smoke off a can 56R3300,3327. He had a $10 cocaine rock which he broke in half and smoked 56R3301. They were relaxed and talking during this time 56R3302. He smoked the second piece of rock and immediately became violent 56R3302. He began to hit her with bottles 56R3302-3. She claimed he unzipped his pants and put his penis in her mouth, she pushed it out and he hit her with a bottle 56R3303-4. She has two felony convictions and had been smoking cocaine for two years at the time of the incident 56R3322-3. She had smoked cocaine in this area "plenty of times" 56R3331. She got high with a lot of people she didn't know 56R3336. Mr. Holland was normal until he smoked the second piece of cocaine 56R3332,3337.

Officer Pepper Shaw stated that she met Officer Winters at about 6:45 p.m. 57R3432. Winters came on the radio and said he had a possible suspect and then came on later and said he'd been shot 57R3438.

Roland Everson testified that on July 29, 1990 he was living at a nursery on Hammondville Road in Pompano Beach as a caretaker

58R3492. He heard noises and walked out and saw a police officer with a man in a headlock 58R3492-3. The officer had a marked K-9 unit 58R3493. Mr. Everson called 911 58R3494. He heard two shots as he was hanging up the phone 58R3495. He saw the officer leaning on the side of the car and he saw Mr. Holland kneeling with the gun 58R3496. Mr. Holland eventually left 58R3498. He stated that the dog was in the car barking, jumping and trying to get out 58R3509.

Betty Bouie stated that she was riding in a car on July 29, 1990 and saw a tall man have a police officer in a headlock and take the officer's gun out of his holster and then the man shot the officer 58R3516-8. She claimed that they were in a face to face headlock and the man reached over the officer's back and got the gun 35R3521-2. She claimed to be 3-4 feet away 58R3526. She claimed there were two shots 58R3531. In her police statement in 1990 she denied seeing the shooting 58R3535-6. She has 3 felony convictions 58R3519.

Officer Michael Powell stated that he was the first officer on the scene when Officer Winters was shot 58R3538-9. Winters was outside his vehicle 58R3540. The car was running, the windows were closed, the dog was in the car and barking 58R3551-2.

Dorothy Horne testified that she was traveling west on Hammondville Road in a car with her husband and daughter 59R3660-1. She saw a man and a police officer struggling over a gun in a field 59R3662. The men were close together and their hands were going up and down in the air 59R3664. There was a shot and the policeman

fell 59R3664. She heard one shot 59R3665. She could not tell whose hands were on the gun 59R3678.

Nikki Horne stated that she was in the car with her parents traveling west on Hammondville Road 59R3684-5. She saw an officer and a man struggling 59R3685. She claimed that they were face to face and the man took the gun from the officer's side and then she heard three shots 59R3686-7. The shots were quick 59R3694-5.

Parish Horne stated that on July 29, 1990, he was driving with his wife and daughter going west on Hammondville Road 59R3700-1. He saw the struggle in his mirror 59R3701-2. The officer had Mr. Holland in a headlock and he reached around and took his gun and shot the officer 59R3703-4. He claimed he heard two or three shots 59R3705. Holland immediately left after the shooting 59R3713.

Officer Kevin Butler stated that the it was 7/10's of a mile between where [redacted] was found and where Winters was found 60R3721. He interviewed Mr. Holland in Spanish through an interpreter at about 9:30 p.m. and he gave the name of Antonio Rivera 60R3738-9. He again interviewed Mr. Holland about 2:30 a.m. on July 30, 1990 60R3730. He said that Mr. Holland had said that the officer threatened to put the dog on him and they started struggling 60R3745. The officer pulled out the gun and Mr. Holland got it and shot the officer twice 60R3745. Mr. Holland had thrown up earlier in the evening at 8:50 p.m. and they had collected the vomit 60R3770. Mr. Holland had told him that he had smoked cocaine and drank that day 61R3807. Mr. Holland stated that the officer

pulled out his gun and threatened to shoot him 61R3834. The police never tested Mr. Holland's hands for gunshot residue 61R3849.

Gene Detuscan, forensic toxicologist, tested Albert Holland's vomit for drugs and alcohol 62R3878-9. Its alcohol content was .03 62R3879. Cocaine was also present 62R3881. Cocaine would have had to be ingested in the previous 60-75 minutes 62R3885. The cocaine would have to have been taken orally or nasally and not smoked 62R3885-6. Michael Wagner, forensic toxicologist, testified that he examined the vomit from Albert Holland and it tested positive for cocaine 62R3889-90.

Deborah Pollock, a crime scene technician, stated that she arrived at the location of [redacted] at 6:54 p.m. 62R3906. At 7:26 p.m., she left for 2600 Hammondville Road because she heard officer Winters saying on the radio that he had been shot 62R3908-3909. She found his nightstick, sunglasses, two empty shell casings and a spring on the ground 62R3909. Fingerprint examiner, Robert Holbrook, testified that a latent print from the hood of Winters' car top matched a latent from the left thumb of Mr. Holland 62R3935,44-45.

Jeffrey Ban, a forensic DNA expert, stated that blood taken off the outside of the driver's door of Officer Winters' car is consistent with the blood of Albert Holland 63R4035. Blood on Winters' shirt is consistent with Albert Holland 63R4043-5. There was human blood of unknown origin on Mr. Holland's pants and sneakers 63R4055-62.

Monica Datz, an evidence technician, attended the autopsy 63R4125-6. There were two projectiles, one was loose in the underwear and one was removed from the left pelvis area 63R4128-32. There was a bullet fragment on a white t-shirt 63R4142.

Dennis Grey, firearms examiner, stated that he examined a semi-automatic Smith and Wesson handgun 63R4159. It holds eight cartridges in the magazine and one in the chamber 63R4161. He received seven projectiles with the weapon 64R4166. The cartridges from the autopsy are consistent with this gun 63R4168-9. He believed that the right magazine pouch was damaged from being hit by both shots 63R4173-8. He feels that both shots were fired from a distance of three to six inches 63R4178-82. He can rule out a contact wound and can rule out the gun being shoved under the officer's bullet proof vest 64R4199-4200. Someone striking your hand while it's on the trigger could make it go off 64R4203-4.

Daniel Radcliffe, a crime lab analyst, testified that Officer Winters' hands tested positive for gunshot residue on both palms and on the right back of the hand 65R4230.

The testimony of Dr. Larry Tate was read to the jury 65R4266. He stated that there were two gunshot wounds to the body, one to the left of the navel and one where the abdomen reaches the thigh 65R4276,84. The abdominal wound was fatal, the other wound was superficial 65R65R4290-92. A bullet fragment was retrieved from his underwear and a projectile from the lower abdomen 65R4294. Both bullets went through the ammunition pouch 65R4298. There is

no way to tell the order of the shots 65R4301. He claimed that the abdomen shot went through the bullet proof vest 65R4303-4.

He was leaving his shop at 7:15-20 p.m. and heard a police officer say, “Hey you get over here” 65R4320-21. Bell was 40-50 feet away 65R4325. The man had on no shirt, dark pants and “had wild eyes” 65R4321. The man stopped and went back to the vehicle and the officer got out and told the man to put his hands on the car, which he did 65R4321-4324. The officer had his night stick in the man’s back 65R4324. He claimed the officer reached down to operate his radio and the man swung and missed 65R4324. The officer grabbed him and got him in a headlock and got him down on the ground 65R4324. Bell claimed that they were facing each other 65R4325. The man tried to come up and the officer hit him 2-3 times with the nightstick across the back 65R4325-6. The officer lost his night stick 65R4327. The man began reaching for the gun and they began struggling over it 65R4327-8. He claimed that the man was trying to pull the gun out and the officer was pushing down 65R4330. The gun came out and it fired twice 65R4331. The man then left 65R4332. He identified Mr. Holland as the man 65R4328. Bell has one felony conviction 65R4332. Bell claimed he saw this through four lanes of traffic 65R4336. Bell stated that at one time both men’s hands were on the gun 65R4347. The shots went off very quickly 65R4355. The prosecution rested and motions for judgment of acquittal were denied 65R4396-4401.

The defense called Dr. William Love, a clinical psychologist. He has been a licensed clinical psychologist since 1969 67R4426.

He has previously taught at Nova University 67R4426. He is board certified in neuropsychology 67R4426-7. He was declared an expert in psychology and neuropsychology 67R4428-9. He examined Mr. Holland in 1991 after reviewing extensive records 67R4430-1. He reviewed medical records from when Mr. Holland was beaten in federal prison in 1979 67R4433-4. It was a severe beating and the CAT scans at the time showed a shift in the brain 67R4434-5. Dr. Love testified that the right frontal horn of Mr. Holland's brain was displaced 67R4471. He spoke to Mr. Holland's father concerning his background 67R4435. Albert began to develop serious drug problems when he was 16-17 67R4437. It included alcohol, marijuana, heroin, PCP, LSD, cocaine, Dilaudid, Percodan, and bam 67R4439,48.

He interviewed Albert Holland and he reviewed records from Mr. Holland's hospitalization in St. Elizabeth's mental hospital 67R4440-1. He considered St. Elizabeth's one of the most prestigious mental hospitals in the United States 67R4441. Mr. Holland was sent to St. Elizabeth's after being found insane in the District of Columbia courts 67R4442-3. He was diagnosed as having schizophrenia which is a biochemically based disease characterized by a breakdown in the ability to perceive reality 67R4445-6. Mr. Holland was given several antipsychotics in St. Elizabeth's including Haldol and Thorazine 67R4512. The behavior that was consistent with schizophrenia began after the severe beating he received in federal prison 67R4446. Alcohol and drug abuse can exacerbate the problems of schizophrenics 67R4447. Dr. Love

testified that Mr. Holland was legally insane during the incident 67R449-52.

Dr. John Marracini, Chief Medical examiner of Palm Beach County, testified as a defense witness 67R4530-1. He is a graduate of Harvard Medical School and is board certified in anatomic, clinical, and forensic pathology 67R4531. He was declared an expert in forensic pathology 67R67R4534. He reviewed the autopsy report, physical evidence and witness statements in the case 67R4535-6. The wounds of the officer are slightly irregular because they passed through the officer's garments or equipment first 67R4539-40. The residue on the officer's hands is consistent with the hands being in the vicinity of a firearm when it is discharged 67R4546. He testified that the physical evidence is consistent with the officer having the man in a headlock and the men facing each other and both of their hands being on the gun when it goes off 67R4555. It is possible for both individuals to have fingers inside the trigger guard at the same time 67R4559. He stated that the evidence is consistent with the shots being very rapid 67R4566-7. It is consistent for the second shot to be caused by the struggle rather than the intent of the shooter 67R4570.

Dr. Raymond Patterson was called as an expert in forensic psychiatry 69R4661-2. He has practiced forensic psychiatry since 1981 69R4659-60. He has been Acting Commissioner of Mental health for the District of Columbia and Forensic Director for the State of Maryland 96R4659-4660. He has also been a surveyor for the Joint

Commission on Accreditation 69R4661. St. Elizabeth's is one of the most respected psychiatric facilities in the country 69R4670-1.

Albert Holland was first admitted to St. Elizabeth's on July 1, 1981, when he was referred by a court for evaluation as to competency and sanity 69R4672. He was given a multi-disciplinary evaluation by the hospital staff and the opinion was that he was insane as he could not conform his behavior to the requirements of law 69R4673-4. The court found him to be legally insane and he was committed to St. Elizabeth's 64R4675. He was diagnosed as suffering from chronic undifferentiated schizophrenia and alcohol and mixed substance abuse 69R4677. Schizophrenia is a major mental disorder which compromises your ability to recognize reality 69R4678. Schizophrenics are far more likely to become violent when involved with drugs or alcohol than others 69R4682. Mr. Holland was given 1,000 milligrams a day of Thorazine which was later reduced to 750 milligrams a day 69R4585-6. Thorazine is an antipsychotic that acts as a major tranquilizer on people who do not have a psychiatric disorder 69R 4686-8. Mr. Holland complained of electricity running through his body and had benefitted from Thorazine previously and requested it 69R4687-8. It is rare for someone to ask for Thorazine to abuse it 69R4688. Mr. Holland was found not guilty by reason of insanity on a second charge in December, 1982 based on the hospital's recommendation 69R4691. The hospital had maintained a consistent diagnosis of schizophrenia based on a reevaluation every three months 69R4693. On June 10, 1986, Mr. Holland's involuntary commitment was continued by the

court 69R4699-4700. Mr. Holland was consistently looked at for malingering and this was rejected 69R4703-4. Schizophrenia can wax and wane 69R4742-3. A person with schizophrenia could function well in a hospital and decompensate with the pressures of living outside 69R4744. The loss of structure and additional stressors could exacerbate the illness 69R4745. Putting a person in fear could also trigger psychosis 69R4745-6. Cocaine increases the level of Dopamine in the blood so it exacerbates symptoms of schizophrenia 69R4746-7. The defense introduced two judgments from the District of Columbia finding Mr. Holland not guilty by reason of insanity on January 8, 1992 and December 14, 1992 70R4767-8.

Albert Holland Sr., Albert's father, testified concerning Albert's background 70R4768. Albert lived at home until he was 17 70R4770. Albert's problems began when he became involved with drugs 70R4771-2. The school he went to was drug infested 70R4771. He later became involved with an older woman who introduced him to heroin 70R4772. In 1979 he was sent to the federal prison in Madison, Wisconsin 70R4773. In October, 1979 he was severely beaten and was in a coma 70R4774-5. He was attacked by seven inmates, two of whom beat him with a metal mop ringer 70R4774. He was in three different hospitals recovering from this attack 70R4775-6. He was released in August, 1980. He was extremely depressed and talked of suicide several times 70R4776. He often spoke of jumping off the roof of the building where his probation officer was 70R4776-7. "He just went bizarre, he went like haywire" 70R4777. He eventually was sent to St. Elizabeth's where

he stayed until June, 1986 70R4777. After he escaped in 1986 he saw a psychiatrist, Dr. Frances Welsing, on his own 70R4779. Albert was bitten by a dog when he was 7 and he had a fear of dogs the rest of his life 70R4781.

The defense called [redacted] 71R4814. She admitted that she had given a police statement soon after the incident in which he stated that there had been no sex involved 71R4815-7. Sandra Bass stated that she was working at Jenkins' restaurant on Hammondville Road on July 29, 1990 73R4915-7. Albert Holland was there buying drinks for people 73R4917-9. She felt that "he didn't look right" and that he "was on something" 73R4920. She had seen Mr. Holland and Jose Padilla smoking crack cocaine earlier in the day 73R4935. Jose Padilla stated that he met Mr. Holland in the Hammondville Road area on July 29, 1990, and they smoked cocaine together at about 2 p.m. 73R4950-8. Vernon Johnson stated that on July 29, 1990, he ran into Jose Padilla and Albert Holland and smoked cocaine with them 73R4963-5. He believes Holland and Padilla were smoking cocaine when he came up 73R4969.

Albert Holland Jr. took the stand 74R5021. He stated that he was 38 years old, was born in the Bronx and grew up mostly in Washington D.C. 74R5021-2. He grew up with his parents, one brother and four sisters 74R5022. He began using drugs and alcohol at age 17 74R5022. He began with marijuana and beer 74R5023-4. He became involved with an older woman who introduced him to injecting drugs including heroin, Dilaudid, Percodan, and bam 74R5024. He eventually went to Federal prison where he was nearly beaten to

death 74R5027. He was unconscious for three weeks 74R5027-8. He was released from prison 74R5028. He eventually got back into drugs, especially PCP 74R5028-9. He became very depressed over his beating, couldn't trust anyone, and stayed to himself 74R5029. He was sent to St. Elizabeth's twice and stayed there for four years 74R5030-2. He was given Thorazine there and it helped him 74R5032-3. He eventually felt they were just trying to keep him there and he escaped in 1986 74R5033-7. He saw a psychiatrist privately as he was having problems sleeping and was having "burning in his head" and "drilling in his mind" 74R5038. He saw her 2-4 times and stopped when he ran out of money 74R5038-9. He saw her in early 1987 74R5040. He began using drugs and alcohol again in 1988-9, especially cocaine 74R5041-2. He left D.C. in 1990 and ended up in Pompano Beach 74R5045-6. He met two guys who let him sleep behind their house 74R5046. He got up the next day and began to drink beer and wine, smoke cocaine and socialize 74R5047. He tried to offer women drugs for money and one tricked him earlier in the day and took his cocaine and wouldn't perform sex 74R5049. He smoked $20-30 worth of cocaine there 74R5050. He eventually went into the woods with [redacted] after she had agreed to sex in return for crack cocaine 74R5053-4. He stated that they each smoked cocaine 74R5054-5. She took her clothes off and this bothered him because he only wanted oral sex for fear of AIDS 74R5055-6. She asked for more drugs and he "went off and became very violent" 74R5056. He began beating her but he never tried to force her to have sex and never put his penis in her mouth 74R5058-9. He became violent with

the cocaine and alcohol 74R5056. He stopped and left 74R5059. The next thing he remembers is waking up in the police station 74R5060. He remembers getting beaten and kicked and throwing up 2-3 times in the police station 74R5063-5. He testified that the officers were saying that he had shot the officer twice so that's what he said to Officer Butler out of fear 74R5068. He sometimes feels like there is electricity flowing through his body and it sometimes causes him to react violently 74R5133-4. Loud noises can also cause "burning in his mind" which is very painful and he can't think clearly 74R5134.

Dr. Frances Welsing testified that Albert Holland saw her privately 3SR56-67. Mr. Holland admitted that he had escaped from St. Elizabeth's and described the hospital as very stressful 3SR59. She had no reason to quarrel with the diagnosis of schizophrenia from St. Elizabeth's 3SR69. She was able to see depression and he gave her a long history of drug abuse 3SR64. Schizophrenia can wax and wane and stress can affect this process 3SR71. People often do better in a hospital than in an outside setting 3SR71-2. She saw no evidence of malingering 3SR76. The fact that Albert Holland found the hospital stressful makes it unlikely that he was malingering as this would prolong his stay there 3SR78-9. He also appeared to be in considerable distress, which is more consistent with mental illness than malingering. 3SR78-9. The defense then rested and a renewed motion for judgment of acquittal was denied 74R5351-3.

The State called Dr. Elizabeth Koprowski, a clinical psychologist, to testify 78R544-5. She felt that Albert Holland was sane during the two incidents 78R5467-70. She had interned at St. Elizabeth's Hospital and stated that it is one of the most prestigious mental hospitals in the world 78R5471. She stated that Dr. Raymond Patterson is very well respected 78R5473. Dr. Koprowski found Mr. Holland to be incompetent when she saw him in September, 1990 which was only 6-7 weeks after the incident 78R5475-7. Mr. Holland has a severe drug abuse problem 78R5490-1. People with schizophrenia often "self-medicate" with drugs and alcohol and this can cause violence 78R5492. Crack cocaine is an extremely powerful drug that can ruin your life 78R5491. Dr. Koprowski believes that when Mr. Holland smoked the second cocaine rock it disinhibited him.

The State called Dr. Harley Stock, a forensic psychologist 79R5514-20. He saw Mr. Holland in September, 1996 79R5523. He believed that Mr. Holland had an anti-social personality and drug and alcohol abuse 78R5538. He believed that Mr. Holland was sane during both incidents 79R5542-44. A recent MRI of Mr. Holland shows a shrinking of the brain ventricles which is consistent with long-tem drug abuse 79R5549-50. He stated that crack cocaine is a powerful drug which can ruin lives 79R5571-2. Dr. Stock stated that he was aware of the evidence of crack cocaine use by Mr. Holland during the incident and "the intoxication he experienced would be consistent with chronic crack cocaine use" 79R5573.

The State called Dr. Daniel Martell, a forensic psychologist 80R5634. He saw Mr. Holland on June 27-9, 1996 80R5647. He felt that Mr. Holland was sane during the incidents and that he was malingering 80R5648-9. He is being paid $250 an hour for his testimony by the prosecution 80R5646. He admitted that a person can malinger and have a mental illness 80R5706. He admitted that stress can exacerbate schizophrenia 80R5721. He also stated that Mr. Holland was intoxicated during the incident with [redacted] 80R5732. Both sides then rested 80R5737. A renewed motion for judgment of acquittal was denied 82R5823-4. Mr. Holland was found guilty as charged of first degree murder of a law enforcement officer, robbery with a firearm, and attempted first degree murder with a weapon, and was convicted of the lesser charge of attempted sexual battery with great force 80R6363-5.

In the penalty phase the prosecution introduced evidence that Mr. Holland had been convicted of assault with intent to rob while armed in 1979 and victim impact evidence 89R6497-6502.

Albert Holland Sr., Albert's father, testified as a defense witness 89R6506. He stated that Albert was born in New York City and grew up primarily in Washington D.C. 89R6506. Albert has a younger brother and four sisters 89R6506. The family was very poor when Albert was young 89R6507-8. He was an average student 89R6509. He liked to play sports and music 89R6509-10. He was self-taught on the trumpet, guitar and harmonica 89R6509-10. When Albert went to a new school it was "notoriously drug infested" 89R6511. Up until that time he had been very involved in sports

especially tennis and basketball 89R6511-12. Albert then became dominated by drugs 89R6512. He began to miss school and started living with an older woman 89R6513.

He eventually was sent to federal prison 89R6514. He was in federal prison in Wisconsin and was found one morning in a pool of blood and was believed to be dead 89R6514. Seven people had beaten him with a metal mop wringer and broke his jaw, broke the orbital bones around his eyes, and damaged his hearing 89R6515. He was rushed by plane to the University Hospital in Madison, Wisconsin where he was in a coma for several days 89R6515. He was eventually sent to the Federal Hospital in Springfield, Missouri 89R6515. He was eventually released and came back to Washington, D.C. 89R6515. Albert was very depressed when he came out 89R6515-6. He often spoke of suicide and jumping off the top of the building 89R6516. He was highly irritated and sensitive, which he had never shown before 89R6517. He would become very angry if he heard a dog barking or heard loud music 89R6517. He eventually was put in St. Elizabeth's mental hospital after being found not guilty by reason of insanity 89R6518. He was "very, very sensitive about noise" 89R6523. Mr. Holland stated:

> Q. There has been some testimony about whether or not Albert actually had any emotional, or psychological problems. From what you've observed, I know you're not a doctor, have you seen a change in him that leads you to believe that he was suffering from some type of problem?
>
> A. Unquestionably, differences like day and night, in that he has problems, believe me. He has serious problems. And he needs to be helped.

89R6523.

Roger Durban is an attorney from Washington D.C. who first began representing Mr. Holland in 1981 90R6556. He had questions about Mr. Holland's competency and felt he had psychiatric problems from the beginning of the case 90R6557. He was quickly sent to a facility for pretrial detainees with psychological problems 90R6559. He was disheveled, incoherent, and not able to interact "in any way, shape or meaningful form, at all" 90R6560. Albert would sit and rock in a chair with his hands folded 90R6561. He would say nothing and drool 90R6561. Albert Holland made no sense when he did speak 90R6561. He pursued an insanity defense and the prosecutor ultimately stipulated that Mr. Holland should be found not guilty by reason of insanity 90R6564-7. Dr. Robert Madsen testified that Albert Holland could not conform his conduct to the requirements of the law and thus was insane under District of Columbia law 80R6568-9. He was placed in St. Elizabeth's mental hospital and was given Thorazine, which seemed to improve his condition 89R6569-70. Mr. Holland eventually escaped from St. Elizabeth's and Mr. Durban represented him on new charges 90R6571. Mr. Holland was again found not guilty by reason of insanity based on the testimony of Dr. Polley and the government's stipulation on December 14, 1982 90R6572-4. Dr. Richard Radner had also evaluated Mr. Holland and felt that he was insane 90R6573. Mr. Holland was again committed to St. Elizabeth's mental hospital 90R6574. Mr. Durban has been a criminal defense attorney for 16 years and has seen people malinger and never had that thought about Albert

Holland 90R6575. He “never doubted for a second the propriety” of the two not guilty by reason of insanity verdicts 90R6576.

The defense called Dr. Robert Polley, Interim Forensic Administrator for the District of Columbia, as an expert in forensic psychology 90R6612-6. He’s worked as a forensic psychologist for the District of Columbia since 1972 90R6614. From 1973-83 he was a clinical administrator at a ward at St. Elizabeth’s 90R6614. He was director of the pretrial branch of the in-patient program from 1983-90 90R6614. He first met Albert Holland on May 9, 1982, when he was admitted to the pretrial ward at St. Elizabeth’s on his second case 90R6617-8. He had been previously found not guilty by reason of insanity and diagnosed as having schizophrenia and organic amnestic syndrome 90R6619. The evaluations on the second charge discontinued the organic amnestic syndrome diagnosis but continued the diagnosis of chronic undifferentiated schizophrenia and also noted paranoid features 90R6620. Mr. Holland’s case was reviewed every three months while he was in St. Elizabeth’s and the diagnosis of schizophrenia was never changed 90R6620-22. He was on a number of different wards and seen by a number of different psychologists and psychiatrists and none suggested rejecting schizophrenia 90R6622-3. Albert Holland was again found not guilty by reason of insanity after a stipulation by the government 90R6625-6. He was committed to St. Elizabeth’s 90R6628-9. In 1986 Albert Holland was again determined to be in need of commitment 90R6631. Schizophrenia is a major mental illness and there is no doubt in his mind that Mr. Holland was

suffering from it 90R6637-8. He stated that the Rohrshach tests indicated psychotic processes 90R6652. Evidence of hallucinations was reported by the staff 90R6655.

Dr. Robert Madsen testified as an expert in clinical psychology 90R6665-77. He worked at St. Elizabeth's from 1978-85 90R666-8. He met Mr. Holland in July, 1981 when he first came to St. Elizabeth's 90R6678. He was confused, had an inappropriate affect, and complained about hallucinations 90R6687-8. He was given 1,000 milligrams of Thorazine which is a high dose 90R6690-1. Thorazine acts as a major tranquilizer for people who are not mentally ill 90R6723-4. Over time he improved with medication 90R6692-3. Mr. Holland's diagnosis was chronic undifferentiated schizophrenia 90R6694. The opinion of everyone who saw him was that he suffered from a mental illness and that he was insane during both incidents 90R6703-4. There was a stipulation and he was found not guilty by reason of insanity 90R6707. Drugs and alcohol exacerbate mental illness 90R6722-3. Mr. Holland was a severe drug and alcohol abuser 90R6724-5. He used marijuana, heroin, speedballs (which are a heroin and methamphetamine mix), PCP, and drank up to two fifths a day 90R6724-5. Some people self medicate with drugs or alcohol 90R6724. Mr. Holland may have been using street drugs "as a way of calming down the chaos that might be within" 90R6725. The defense then rested 91R6751.

The State recalled Dr. Daniel Martell 91R6751-2. He felt that Mr. Holland was not under the influence of extreme mental or emotional disturbance during the offense 91R6751-2. He also felt

that his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was not substantially impaired 91R6753-4. He made no efforts to speak to anyone who treated Albert Holland or any of his family 91R6761.

The State recalled Dr. Elizabeth Koprowski 92R6789. She felt that Mr. Holland was not under the influence of extreme mental or emotional disturbance 92R6790. She felt that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was not substantially impaired 926791. She stated that Mr. Holland has suffered from mental illness 92R6792. The State then rested 92R6798. The jury recommended the death penalty by a vote of 8-4 92R6869-70. The trial court sentenced Mr. Holland to death 94R6917-67.

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Mr. Holland's right of self-representation. It incorrectly relied on Mr. Holland's lack of technical legal competence. Godinez v. Moran, 509 U.S. 389 (1993); State v. Bowen, 698 So. 2d 248 (Fla. 1997).

2. The trial court erred in its instructions as to the intent requirement as to felony murder and attempted sexual battery. The jury was incorrectly instructed that Mr. Holland need not have the intent to commit sexual battery in order to be guilty of attempted sexual battery or to use attempted sexual battery as a basis for felony murder. Rogers v. State, 660 So. 2d 237 (Fla. 1995). Additionally, the jury was told that voluntary intoxication could not be a defense to attempted sexual battery or to felony

murder based on attempted sexual battery, over his objection. These errors individually and cumulatively denied him a fair trial.

3. The trial court erred in allowing the State to call experts who had read the report of Dr. Strauss, who had improperly interviewed Mr. Holland in violation of the Fifth and Sixth Amendment. This error is akin to the use or derivative use of immunized testimony condemned in Kastigar v. United States, 406 U.S. 441 (1972).

4. The trial court erred in failing to recuse the prosecutor who had obtained the improper testimony of Dr. Strauss. The State did not meet its burden of showing no use or derivative use of this testimony. United States v. Semkiw, 712 F. 2d 891 (3d Cir. 1983); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

5. The trial court erred in prohibiting the redeposition of key witnesses.

6. It was error to admit an inaudible videotape of Mr. Holland. This allowed the jury to speculate as to what was said.

7. The trial court erred in failing to suppress Mr. Holland's statement after he had invoked his right to counsel.

8. The trial court erred in admitting the hearsay testimony of the medical examiner, Dr. Tate.

9. The trial court erred in allowing a psychologist to speculate as to whether a gun was hidden.

10. The evidence was insufficient as to premeditation.

11. The trial court mistakenly used the sanity standard in rejecting mental mitigation. Mines v. State, 390 So. 2d 332(Fla.

1980); Ferguson v. State, 417 So. 2d 631 (Fla. 1982); Campbell v. State, 571 So. 2d 415 (Fla. 1990).

12. The trial court made several key factual errors concerning the testimony of defense mental health experts.

13. The trial court misstated the testimony of the defense experts concerning the applicability of the statutory mental mitigating circumstances.

14. The trial judge failed to consider and/or find non-statutory mitigating circumstances which were supported by the evidence. Maxwell v. State, 603 So. 2d 490 (Fla. 1992).

15. The State was improperly allowed to bring out the facts of a prior offense of which Mr. Holland was acquitted at the penalty phase. Burr v. State, 576 So. 2d 278 (Fla. 1991); State v. Perkins, 349 So. 2d 161 (Fla. 1977).

16. The attempted sexual battery on [redacted] was improperly used to support two aggravating circumstances.

17. It was error to utilize that the offense was during a robbery to support aggravating circumstance (5)(d) (during a felony).

18. It was error to admit victim impact evidence.

19. The trial court employed an unconstitutional death presumption.

20. The felony murder aggravating circumstance (5) (d) is unconstitutional on its face and as applied as it fails to genuinely narrow the class of persons eligible for the death penalty.

21. The death penalty is disproportionate.

22. Electrocution violates the Florida and United States Constitutions.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING MR. HOLLAND HIS RIGHT OF SELF-REPRESENTATION.

The trial court erred in denying Mr. Holland his right of self-representation after he requested self-representation on several occasions. Faretta v. California, 422 U.S. 806 (1975); Godinez v. Moran, 509 U.S. 389 (1993); State v. Bowen, 698 So. 2d 248 (Fla. 1997). The trial court incorrectly based its decision on Mr. Holland's technical legal competence. Godinez; Bowen; Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989). This denied Mr. Holland's rights 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.

Mr. Holland first requested self-representation on March 22, 1996 31R1197. This was six months before trial.

> THE DEFENDANT: One last thing, and if I am allowed to represent myself will I be entitled to those things and present those things and have those things in my possession?
>
> THE COURT: Mr. Holland, the Court will be happy to conduct a Faretta inquiry to make a determination whether

> or not you're able to represent yourself, but I don't think you have had any training in the law.
>
> Yes, you've sat through your prior trial. You've been involved in capital litigation. You haven't demonstrated -- this is the first time now that you're coming to the Court and even making a suggestion of representing yourself.
>
> THE DEFENDANT: I asked the question would I be entitled to have photographs and be able to even view those victims and to present them and everything I want to know.
>
> THE COURT: Mr. Holland, just the mere question that you're asking the Court is a procedural question. It's one that is governed by the rules of evidence as well as the criminal rules of procedure.
>
> THE DEFENDANT: I'd like to take procedure --
>
> THE COURT: And just not have to answer to that question and have to ask the Court to answer it evinces to the Court as yet you don't have the requisite legal ability to represent yourself, so I don't think I need to go much further than this.

31R1197-1198. The trial court assumed that Mr. Holland was not qualified to represent himself due to a lack of legal ability before the Court ever conducted an inquiry.

Mr. Holland again expressed his desire to go pro se during the same hearing.

> THE DEFENDANT: I just want to say something else. Can we go through this procedure of self representation?
>
> I think that's very important right now, because you stated there is a way to do that.
>
> THE COURT: The Court will at this juncture conduct a Faretta inquiry. Mr. Holland, if you'd be good enough to tell the Court of your educational experience.

THE DEFENDANT: Well, I have a GED, but what I'm asking you, your Honor --

THE COURT: I need to ask you certain questions in order to be able to make this decision.

THE DEFENDANT: Okay.

THE COURT: Okay.

THE DEFENDANT: I have a GED.

THE COURT: Tell the Court what legal training you have or what training you have that would assist you in being able to represent yourself charged with a capital crime as well as other crimes.

THE DEFENDANT: Would you repeat the question, please?

THE COURT: Tell me in simple terms that legal or other training you have that would assist you to represent yourself in proceedings of this nature.

THE DEFENDANT: Well, from what I've seen in the evidence, Ray Charles could come in here and represent himself and Stevie Wonder, so I don't need too much legal training to do that.

I mean anybody can do it. That it doesn't make sense that Mr. Satz and his people are saying. His people is saying and what my people is saying right along with them. You know, it doesn't take much to see it and a jury could see it.

THE COURT: Let's talk about your ability, for example, to select a jury to make proper legal objections, because the start of the trial --

THE DEFENDANT: Well, I think I can do it. I can do better than what they were doing in here today in trying to do the questionnaire. I could do that.

THE COURT: Do you have any idea how to examine witnesses?

> THE DEFENDANT: Well, I would not be disrespectful, your Honor. I'll ask them the questions, try to ask them as properly as I can.
>
> THE COURT: How about to make legal objections?
>
> THE DEFENDANT: Well, that may be kind of difficult if the judge doesn't allow you to do, like you're going to do to me sometimes, but they -- I can make the objection properly.
>
> THE COURT: Any training you've had, any books that you've read?
>
> THE DEFENDANT: No.
>
> THE COURT: Any anything?
>
> THE DEFENDANT: No, but what I'm trying to tell you is, you know, I won't violating any rules in here. I won't be disruptive.
>
> THE COURT: Do you know the rules that you could violate?
>
> THE DEFENDANT: No, but I'm just saying common things that -- don't interrupt people, something like that.
>
> THE COURT: I don't think the Court needs to go much further in its effort to conduct a Faretta inquiry.
>
> The Court clearly finds Mr. Holland does not have any specific legal training, is not familiar with the rules of evidence, nor trial procedure, is not familiar with how a trial is conducted, even though he's sat through them in the past.

31R1201-1204. The trial court's ruling was based on Mr. Holland's technical legal ability.

Mr. Holland again expressed his desire to represent himself on August 2, 1996, and the trial court conducted an additional hearing.

> THE COURT: Okay. Sir, why don't you tell us you're [sic] education, how far you went in school?

THE DEFENDANT: I have a GED.

THE COURT: When did you acquire that GED?

THE DEFENDANT: You said when or where?

THE COURT: When. When.

THE DEFENDANT: It was when I was in prison, I believe it was 1980.

THE COURT: Since obtaining your GED, do you have any other educational training?

THE DEFENDANT: Will you please repeat the question.

THE COURT: Since you've obtained your GED, have you obtained any other educational training, experience?

THE DEFENDANT: Well, no, I haven't.

THE COURT: Okay. Tell me specifically what legal training you have?

THE DEFENDANT: Well since I've been getting arrested, I know a little things here and there about the law. I've been reading cases now since this time. I've been studying a little bit on the law and I've become familiarized a little bit where I think I can handle my case.

I know my main thing is to be able to organize and argue the way I want to argue and question witnesses, subpoena and to look at all of the discovery that's --

THE COURT: Tell me what you know about the rules of criminal procedure.

THE DEFENDANT: Ah -- see, what I'm trying to point out to you, Judge, Your Honor --

THE COURT: Please respond to the Court's question, Mr. Holland.

THE DEFENDANT: I will. I know that if I'm going to participate in a trial, I can have Voir Dire and ask witnesses, I mean, jurors certain questions. I can pick my own jury.

I would object when the Prosecutor, Mr. Michael Satz, is out of line and when it's time for me to object.

THE COURT: How would you know when it's time for you to object.

THE DEFENDANT: (Defendant shakes head.)

THE COURT: You're nodding your head to the negative; you wouldn't know, would you?

THE DEFENDANT: I don't -- I was being nodding my head to the negative. I would know to do it because I know when it's not appropriate.

THE COURT: Do you know that because of the case law or because of the rules of procedure?

THE DEFENDANT: I know it because -- if you let me, may I give you an example?

THE COURT: Sure.

THE DEFENDANT: He may be questioning the witness in a bad way, and I can say he's badgering the witness.

THE COURT: Okay. Now you're talking about witness instead of selecting a jury.

THE DEFENDANT: What was your question again?

THE COURT: How would you know when to object, how would you know the legal grounds or case law to support your objection?

THE DEFENDANT: Say it again.

THE COURT: Okay. I said it as many times as I'm going to.
Any questions, Mr. Lewis that you have?

MR. LEWIS: No, Judge.

THE DEFENDANT: What I was going to tell you --

THE COURT: Any questions you have?

MR. SATZ: No, Your Honor.

THE DEFENDANT: I was going to tell you this, you can give me standby counsel. And to answer your question, like on Matlock.

THE COURT: A TV show?

THE DEFENDANT: They say, speculation.

THE COURT: Matlock TV show?

THE DEFENDANT: I'm using it as an example to answer your question.

I was saying that is speculation or no foundation. But I know I wold object to it and I wouldn't be out of order or be disruptive in any kind of way.

THE COURT: The Court having conducted a Faretta Inquiry, the Court finds Mr. Holland is not able to adequately appropriately represent himself.

THE DEFENDANT: Or you can apply me --

THE COURT: The Court's ruling at this juncture.

Nor to comply with the Court's order, nor with applicable rules of evidence, rules of criminal procedure, as well as case law.

THE DEFENDANT: One last thing.

THE COURT: Mr. Holland is in need of counsel both in --

THE DEFENDANT: What about standby counsel.

THE COURT: -- both in the proof phase or guilt phase of the case, as well as in a possible penalty phase. And as such, Mr. Holland's motion to represent himself is denied.

36R1392-1397.

The issue of Mr. Holland's self representation again arose on August 26, 1996. The trial court again denied Mr. Holland's right

to self representation. This time the court did not conduct a hearing. The trial court made the following statement.

> The Court's going to deny Mr. Holland the opportunity to represent himself.
>
> The Court specifically finds that both his lack of formal legal training, lack of understanding of both the criminal law as well as procedures, his alleged defense or defense actually, of insanity and the complexity of this case.
>
> There are approximately 180 witnesses listed, Mr. Satz?
>
> MR. SATZ [Prosecutor]: Yes, sir.
>
> THE COURT: With the fact that this is a retrial, which of course -- as stated by Counsel -- makes it even more complex.
>
> It is such that Mr. Holland needs representations and aid of counsel.

37R1502.

Mr. Holland asserted his right to self-representation on several other occasions, which the trial court summarily denied 40R1636-7;41R1675-7;48R2567-8;53R3124-5;55R3183. The trial judge also entered handwritten orders on March 22, 1996, and September 18, 1996 99R7681;100R7940. Neither contained any additional reasoning.

The trial court had held a competency hearing prior to Mr. Holland's first request for self representation 27R833-943. At this hearing all three experts testified that Mr. Holland was competent to stand trial and the trial court found him to be competent 27R833-943.

The trial court's reliance on Mr. Holland's lack of technical legal ability was improper. "In the absence of unusual circumstances a person who is mentally competent and *sui juris* has the right to conduct his own defense without counsel." State v. Capetta, 216 So. 2d 749, 750 (Fla. 1968); Kearse v. State, 605 So. 2d 534, 538 (Fla. 1st DCA 1992); Kimble v. State, 429 So. 2d 1369, 1371 (Fla. 3d DCA 1983). A defendants's "technical legal knowledge" is "not relevant" to his exercise of his right to defend himself. Faretta, 422 U.S. at 837.

> Once a court determines that a competent defendant of his or her own free will has "knowingly and intelligently" waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented. See Fla.R.Crim.P. 3.111. The court may not inquire further into whether the defendant "could provide himself with a substantively qualitative defense," Bowen, 677 So. 2d at 864, for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all.

Bowen, 698 So. 2d at 251 (footnote omitted).

> We emphasize that a defendant does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se. As the Supreme Court stated in Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 2686-87, 125 L.Ed.2d 321 (1993), "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."

Hill v. State, 688 So. 2d 901, 905 (Fla. 1996). Competence to waive the right to counsel is the same level of competence as that required to stand trial. Godinez. A defendant can not be denied self-representation due to a trial court's belief that he will be

denied a fair trial if tried without counsel. Hughes v. State, 700 So. 2d 647 (Fla. 1997).

The basis for the trial court's ruling was Mr. Holland's lack of technical legal competence. The judge stated:

> The Court clearly finds Mr. Holland does not have any specific legal training, is not familiar with the rules of evidence, nor trial procedures, is not familiar with how a trial is conducted, even though he's sat through them in the past.

31R1203-1204. This is the reasoning condemned by this Court in Hill and Bowen and by the United States Supreme Court in Faretta and Godinez. The courts have consistently reversed when the trial court denies the right of self representation based on the defendant's lack of legal ability. Bowen; Kearse; Crystal v. State, 616 So. 2d 150 (Fla. 1st DCA 1993); Ollman v. State, 696 So. 2d 409 (Fla. 1st DCA 1997); Kimble v. State, 429 So. 2d 1369 (Fla. 3d DCA 1983); Beaton v. State, 709 So. 2d 172 (Fla. 4th DCA 1998); Peters v. Gunn, 33 F.3d 1190 (9th Cir. 1994); United States v. Arlt, 41 F.3d 516 (9th Cir. 1984).

The trial court also mentioned the filing of a notice of insanity as a reason for denying the right of self representation. It appears that the mention of the insanity defense is a post hoc rationalization as the trial court had previously denied this right on three occasions 31R1197-8,1201-4;36R1392-7.

The pursuit of an insanity defense is not a valid reason to deny the right of self-representation. This Court has held that defendants had the right to go *pro se*, despite their counsel filing notices of an insanity defense. Goode v. State, 365 So. 2d 381

(Fla. 1978); Muhammad v. State, 494 So. 2d 969 (Fla. 1986). The Arizona Supreme Court has outlined why the pursuit of an insanity defense is not inconsistent with the right of self representation.

> Finally, Defendant contends that a court should not allow a defendant asserting an insanity defense to represent himself because jurors know that a judge would not allow an insane person to represent himself and therefore would not believe the insanity defense. He argues that allowing Defendant to represent himself violated his due process rights under the United States and Arizona Constitutions. We reject this argument.
>
> The Sixth and Fourteenth Amendments to the United States Constitution and Ariz. Const. Art. 2, § 24, guarantee criminal defendants the right to represent themselves at trial. Faretta, 422 U.S. at 832, 95 S.Ct. at 2539-40; State v. DeNistor, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985). This right is not abrogated merely by the assertion of a particular defense. Although it may not be wise to combine an insanity defense with self-representation, Defendant's argument confuses the wisdom of his waiver with its constitutional propriety. It amounts to a complaint that, even if Defendant knew what he was doing, and thus had the right to waive counsel, the court should have stopped him from making an unwise choice. The court does not have this power; the law guarantees a defendant the right to waive counsel if he is mentally competent to do so. Faretta, 422 U.S. at 834, 95 S.Ct. at 2541 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (1970) (although defendant may conduct defense to his own detriment, "his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'").

State v. Cornell, 878 P.2d 1352, 1362 (Ariz. 1994).

The denial of the right of self representation is always harmful error. Orazio; Arlt. A new trial is required.

POINT II

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS AS TO THE INTENT REQUIREMENT ON FELONY MURDER AND ATTEMPTED SEXUAL BATTERY.

This issue involves two related errors. The trial court gave an erroneous instruction on intent as to felony murder (based on attempted sexual battery) and as to attempted sexual battery. It compounded this error by refusing counsel's request to instruct on voluntary intoxication as a defense to attempted sexual battery and to attempted sexual battery as a theory of felony murder. These errors, individually and cumulatively, 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.

Defense counsel specifically requested that voluntary intoxication be given in connection with sexual battery and to felony murder in which sexual battery is the underlying felony, and the trial court overruled this request 81R5788-90.

The jury was instructed on sexual battery and attempted sexual battery as theories of felony murder 84R6102-9. The jury was given the following additional instruction, the second paragraph of which is not in the Standard Jury Instructions.

> 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 the sexual

> battery, since specific intent is not an element of the offense of sexual battery.

84R6107-6108.

The jury was specifically told that voluntary intoxication is not a defense to felony murder where the underlying offense is sexual battery and is not a defense to sexual battery or attempted sexual battery 84R6174-5. The jury returned a general verdict of guilt on the first degree murder count and returned of verdict of guilt of the lesser included offense of attempted sexual battery on the sexual battery count 86R6363-6365.

The first instruction is contrary to the decisions of this Court. In Rogers v. State, 660 So. 2d 237 (Fla. 1995), this Court reversed a conviction for attempted sexual battery based on sufficiency of the evidence and outlined the necessary intent to sustain a conviction.

> Our statute defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or by anal or vaginal penetration of another by any other object." § 794.011(1)(h), Fla.Stat (1989). To establish attempt, the State must prove a specific intent to commit a particular crime and an overt act toward the commission of that crime. Thomas v. State, 531 So. 2d 708, 710 (Fla. 1988).

660 So. 2d 237, 241 (emphasis supplied).

This Court clearly held that "a specific intent" to commit a sexual battery is required to be guilty of attempted sexual battery. The trial court in this case instructed the jury that the State did not have to prove that the defendant had a specific intent to commit sexual battery in order to rely on attempted sexual battery as a theory of sexual battery. An inaccurate

instruction on an element of an offense is fundamental error. Viveros v. State, 699 So. 2d 822, 825 (Fla. 4th DCA 1997); Jones v. State, 666 So. 2d 995, 998 (Fla. 5th DCA 1996).

This Court held in Rogers that "a specific intent" to commit sexual battery is required to be guilty of attempted sexual battery. Thus, voluntary intoxication would be a defense to this offense. It was error to instruct the jury that voluntary intoxication is not a defense to attempted sexual battery 84R6175.

These two instructions individually and cumulatively are prejudicial. The trial court instructed the jury that Mr. Holland did not have to have an intent to commit sexual battery in order to use attempted sexual battery as an underlying felony for felony murder. This is contrary to this court's decision in Rogers. This relieved the State of the burden of proof as to an element of felony murder as well as on the substantive charge of attempted sexual battery. Mr. Holland's intent to sexually batter Ms. [redacted] was sharply contested. Mr. Holland testified that he did not try to force Ms. [redacted] to have sex 74R5058-9. Defense counsel argued at length against the sexual battery theory 82R5953-9. The jury obviously struggled over this issue, returning a lesser included offense of attempted sexual battery on the second day of deliberations. An accurate instruction reflecting a requirement of intent to sexually batter could have led the jury to acquit him on this charge and reject it as a felony murder theory. This affirmative misinstruction was clearly harmful.

The trial court's erroneous instruction on voluntary intoxication was also harmful. There was extensive testimony by the alleged victim that Mr. Holland's behavior completely changed after he smoked the second piece of cocaine 56R3302. The defense extensively argued voluntary intoxication 82R5927,5976-89. A new trial is required on first degree murder and attempted sexual battery.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE THE TESTIMONY OF EXPERTS WHO HAD REVIEWED THE REPORT OF DR. STRAUSS.

This issue involves allowing the prosecution to call experts who had reviewed the report of Dr. Strauss. This case was previously reversed due to the admission into evidence of the testimony of Dr. Strauss as to competency and sanity. Holland v. State, 636 So. 2d 1289 (Fla. 1994). This Court held that this testimony violated Mr. Holland's rights under the Fifth and Sixth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. Id. at 1290-2. The State gave Dr. Strauss' report to Dr. Kaprowski who subsequently testified as to sanity and again at the penalty phase and to Dr. Block-Garfield, who testified in the competency hearing. The admission of this evidence denied Mr. Holland his rights to remain silent and to 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. Kastigar v. United States, 406 U.S. 441 (1972).

This Court described the issue concerning Dr. Strauss:

> Holland invoked his rights to counsel and to remain silent during his first appearance on July 30, 1990. The judge indicated at the hearing that he would sign an order prohibiting law enforcement interviews outside the presence of Holland's attorney. After the judge entered his order dated July 30, 1990, Strauss, a contract psychiatrist with the Broward County Jail, examined Holland twice in jail in August 1990 to help determine whether Holland needed further mental-health evaluation or could be put into the jail's general population. There was no notice to counsel. The State, however, later contacted Strauss and secured his testimony on the issues of Holland's competency and sanity. Strauss was the State's only expert witness at the competency hearing and was a key prosecution witness on the issue of insanity....
>
> Strauss's testimony was, in the end, the type of testimony the United States Supreme Court disapproved in *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989). In *Powell* the Court found that the introduction of psychiatric evidence on future dangerousness based on an in-custody psychiatric exam conducted with notice to counsel violated the Fifth and Sixth Amendments to the United States Constitution. While the introduction of defense evidence on insanity constitutes a partial waiver of a defendant's Fifth Amendment rights against self-incrimination, the introduction of psychiatric evidence to support an insanity defense does not waive his Sixth Amendment right to consult with counsel. *Id.* at 682, 109 S.Ct. at 3148. Defense counsel in the instant case did not even have notice of Strauss's jail visits. Because Strauss testified about competency and sanity -- and based his opinions almost exclusively on those visits -- the lack of notice, as in *Powell*, violated Holland's Sixth Amendment right to consult with counsel. The testimony also violated article I, section 9 of the Florida Constitution. As Strauss himself testified, Holland's responses might have been different had he known the ultimate nature of the visits. Strauss thus should not have been allowed to testify about Holland's competency and sanity based on information he acquired during the August visits.

> In addition, and significantly, Holland had not filed a motion to rely on an insanity defense when Strauss visited him jail. Florida Rule of Criminal Procedure 3.216(d) allows a compelled examination only after a defendant files notice of intent to rely on an insanity defense. The United States Supreme Court has held that a defendant waives the Fifth Amendment right to remain silent on raising a mental-status defense. *Buchanan v. Kentucky*, 483 U.S. 402, 421-24, 107 S.Ct. 2906, 2917-19, 97 L.Ed.2d 336 (1987). In this case, however, Holland had not raised such a defense when Strauss visited him, and, as the judge's order prohibiting law enforcement interviews outside the presence of Holland's attorney underscores, he had not waived his right to remain silent. Thus, Strauss's testimony as to Holland's sanity violated Holland's Fifth Amendment right to remain silent.

Id. at 1291-1293.

Defense counsel filed a motion to strike Dr. Strauss and experts who had reviewed Dr. Strauss' report 97R7381-96. The State filed a written response to the motion 98R7406-49. An evidentiary hearing was held on this motion 12R269-372,14R374-492,15R493-608. State's Attorney Investigator Dale Nelson testified that he provided Dr. Strauss' report to Dr. Koprowski and Dr. Block-Garfield 15R524. The trial court denied the motion 15R581-595.

The United States Supreme Court has consistently held that the use or derivative use of immunized testimony violates the Fifth Amendment. Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Kastigar.

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures. A person accorded ... immunity ... and subsequently prosecuted, is not dependent for the preservation of his rights upon the

> integrity and good faith of the prosecuting authorities. As stated in *Murphy:* 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S. at 79, n.18, 84 S.Ct. at 1609. This burden of proof, which we reaffirm as appropriate, is not limited to negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Kastigar, 406 U.S. at 460 (footnote omitted).

The defendant must be "in substantially the same position" as if the statements hadn't been taken. Murphy at 79.

The rule of Kastigar has most commonly been applied to the immunity situation. It is equally applicable to other situations involving statements taken in violation of the Fifth or Sixth amendments or the Florida Constitution. The courts have recognized that the Kastigar principle can apply to information obtained in a mental health evaluation in violation of the Fifth Amendment. United States v. Stockwell, 743 F.2d 123 (2d Cir. 1984).

In the present case this Court held that Dr. Strauss' interviews, which were done in violation of the United States and Florida Constitution, were the basis of his findings. The State Attorney's Office provided Dr. Block-Garfield and Dr. Kaprowski his report. The admission of their testimony was harmful error. The issues of sanity and mental mitigation were both sharply contested. A new trial is required. Assuming arguendo, that this Court feels that a new trial is not required, at the least a new penalty phase

is required. Mr. Holland's mental state was a key issue at penalty. The jury's recommendation of death was only eight to four. Thus, the error is likely to be harmful. Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991).

POINT IV

THE TRIAL COURT ERRED IN FAILING TO RECUSE STATE ATTORNEY MICHAEL SATZ AND/OR THE STATE ATTORNEY'S OFFICE.

Mr. Holland moved to recuse State Attorney Michael Satz and the State Attorney's Office for the 17th Judicial Circuit 97R7333-54. The State filed a written response 98R7454-87. An evidentiary hearing was held 12R269-372;14R374-492;15R493-608. The trial court denied the motion 15R581-595. The denial of this motion 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.

This Court previously reversed this case due to the State's use of the testimony of Dr. Strauss which was obtained in violation of Article I, Section 9 and the Fifth and Sixth Amendments.

Several courts have recognized the dangers of a prosecutor who had been exposed to immunized testimony handling the prosecution of that witness. In United States v. Semkiw, 712 F.2d 891 (3d Cir. 1983) the Court reversed for an evidentiary hearing to determine whether there was "non-evidentiary use" of the defendant's immunized testimony.

> The stipulations at the hearing did not discharge the government's burden on the absence of taint. One of the undisputed facts was that the prosecution already possessed all of its evidence against defendant even

> before it compelled him to testify. It may fairly be assumed from this state of affairs that the government intended to use the defendant's testimony to its own advantage in the preparation of its case against him. "Such use could conceivably include ... refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); see also United States v. Pantone, 634 F.2d at 721. Thus the record does not show that defendant and the prosecution remained in substantially the same position as if defendant had not testified.
>
> The possibility that the government compromised the defendant's immunity is heightened by the fact that it assigned the trial to an attorney who had "access" to the compelled testimony. It is no answer for the prosecution to say, as it does on this appeal, that defendant did not prove that the trial attorney learned his defense from the testimony. The burden of proof at the hearing on this issue rested with the government, not the defendant.
>
> The defendant's request to bar the Assistant United States Attorney who had the opportunity to study the grand jury transcript from conducting the trial was never answered at the hearing. Yet the government might easily have removed any cloud from the trial by assigning it to another attorney who did not and would not review the immunized testimony. This procedure is not novel.

712 F. 2d at 895.

In United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973) the Court rejected a trial court's findings of a trial court that the government's not introducing immunized testimony removed the taint from the prosecution and it ordered the indictment dismissed.

> We find, however, that even though the voluminous reports, which we have examined, may have afforded proof of an independent source of the evidence adduced at McDaniel's trial, such reports nevertheless fail to satisfy the government's burden of proving that the United States Attorney, who admittedly read McDaniel's grand jury testimony prior to the indictments, did not use it in some significant way short of introducing

> tainted evidence. See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 181, 186 (1972); Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171, 185, 186 (1972). Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.
>
> Kastigar, after all, proscribed "any use, direct or indirect ..." And, indeed, if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury.
>
> The three volumes of transcript in which McDaniel fully confessed his misdeeds were read in their entirety by the United States Attorney three and eight months, respectively, before the two federal indictments were handed down. Furthermore, they were read when the United States Attorney was unaware that the testimony came pursuant to a grant of immunity, and he therefore could have perceived no reason to segregate McDaniel's testimony from his other sources of information. Under these circumstances, we are of the opinion that the government is confronted with an insurmountable task in discharging the heavy burden of proof imposed by Kastigar.

482 F.2d at 311-312.

In the present case State Attorney Michael Satz was the lead prosecutor and Dale Nelson was the lead investigator in both prosecutions 14R481. They were involved in securing Dr. Strauss testimony 14R481-484. They also provided Dr. Strauss' report to other experts in the case 15R534.

> In a Kastigar setting, we are of the firm opinion that it would be unwise to permit an attorney familiar with the immunized testimony to participate in the trial or preparation of the case.

United States v. Byrd, 765 F.2d 1524, 1532 (11th Cir. 1985).

The improper evidence from Dr. Strauss completely changed the prosecution of the case. At the time of this alleged offense Mr. Holland was an escapee from a mental hospital. He had twice been found not guilty by reason of insanity and had been involuntarily hospitalized for a period of four years at the time of his escape 64R4673-4700. The courts continued to find that he required involuntary hospitalization at the time of his escape. The consistent diagnosis was chronic undifferentiated schizophrenia and alcohol and mixed substance abuse 64R4677.

The prosecution had the burden of showing that the taint had been removed from the improper obtaining of evidence from Dr. Strauss. The United States Supreme Court in Kastigar prohibited the use of compelled evidence as an "investigatory lead". 406 U.S. at 460. The state did not meet its burden of showing that the Strauss evidence had not been used as an investigatory lead. Indeed, all the evidence is that it was Dr. Strauss who first suggested malingering contrary to Dr. Holland's long history of being diagnosed as having schizophrenia. This was an "investigatory lead" under Kastigar. McDaniel outlined other improper uses of the compelled evidence. These include "assistance in focusing the investigation, ... interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." The Strauss evidence first introduced malingering into the case. This became the State's theory of the case. The State did not show that the Strauss testimony had not been put to any of the uses prohibited in McDaniel.

The trial court erred in denying the motion to recuse Mr. Satz and the State Attorney's Office of the 17th Circuit. This case must be reversed for a new trial conducted by prosecutors not exposed to the compelled evidence obtained by Dr. Strauss.

POINT V

THE TRIAL COURT ERRED IN PROHIBITING THE REDEPOSITION OF CERTAIN WITNESSES.

The trial court denied a defense motion to redepose certain witnesses who had been deposed prior to the first trial. This denied Mr. Holland due process of law pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution; the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Florida Rule of Criminal Procedure 3.220.

Defense counsel filed two motions to redepose State witnesses 97R7397-8;99R7694. The first motion requested the redeposition of the Medical Examiner, Dr. Larry Tate. The second requested redeposition of ten witnesses, including Dr. Tate; [redacted] the alleged victim in two counts; Abraham Bell and Roland Everson, who claimed to be eyewitnesses to the homicide; five police officers who played key roles in the investigation; and Tyrone Carter. Oral argument was heard on this motion and the motion was denied 29R1012-9. This was error.

Florida Rule of Criminal Procedure 3.220(h) provides:

> In any case, including multiple defendant or consolidated cases, no person shall be deposed more than once except by consent of the parties, or by order of the court issued upon good cause show.

Fla.R.Crim.P. 3.220(r).

The one deposition limit has no application to the retrial situation. The Florida Bar re Emergency Amendments to Rules of Criminal Procedure (Rule 3.220), 498 So. 2d 875 (Fla. 1986). In adopting the rule this Court stated:

> The Committee has recommended that we amend Rule 3.220(d) by creating a subsection (1) in order to clarify the use of discovery depositions in cases involving multiple defendants.

498 So. 2d at 876 (emphasis supplied). This rule was designed to apply to multiple defendant cases.

This court has made it clear that retrials and resentencings proceed de novo.

> Resentencing should proceed de novo on all issues ... a prior sentence, vacated on appeal, is a nullity.

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). Obviously, the de novo principle applies with even more force when a new trial is granted. Redeposition should be allowed as a matter of right in a retrial.

Assuming arguendo that this Court feels that this rule applies to retrials, Mr. Holland would argue that the trial court abused its discretion in finding that good cause had not been shown to redepose one or more of these witnesses. This is a capital case involving a unique need for reliability under the Florida and United States Constitution. Redeposition should be allowed as a matter of right in retrials of capital cases. There was a change of defense counsel on retrial. The first trial took place in July-August, 1991. The second trial took place in September-October, 1996. There was five years between trials. In a capital case,

with new counsel, and where five years passed between trial it was error not to allow redeposition of some or all of the list of ten key witnesses identified by the defense. This error was harmful. A new trial is required.

POINT VI

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

A videotape of the interrogation of Mr. Holland was admitted over Mr. Holland's objection that it was 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).

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, arguendo, 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 VII

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.

Prior to this trial, both sides agreed to adopt the motions, responses, and evidence from the first trial on this issue 38R1610-3. This Court did not rule on this issue on the first appeal as it was reversing for a new trial on other grounds. Defense counsel

filed a pre-trial motion to suppress, specifically alleged a violation of the rights to counsel and self-incrimination. Appendix. The prosecution filed a written response IR4186-94. A hearing was held on the motion, which the court denied IR447-524,4531-32. Defense counsel renewed his objections when the statements were introduced 60R3743.

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 IR452. At 8:57 p.m. he was interrogated IR454-55. He spoke Spanish and gave his name as Antonio Rivera IR453-55. He invoked his right to counsel and the interrogation ceased IR456-57.

Later, two officers interrogated him for half an hour "to get background information on the defendant" including "anything that's required on the booking sheet" IR457-62. Officer Juan Cabrera was placed outside Mr. Holland's cell "in case he would say something" IR471. This was unusual IR471.

Officer Butler was assigned to be one of the investigating detectives on the case at 8:00 p.m. on July 29, 1990 IR469. 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 IR470. He stated that because witnesses stated that the perpetrator spoke English, he felt the defendant spoke English IR471. Officer Butler then went to Mr. Holland's cell at 1:00 a.m. on July 30, 1990 IR472. He testified that the following took place:

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. (Prosecutor) 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.

IR472-73.

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 IR474. Officer Butler was standing in the area and they made eye contact IR475-76. Mr. Holland allegedly said, "Can I talk to you?" IR476. 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 IR476-82. During the

interview, Mr. Holland threw up IR515. The vomit smelled like alcohol. Mr. Holland was extremely tired IR515-16. He stated that Mr. Holland stopped two or three times and asked if he was going to be beaten IR486.

A person who invokes his right to counsel may not be interrogated by law enforcement. Edwards v. Arizona, 451 U.S. 477 (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 (1989).

The police actions in this case were 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 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, 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" IR472-73.

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.

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 IR1793. 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. This is especially true given the jury's eight to four vote. Omelus.

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF DR. TATE.

The trial court erred in admitting the hearsay testimony of Dr. Tate. This denied Mr. Holland his rights to due process of law and to confront adverse witnesses pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Florida Statutes 90.801-804. The admission of this evidence was prejudicial and a new trial is required.

The prosecution made a motion to admit the former testimony of Dr. Tate, claiming he was unavailable 99R779-86. A hearing was held on this during trial 65R4246-4265. Dr. Tate was the medical examiner on this case and has since retired. The prosecution put on an investigator to outline its efforts to find Dr. Tate. He testified that they ran Dr. Tate on AutoTrac. They found Dr. Tate's mother-in-law, living in Palm Beach County 65R4250. They

had not looked at the phone records for his mother in law in over a year 65R4254. They never subpoenaed the mother in law or her nurse 65R4254-55. They found a credit card going to his wife and they did not subpoena the records for it 65R4258-9. They made no efforts to subpoena the IRS records of Dr. Tate. Defense counsel objected that inadequate efforts had been made to declare Dr. Tate to be unavailable and that the prosecution could easily call another medical examiner to testify based on Dr. Tate's notes, reports, and raw data and that this would allow cross-examination 65R4261-2. The trial court overruled this objection and allowed Dr. Tate's prior testimony to be read to the jury 65R4263-4313.

The trial court's ruling was error in two respects. (1) The State made an inadequate showing of unavailability. (2) Assuming arguendo that the State made an adequate of unavailability, under the facts of this case it should have been required to use another medial examiner to allow cross examination. "There is a clear constitutional preference for in-court confrontation of witnesses." Palmieri v. State, 411 So. 2d 985, 986 (Fla. 3d DCA 1982). The efforts of the State here are insufficient. Lawrence v. State, 691 So. 2d 1068 (Fla. 1997); Palmieri; McClain v. State, 411 So. 2d 316 (Fla. 3d DCA 1982); McMillon v. State, 552 So. 2d 1183 (Fla. 4th DCA 1989). There were additional steps that the State could have taken such as subpoenaing Dr. Tate's tax records or credit card records or the phone records of his mother in law in recent months.

Assuming arguendo that this Court finds that the State made an adequate showing of unavailability, the trial court should have

still required the prosecution to call another medical examiner. It should be noted that the circumstances of this case are very different from those in which the unavailability analysis is normally conducted. Normally this issue involves a fact witness where the State has no special relationship with the witness and will be deprived of the testimony if the witness is excluded. Here, we have a medical examiner testifying as an expert. This is a State employee whose information could be easily relayed by other State employees. (This Court has approved a new medical examiner testifying from the prior work of another examiner. Geralds v. State, 674 So. 2d 96 (Fla. 1996); Capehart v. State, 583 So. 2d 1009 (Fla. 1991).) We have a retrial with new counsel who were also contesting the facts of the case as opposed to the first trial when the defense had been solely as to Mr. Holland's mental state. This is a capital case involving a unique need for reliability pursuant to the Florida and United States Constitutions. Gardner v. Florida, 430 U.S. 349 (1977); Tillman v. State, 591 So. 2d 167 (Fla. 1991). Under the circumstances of this case it was error to allow the State to read the testimony of Dr. Tate and thus preclude confrontation and cross-examination. The error was harmful. The medical examiner's testimony and his theories were sharply at issue. A new trial is required.

POINT IX

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATION.

The trial court erred in denying Appellant's motion for judgment of acquittal as to the element of premeditation. This denied Mr. Holland due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitutions and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. Mr. Holland made motions for judgment of acquittal at the close of the State's case and at the close of all the evidence, specifically pointing out the lack of evidence of premeditation, which were denied 65R4395-4401;77R5352-3;82R5823-4.

> Premeditation is more than a mere intent to kill; it is a fully formed purpose to kill. Wilson v. State, 493 So. 2d 1019 (Fla. 1986). Premeditation may be proved by circumstantial evidence. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). However, premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. Cochran v. State, 547 So. 2d 928 (Fla. 1989). If the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Coolen v. State, 696 So. 2d 738 (Fla. 1997).
>
> Cummings v. State, 715 So. 2d 944, 949 (Fla. 1998).
>
> 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 v. State, 575 So. 2d 181, 186 (Fla. 1991).

In the present case, the prosecution introduced substantial evidence that Mr. Holland was under the influence of cocaine during

the incident. [redacted] testified that during her encounter with Albert Holland they were relaxed and talking until he smoked a second piece of cocaine and then he became violent 56R3302. Gene Detuscan, the State's toxicologist, testified that Mr. Holland's vomit tested positive for cocaine and that this would have to have been from ingestion from means other than smoking 62R3885-90.

The State introduced the testimony of witnesses who claimed to have seen some or all of the incident. Their testimony differed in some aspects. The testimony of Dorothy Horne exemplifies the testimony of a State witness who clearly negates the element of premeditation. Dorothy Horne testified that on July 29, 1990, she traveling west on Hammondville Road in a car with her husband and daughter 59R3660-1. She saw a man and a police officer struggling over a gun in a field 59R3662. The men were close together and their hands were going up and down in the air 59R3664. There was a shot and the policeman fell 59R3664. She could not tell whose hands were on the gun 59R3678. The homicide is not premeditated under this version of events. It occurred during a struggle over the officer's gun and neither party had clear control over the gun. As the State is bound by its evidence, a judgment of acquittal as to the element of premeditation must be granted.

Another line of State witnesses is exemplified by Abraham Bell. He was leaving his shop at 7:15-20 p.m. and heard a police officer say, "Hey you get over here" 65R4320-21. The man had on no shirt, dark pants and "had wild eyes" 65R4321. The man stopped and went back to the vehicle and the officer got out and told the man

to put his hands on the car, which he did 65R4321-4324. The officer had his night stick in the man's back 65R4324. He claimed the officer reached down to operate his radio and the man swung and missed 65R4324. The officer grabbed him and got him in a headlock and got him down on the ground 65R4324. Bell claimed that they were facing each other 65R4325. The man tried to come up and the officer hit him 2-3 times with the nightstick across the back 65R4325-6. The man's right hand was partially blocked and his left hand was completely blocked 65R4326. The officer lost his night stick 65R4327. The man began reaching for the gun and they began struggling over it 65R4327-8. He claimed that the man was trying to pull the gun out and the officer was pushing down 65R4330. The gun came out and it fired twice 65R4331. The man then left 65R4332. Bell stated that at one time both men's hands were on the gun 65R4347. The shots went off very quickly 65R4355.

Under this line of testimony the evidence is also insufficient to sustain the element of premeditation. The struggle over the gun and the two quick shots are equally consistent with a desire to break free from the headlock and to stop being hit in the back with a night stick as with a "fully formed purpose to kill".

The evidence of premeditation is insufficient here as in Forehand v. State, 171 So. 241 (Fla. 1936) and Weaver v. State, 220 So. 2d 53 (Fla. 2d DCA 1969).

> 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. Such were the facts which the jury were reasonably justified in finding to be true.

171 So. at 242.

> 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.

In the present case, there were only two virtually instantaneous shots, while the defendant was in a headlock, and with no ability to aim. There is far weaker evidence of premeditation in the current case than in Forehand and Weaver. The evidence of premeditation was insufficient here as in Forehand and Weaver. The error was harmful as one or more jurors may have relied on premeditation.

POINT X

THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS TO TESTIFY AS TO SPECULATION.

A State psychologist, Dr. Daniel Martell, was allowed to express his opinion as to whether a gun had been hidden. His testimony was purely speculative. He had no special training or experience to allow him to determine whether a gun had been hidden. The admission of this testimony denied Mr. Holland due process of law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9,16, and 17 of the Florida Constitution; and Fla. Stat. 90.604 and 90.701.

The prosecution called Dr. Martell as an expert on the issue of sanity. He launched into a long narrative of his version of the offense 80R5686-93. The following took place during this narrative.

> DR. MARTELL: Then he attempts to hide the murder weapon and he doesn't just drop it or throw it, he intentionally places it in a remote location.
>
> DEFENSE COUNSEL: Your Honor? Excuse me, Doctor, I'm going to impose an objection. It's speculation upon speculation. A lot of what this doctor is saying is not in evidence in the case and I object to his being allowed

to propound an opinion, based on his speculation, as to what the evidence is.

BY PROSECUTOR:

Q. Doctor, let me ask you a question with reference to the gun; did you see any photographs of the gun?

A. I did.

Q. Okay, and how did it appear to you?

A. It was clear to me, from looking at the location where the gun was found, that a gun would not end up in that place in that position, randomly. It had to be placed there.

Q. That's your opinion.

A. That's my opinion.

DEFENSE COUNSEL: And that's the basis of my objection, Judge. That's his speculation. That's an issue for the jury to decide. He shouldn't be allowed to treat it as fact for purposes of basing an opinion.

THE COURT: Objection is overruled.

80R5693-4.

Dr. Martell had no expertise at looking at a photograph and determining whether a gun had been hidden or randomly dropped. Opinion testimony can only be admitted if a proper predicate is laid. Fino v. Nodine, 646 So. 2d 746 (Fla. 4th DCA 1994); Laffman v. State, 565 So. 2d 760 (Fla. 3d DCA 1990); Beck v. Gross, 499 So. 2d 886 (Fla. 2d DCA 1986); Albers v. Dasho, 355 So. 2d 150 (Fla. 4th DCA 1978). Speculation is inadmissible. Durrance v. Sanders, 329 So. 2d 26 (Fla. 1st DCA 1976). The error here was harmful. Mr. Holland's mental state was sharply in issue in this case. The improper opinion testimony was designed to create an impression of

a more planned escape. This could have easily influenced the jury on the issue of sanity and /or degree of the offense. A new trial is required. Assuming arguendo that this Court finds the error harmless as to guilt it is harmful as to penalty. The jury's vote at penalty was only eight to four. Virtually any error could have tipped the balance.

POINT XI

THE TRIAL COURT ERRED IN USING THE WRONG LEGAL STANDARD IN REJECTING MITIGATION.

The trial court used the sanity standard to reject non-statutory mental mitigation. It is reversible error to use the sanity standard to reject mental mitigation. Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982); Campbell v. State, 571 So. 2d 415, 418-9 (Fla. 1990). This denied Mr. Holland due process of law and subjects him to cruel and/or unusual punishment pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and Florida Statute 921.141.

The trial court used the sanity standard in rejecting a non-statutory mitigating circumstance. The trial court stated:

> 4. Two previous adjudications of insanity, in the Superior Court of the District of Columbia.
>
> The Defendant's two prior adjudications of insanity were not based upon the law as it exists in the State of Florida. Pursuant to the test for insanity in the District of Columbia, the defendant was found to be insane because he committed the crimes due to an irresistible impulse. The expert testi-

> mony before the Superior Court of the District of Columbia established that the defendant knew the difference between right and wrong when he committed the Washington D.C. offenses, which is the applicable standard in the State of Florida. An irresistible impulse is not a defense or excuse for committing a crime in the State of Florida.
>
> While this Court recognizes the two prior adjudications of insanity in the District of Columbia, that standard for insanity is a much lesser, more lenient standard than that which is used under the law of the State of Florida. Additionally, the evidence presented before this Court established beyond and to the exclusion of every reasonable doubt, that the defendant was not insane at the time of the commission of the acts pending before this Court. Accordingly, the applicability of this mitigating circumstance has not been established by a preponderance of the evidence.

102R8192-93. The trial court relied solely on the fact that the prior adjudications of insanity were under a different standard than the Florida standard and that Mr. Holland was not "insane" at the time of the offense to reject this as mitigation. This is precisely the error in Mines, Ferguson, Ferguson, and Campbell. It was undisputed that Mr. Holland had been involuntarily hospitalized on both occasions and had continued to be involuntarily hospitalized when he escaped. It is also undisputed that Mr. Holland had been continuously diagnosed as schizophrenic. This is substantial mitigation. The trial court's improper use of the sanity standard to reject this mitigation was harmful error.

POINT XII

THE TRIAL COURT MADE SEVERAL FACTUAL ERRORS IN ITS EVALUATION OF THE TESTIMONY OF DEFENSE MENTAL HEALTH EXPERTS.

The trial court made several factual errors in its evaluation of the testimony of defense mental health experts. These errors individually and cumulatively skewed the judge's evaluation of statutory and non-statutory mitigating circumstances. This denied Mr. Holland due process of law and subjected him to cruel and/or unusual punishment 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, and Florida Statute 921.141.

The trial court summarized the testimony of several State and defense witnesses before it analyzed the statutory and non-statutory mitigating circumstances. It made several crucial factual errors in analyzing the testimony of two key defense witnesses: Dr. Thomas Polley and Dr. Raymond Patterson. The trial judge made the following statement with respect to Dr. Polley.

> The Bender Gestalt, Weschler Adult Intelligence and Memory Scale and Rorschach tests indicated that there was a logical flow to the defendant's thoughts, that there was no evidence of loose or tangential thinking, no impairment of his remote or recent memory and no evidence of psychosis or overt psychosis.

102R8182.

In fact, Dr. Polley specifically testified that the Rorschach test did show that there was evidence of psychosis.

> Q (Prosecutor) Would you -- the testing you did showed manipulation, manipulative behavior?
>
> A (Dr. Polley) It showed that there was an underlying psychotic process that was not evidenced on the surface of his presentation.

Q And that showed up in the testing?

A Yes.

Q Which test showed that?

A In response to the Rorschach.

Q Which response to the Rorschach.

A The response to some of the cards where there was disorganization as a result of being stimulated by them. Some of the figure drawing indicated psychosis.

Q Which one, do you remember?

A I don't remember which specific card and I don't think that it would be useful to the jury to know what specific card, other than knowing that as we assessed his response to the Rorschach, as I assessed it with the intern, that the pattern of responding was suggestive of a psychotic process.

90R6652.

The trial court's recounting of Dr. Polley's testimony as to hallucinations is also misleading, at best. The trial court stated:

> Dr. Polley in 1983, 1985 and 1986 saw no evidence of any psychotic symptoms nor any delusions or hallucinations.

102R8183.

Dr. Polley actually testified somewhat differently.

> Q (Prosecutor) During the time that you saw him, you saw no symptoms of delusions, or any direct clear evidence of any hallucinations, right?
>
> A (Dr. Polley) I did not directly observe them. Evidence of hallucinations was reported by the staff and apparent auditory nurses responding to him.

90R6655.

The trial judge also misstated the testimony of Dr. Patterson in terms of the evidence of psychosis. He stated:

> Dr. Patterson testified that the defendant was not acutely psychotic when he was hospitalized in 1981, and that by 1982, Albert Holland, Jr. was not exhibiting any psychotic symptomolgy.

102R8184-85. In fact, Dr. Patterson testified on two different occasions concerning evidence of psychosis.

> Q (Prosecutor) And you and Doctor Polley, you know, both stated that, talking about the March 19, 1982 robbery, that he knew the difference between right and wrong; you were concerned about the ability to conform his conduct to the requirements of law?
>
> A (Dr. Patterson) Yes, we were.
>
> Q And that's also called "irresistible impulse?"
>
> A Yes, it is.
>
> Q And what was the thing that you all felt was irresistible about committing this robbery; didn't you say something about he needed to get money for his father?
>
> A There were a number of family dynamics that came into play about his relationship with his father and his father's relation with his mother, their relationship with each other, that was part of it.
>
> It was also his assertion of "Coop." Coop was his harmonica. And he had a very bazaar [sic] way of describing his harmonica and the way it influenced his thinking, and electricity running through his body. There's a number of problems running through his mind.
>
> Q That's the first admission. I'm thinking about the second, when you're dealing with the second robbery on March 19, 1982, that you felt that he knew the difference between right and wrong, but he was involved psychotically because he needed to undo his past wrong to his father and his family by expressing concern and support with money?

A Yes.

Q And that he was irresistible impulse --

A That’s part of it, yeah.

Q -- to get money for his father?

A Yes, but in a psychotic way, to right the wrong; that’s the part that we considered psychotic.

69R4730-32.

Dr. Patterson also testified as to Mr. Holland’s symptoms upon entry and the prescription of Thorazine.

Thorazine is a major tranquilizer and we use it for serious disorders with one or two exceptions....

Q So you’re talking about a dosage of 1000 --

A That’s right.

Q -- milligrams?

A Yes.

Q How does that dosage of Thorazine, how does that deal with someone who is schizophrenic?

A Well what we’re doing with that medication is attempting to affect target symptoms. “Target symptoms” meaning delusions, hallucinations, sometimes some behavioral problems.

Mr. Holland came in on the 1st of July and within twenty-four hours struck another patient for what was no apparent reason. He was also complaining of electricity running through his body, that he was confused.

He was asking for Thorazine. He had been treated with Thorazine at another facility in the District of Columbia between April, when he was arrested, and July when he came to the hospital. So he had already had some familiarity with it and came asking if he can be prescribed Thorazine.

> Q Is Thorazine a medication that you can find that patients who are looking to try to get high on some kind of drug ask for?
>
> A Thorazine is not commonly an abused drug.
>
> We, in my private practice as well as in the hospital, I had my people ask me for Valium or ask me for diet pills, any number of things that give them a high or buzz. Thorazine, typically, doesn't do that.
>
> So when you have someone that comes in asking for a major antipsychotic medication, it gives you some insight that perhaps they are having some serious symptoms.

69R4687-88. This testimony is certainly indicative of psychosis.

The trial judge's errors in evaluating the testimony of Dr. Polley and Dr. Patterson are crucial. These witnesses were key defense witnesses concerning mental mitigation in this case. This error concerning the state of the evidence of psychosis at St. Elizabeth's was critical in evaluating both statutory and non-statutory mental mitigation.

This error is harmful. The statutory mental mitigating circumstances are among the most significant mitigating circumstances in a capital case. Burns v. State, 699 So. 2d 646 (Fla. 1997); Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Deangelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Errors concerning the application of the statutory mental mitigating circumstances are generally harmful. Campbell v. State, 571 So. 2d 415, 418-419 (Fla. 1990); Ferguson v. State, 417 So. 2d 631, 636-638 (Fla. 1982); Mines v. State, 390 So. 2d 332, 337 (Fla.

1980). In Ferguson, supra, this Court explained why such an error is almost always harmful:

> In our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.

417 So. 2d at 638.

This Court recently reversed on a similar error. Larkins v. State, 655 So. 2d 95, 100 (Fla. 1995).

> The trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."

655 So. 2d at 100.

The error here is also harmful. The mental mitigating factors were a crucial issue at the penalty phase. The trial court's misstatement of the mitigating evidence is harmful error.

POINT XIII

THE TRIAL COURT RELIED ON A FACTUAL ERROR IN REJECTING A STATUTORY MENTAL MITIGATING CIRCUMSTANCE.

The trial court relied on a misstatement of the testimony of defense witnesses in rejecting the statutory mental mitigating circumstance of "extreme mental or emotional disturbance" pursuant to Florida Statute 921.141(5)(b). This denied Mr. Holland due process of law and subjected him to cruel and/or unusual punishment

pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, and Florida Statute 921.141.

The trial court began its analysis of the statutory mental mitigating circumstances as follows:

> The statutory mitigating circumstances relied upon by the defendant were not established by the evidence presented. To the contrary, each and every defense expert, with the exception of Dr. Love, testified that the defendant was not under the influence of extreme mental or emotional disturbance when he murdered Officer Scott Winters.

102R8189. This statement that all of the defense experts other than Dr. Love explicitly rejected this mitigating circumstance is simply false. Dr. Love testified that Mr. Holland was legally insane during the incident 67R449-52. The other defense mental health experts all testified to Mr. Holland's history of schizophrenia and his involuntary hospitalizations 69R4661-4748;90R6612-91R6751. None of these experts expressed an opinion as whether he qualified for this statutory mental mitigating circumstance during the incident. This is very different from the judge's statement that these experts had explicitly rejected this circumstance.

This error is harmful. The statutory mental mitigating circumstances are among the most significant mitigating circumstances in a capital case. This Court has repeatedly held errors concerning the application of the statutory mental mitigating circumstances to be harmful. Campbell; Ferguson. This Court recently reversed, in part, on a similar error. Larkins. The

mental mitigating factors were a crucial issue at the penalty phase. Resentencing is required.

POINT XIV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE.

The trial court failed to consider certain non-statutory mitigating circumstances which are supported by the evidence. The current order violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution.

This Court has made clear a trial judge's duty to evaluate all non-statutory mitigating factors which are in the record.

> Every mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process. *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (citing *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Moreover,
>
> > when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court *must* find that the mitigating circumstance has been proved.
>
> *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990) (emphasis added).
>
> Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

The trial court failed to consider five non-statutory mitigating factors which are apparent from the record. These are: (1) The homicide was with little or no premeditation. (2) Mr. Holland's drug use at the time of the offense. (3) The traumatic

effect on Mr. Holland of nearly being beaten to death. (4) Mr. Holland's positive childhood activities and loving family relationships prior to drug addiction. (5) The fact that Mr. Holland may have been suffering from a mental or emotional disturbance less than "extreme".

It is clear that this was a homicide with little or no premeditation. See Point XI. This Court has stated if the "killing, although premeditated, was most likely upon reflection of a short duration" it is a mitigating factor. Wilson v. State, 493 So. 2d 1019, 1923 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985). The State's evidence shows that this homicide took place during s struggle with little or no premeditation.

The trial court ignored the evidence of Mr. Holland's drug use immediately prior to the offense. The trial judge considered Mr. Holland's long term drug and alcohol abuse and the testimony of Jose Padilla and [redacted] that he had smoked cocaine with them earlier in the day 102R8190-1. However, the trial court did not consider the most powerful evidence of intoxication from State's witnesses [redacted] and Michael Wagner.

[redacted] testified that she met Albert Holland and that they were talking while he smoked cocaine 56R3301-2. He smoked the second piece of cocaine and changed and became violent 56R3302. It was like he snapped 56R3319. She claimed Mr. Holland was normal until he smoked the second piece of cocaine 56R3332,37. The confrontation with Officer Winters was soon after this. Indeed the

State's theory was that Mr. Holland killed Officer Winters in order to escape from the incident with Ms. [redacted].

Officer Winters called in on the radio saying that he had been shot at 7:26 p.m. 62R3908-9. Mr. Holland threw up in the jail at 8:50 p.m. and a sample was collected 60R3770. State witness, toxicologist Michael Wagner, stated that this sample tested positive for cocaine and that the cocaine had to be injected within three hours 62R3889-91. Thus, State witness [redacted] provide undisputed evidence that Mr. Holland had smoked crack cocaine shortly before this incident. Mr. Wagner provided scientific evidence that Mr. Holland must have also injected cocaine.

The trial court's failure to consider the fact that Albert Holland was under the influence of cocaine was extremely 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 [redacted] 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.

There was undisputed evidence that Mr. Holland was nearly beaten to death while in prison. The trial court failed to consider the traumatic affect which this would have on Mr. Holland

and the undisputed testimony that his behavior changed after this beating. The trial court only considered the beating in terms of organic brain damage and did not consider the traumatic affect that this beating would have and the undisputed evidence that his behavior changed 102R8192. Mr. Holland's father testified that Albert was in federal prison in Wisconsin in 1974 and was found one morning in a pool of blood 89R6514. Seven people had beaten him with a metal mop wringer and broke his jaw, broke the orbital bones around his eyes, and damaged his hearing 89R6515. He was rushed by plane to the University Hospital in Madison, Wisconsin where he was in a coma for several days 89R6515. He was in three different hospitals recovering from this attack 70R4775-6. He was released in August, 1980. He was extremely depressed and talked of suicide several times afterward 70R4776. He often spoke of jumping off the roof of the building where his probation officer was 70R4776-7. Then "he just went bizarre, he went like haywire" 70R4777. He was highly irritated and sensitive, which he had never shown before 89R6517. He would become very angry if he heard a dog barking or heard loud music 89R6517.

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). It is clear that the beating had a traumatic effect on Mr. Holland. The failure to consider this is prejudicial.

The trial court also failed to consider Albert Holland's positive achievements as a child and positive family relationships as a mitigating circumstance. Albert was born in New York City and grew up primarily in Washington D.C. 89R6506. He has a younger brother and four sisters 89R6506. The family was poor when Albert was young 89R6507-8. He was an average student 89R6509. He liked to play sports and music 89R6509-10. He was self-taught on the trumpet, guitar and harmonica 89R6509-10. He was very protective of his younger brother who was ten years younger 89R6510. He was very involved in sports especially tennis and basketball 89R6511-12. A defendant's caring relationship with his family is mitigating. Barrett v. State, 649 So. 2d 219 (Fla. 1994); Scott v. State, 603 So. 2d 1275 (Fla. 1992); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). The mitigation here is very similar to that recognized in Perry. Here, as in Perry, Mr. Holland showed promise as a young person and then completely changed. Id. at 821.

The trial court also failed to consider the fact that Mr. Holland may have been suffering from a mental disturbance less than "extreme" at the time of the homicide. The trial court rejected the statutory mitigating circumstance of being "under the influence of extreme mental or emotional disturbance" based in part on a mistake in his recollection of the testimony of the defense experts. See Point XIII. The trial judge failed to consider the fact that Mr. Holland may have been suffering from mental or emotional disturbance less than "extreme" 102R8169-95. There was significant evidence of Mr. Holland's history of mental illness as

well as testimony concerning his cocaine use at the time of the incident and how his behavior completely changed. The trial court's failure to consider the fact that he may have been suffering from a mental or emotional disturbance less than "extreme" is harmful error.

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.

POINT XV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO BRING OUT THE FACTS OF A PRIOR OFFENSE OF WHICH MR. HOLLAND HAD BEEN ACQUITTED AND WHICH WAS NOT RELEVANT.

This issue involves the eliciting of the facts of a prior criminal offense of which Mr. Holland had been acquitted. This denied Mr. Holland due process of law pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution and the Fla. Stat. 921.141. Mr. Holland called his prior counsel to testify concerning his mental illness during his representation of Mr. Holland in the early 1980's in the penalty phase of the case 90R6544. The State brought out the facts of a prior offense from 1981 in which Mr. Holland had been found not guilty by reason of insanity 90R6593-6598. Defense counsel objected that this testimony was irrelevant and was not a statutory aggravator 90R6596. The State was allowed to bring out that he threatened the victim of the robbery and claimed that he had been in St. Elizabeth's previously 90R6597.

It was improper and irrelevant to bring out the facts of an offense which Mr. Holland had been acquitted. It is a violation of Article I, Section 9 of the Florida Constitution to introduce evidence of a collateral crime which the defendant has been acquitted of. Burr v. State, 576 So. 2d 278 (Fla. 1991); State v. Perkins, 349 So. 2d 161 (Fla. 1977). Here, the facts of the prior case are irrelevant to Mr. Holland's mental state. Crimes for which a defendant has not been convicted constitute non- statutory aggravation. This error was harmful, given the close jury vote.

POINT XVI

THE TRIAL COURT IMPROPERLY USED THE ATTEMPTED SEXUAL BATTERY TO SUPPORT TWO AGGRAVATING CIRCUMSTANCES.

The trial court improperly used the alleged attempted sexual battery upon [redacted] to support two aggravating circumstances. This use of the "same aspect" of the offense to find two aggravating circumstances denied Mr. Holland due process

of law and subjected him to cruel and/or unusual punishment pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and Florida Statute 921.141. Provence v. State, 337 So. 2d 783 (Fla. 1976); United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); modified on denial of rehearing, United States v. McCullah, 87 F.3d 1136 (10th Cir. 1996).

In the present case the trial judge relied on the attempt to commit a sexual battery upon [redacted] to find that "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person" pursuant to Florida Statute 921.141(5)(b) 102R8172-3. The trial court also used the same offense to find that the capital felony was committed while the defendant was engaged in an enumerated felony pursuant to Florida Statute 921.141(5)(d) 102R8173-4. The jury was instructed that the commission of this offense could be used to support both of these aggravating circumstances 92R6850-1.

This Court has held that it is improper to use "the same aspect" of an offense to support two aggravating circumstances. Provence, at 786. Such duplication also violates the Federal Constitution. McCullah, at 1111-2. This Court has had few opportunities to apply the rule of Provence to these two aggravators (prior violent felony and during a felony). However, the limited writings of this Court in this area support a finding that the trial court improperly violated the rule of Provence. This Court grappled for several years with the issue of whether a

contemporaneous conviction could support the prior violent felony aggravator. In Hardwick v. State, 461 So. 2d 79 (Fla. 1984), a majority of this court held that a contemporaneous conviction could be used to support this aggravator even on the same victim. 461 So. 2d at 81. However, three members of this Court dissented from this aspect of the opinion.

> I agree with the majority's affirmance of the conviction and sentence in this case. I disagree with that portion of the opinion which finds that contemporaneous convictions for violent felonies committed against the murder victim during the course of action leading to the murder may be used to establish the aggravating circumstances of the previous convictions of violent felonies. See § 921.141(5)(b), Fla. Stat. (1981). I would hold that those violent felonies committed upon the victim during or close to the time when the defendant commits the murder may not be used to establish this aggravating circumstance.
>
> We have said that this aggravating circumstance may be found where the violent felony occurred subsequent to the murder but the convictions are returned jointly. King v. State, 390 So. 2d 315, 320-21 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981). However, as the majority opinion recognizes, this Court has never before permitted contemporaneous violent felonies committed upon the murder victim by the defendant to establish the aggravating circumstance of previous convictions for violent felonies. I do not believe that the legislature, in enacting subsection 921.141(5)(b), intended such contemporaneous behavior to be counted as a prior history of violence. In this case such conduct aggravated the offense under the provisions of subsection 921.141(5)(d). It should not be counted twice. Therefore, I concur in the result reached by the majority.

461 So. 2d at 82 (Opinion McDonald, J., joined by Justices Overton and Ehrlich).

Subsequently the position of Justices McDonald, Overton and Ehrlich prevailed and this Court held that a contemporaneous conviction on the same victim can not be used as a prior violent felony. Wasko v. State, 505 So. 2d 1314, 1317-8 (Fla. 1987). This Court explicitly receded from Hardwick to the extent it conflicted with Wasko. Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987). In Wasko this Court did not explain why it was prohibiting the use of a contemporaneous conviction on the same victim to establish the prior violent felony aggravator. The logical explanation is that the doubling concerns expressed by three justicies prevailed. The requirement of a different victim has successfully reduced the doubling concerns of these two aggravators. Indeed, this Court has only been faced with this issue on one occasion. Henyard v. State, 689 So. 2d 239 (Fla. 1996). In Henyard, this Court rejected a doubling claim. However, this Court's reasoning supports a finding of doubling in this case.

> Henyard argues that, to the extent that the contemporaneous convictions are considered under the prior violent felony aggravator, the trial court has improperly doubled this aspect with the aggravating circumstance that the murder was committed in the course of a kidnapping. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976) (evidence used to support two independent aggravating circumstances cannot refer to the same aspect of defendant's crime), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). In this case, the trial court imposed death sentences for the murders of both Jasmine and Jamilya Lewis. For each death sentence the trial court considered the contemporaneous conviction for the kidnapping of the other sister under the prior violent felony aggravating factor, and considered the victim's kidnapping under the murder in the course of a felony aggravating factor. § 921.141(5)(d). That is, the trial court considered these two aggravators for each

> murder. Thus, the presence of these aggravators does not constitute improper doubling and Henyard's claim is without merit.

689 So. 2d at 252.

In this case, unlike Henyard, the same felony upon the same victim (attempted sexual battery upon [redacted]) was used to used to support both aggravators. Here, the doubling concerns of Justices McDonald, Overton and Ehrlich have proven true. The "same aspect" of the offense has been used to support two aggravators in violation of Provence.

This error is harmful. The Court in McCullah outlined why doubling violates the Federal Constitution and is harmful.

> Double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally. Cf. Stringer v. Black, 503 U.S. 222, 230-32, 112 S.Ct. 1130 1137, 117 L.Ed.2d 367 (1992).

76 F.2d at 1111-12.

In the present case, the error is clearly harmful. The judge explicitly used the same offense to support both aggravators. The jury was also instructed that it could use the same offense to support both aggravators. It is likely that the jury made the same error. The jury's vote was only eight to four for death. Thus, it is more likely for errors to be harmful. Omelus, at 567. Resentencing is required.

POINT XVII

> IT WAS ERROR TO INSTRUCT THE JURY AND TO FIND THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED DURING A ROBBERY.

The trial court found that the homicide was committed during a robbery pursuant to Florida Statute 921.141(5)(d) 102R8173-4. The jury was instructed that the commission of this offense could be used to support this aggravating circumstance 92R6850-51. Defense counsel objected to the robbery instruction 87R6399. The use of this aggravator denied Mr. Holland due process of law and subjected him to cruel and/or unusual punishment pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and Florida Statute 921.141.

In this case, the evidence clearly shows that robbery was not the motive for the killing, but that the taking of the officer's gun was merely incidental. The state presented several witnesses concerning the confrontation between Mr. Holland and Officer Winters. One line of testimony is exemplified by the testimony of Dorothy Horne. She saw a man and a police officer struggling over a gun in a field 59R3662. The men were close together and their hands were going up and down in the air 59R3664. There was a shot and the policeman fell 59R3664. She heard one shot 59R3665. She could not tell whose hands were on the gun 59R3678.

Another line of testimony is exemplified by the testimony of Abraham Bell. He was leaving his shop at 7:15-20 p.m. and heard a police officer say, "Hey you get over here" 65R4320-21. The man stopped and went back to the vehicle and the officer got out and told the man to put his hands on the car, which he did 65R4321-4324. The officer had his night stick in the man's back 65R4324.

He claimed the officer reached down to operate his radio and the man swung and missed 65R4324. The officer grabbed him and got him in a headlock and got him down on the ground 65R4324. The man tried to come up and the officer hit him 2-3 times with the nightstick across the back 65R4325-6. The officer lost his night stick 65R4327. The man began reaching for the gun and they began struggling over it 65R4327-8. The gun came out and it fired twice 65R4331. The man then left 65R4332. The shots went off very quickly 65R4355. The gun was found in field near the incident 65R4374. Thus, the gun was quickly discarded.

In Jones v. State, 580 So. 2d 143, 146 (Fla. 1991), this Court held that although the taking of a police officer's gun may constitute robbery, since the robbery was not the reason for the killing the aggravating circumstance that the capital offense was committed during the course of a robbery would not apply:

> ... the trial court found that five aggravating circumstances, ... 3) committed during a robbery.... Factors, 1, 2, and 4 and 5 are supported by the evidence. Number 3, however, is not. Taking the officer's service weapon, technically an armed robbery, was only incidental to the killing, not the reason for it. *See Parker v. State*, 458 So. 2d 750 (Fla. 1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985).

580 So. 2d at 146. Likewise, the taking of the officer's gun in this case was not the reason for the killing. Rather, the "robbery" was merely an incident during an attempt to avoid arrest. Thus, the robbery aggravator does not apply at bar.

The error is harmful as the jury's vote was only eight to four for death. Omelus v. State, 584 So. 2d 563 (Fla. 1991).

POINT XVIII

THE TRIAL COURT ERRED IN ALLOWING THE USE OF VICTIM IMPACT EVIDENCE.

The trial court erred in admitting victim impact evidence over defense objection. Defense counsel filed a motion to prohibit victim impact evidence. Appendix B. He orally renewed this motion at a pre-trial motion hearing and at the time that the evidence was introduced 38R1608-1610,89R6467-6476. Victim impact testimony was presented to the jury and considered by the judge 89R6497-6502, 102R8177. The admission of this evidence denied Mr. Holland due process of law, subjected him to cruel and unusual punishment, and to ex post facto laws in violation of Article I, Sections 2, 9, 10, 16 and 17 of the Florida Constitution; Article I, Section 10 of the United States Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Victim impact evidence is irrelevant to any aggravating circumstance and is highly inflammatory. It is given to the judge and jury without any meaningful guidance as to how to weigh it. It violates the due process and cruel and/or unusual clauses of the Florida and United States Constitutions. Appellant recognizes that this Court rejected similar arguments in Windom v. State, 656 So. 2d 432 (Fla. 1995). Appellant would urge this Court to reconsider its decision.

The application of the victim impact statute in this case is violative of the ex post facto clauses of the United States and Florida Constitutions. The alleged offense in this case took place on July 29, 1990. The statute authorizing the admission of victim

impact evidence took effect on July 1, 1992. Appellee recognizes that this Court rejected a similar argument in Windom. However this Court should revisit this portion of Windom in light of intervening caselaw out of this Court and the United States Supreme Court. In State v. Hootman, 709 So. 2d 1357 (Fla. 1998), this Court held for the first time that the use of an aggravating circumstance which was not in effect at the time of the crime violates the ex post facto clauses of the Florida and United States Constitution. This Court's analysis is also influenced by the recent United States Supreme court decision in Lynce v. Mathis, ___ U.S. ___, 117 S.Ct. 891 (1997).

This Court should reconsider the ex post facto analysis of Windom in light of Hootman and Lynce v. Mathis. Victim impact evidence "applies to events before its enactment" and "disadvantages the offender". Lynce at 895. The admission of this evidence is harmful given the jury's eight to four vote. Omelus.

POINT XIX

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH.

The trial court erroneously presumed that death is the proper penalty when any aggravator is found unless outweighed by the mitigating circumstances. The imposition of the death sentence in this case violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution and Fla. Stat. 921.141.

The trial judge made the following statement in his sentencing order:

> Death is presumed to be the property penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances.

102R8193.

This is a misstatement of Florida law, as well as an improper death presumption in violation of the Florida and United States Constitutions. Florida Statutes 921.141(3) requires the judge to find "sufficient aggravating circumstances" to justify the death penalty before he can even begin the weighing of aggravating and mitigating circumstances. There is absolutely nothing in the judge's order that indicates he performed this required first step.

The Eleventh Circuit Court of Appeals has held the use of the death presumption employed by the judge in this case to violate the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The court struck down a jury instruction identical to the formulation utilized by the trial judge. The court stated:

> In the present case, the terminology that death is presumed appropriate seeped in to the sentencing instructions given by the trial judge. The jury was instructed:
>
> > When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.
>
> Jackson contends that such an instruction amounts to constitutional error. We agree ...
>
> In this case, however, the jury was instructed that death was presumed to be the appropriate penalty. Justice

McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:

> I would also like to comment on the reference in the majority opinion in State v. Dixon, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974) . I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.
>
> Randolph v. State, No. 54-896 (Fla. Nov. 10, 1983) (LEXIS, States Library, Fla. File) (McDonald, J., dissenting), withdrawn, 463 So. 2d 186 (Fla. 1984), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 6565 (1985).
>
> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.

837 F. 2d at 1473 (emphasis supplied).

The Eleventh Circuit correctly held that when the sentencer employs such a death presumption it violates the Eighth Amendment.

In the Florida scheme both the judge and jury play a constitutionally significant role in sentencing. The judge employing such erroneous presumption is also constitutional error. Resentencing is required.

POINT XX

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(d)) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d)) violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Holland's death sentence unconstitutional 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.

Mr. Holland filed a motion to declare this aggravator unconstitutional 96R7128-7135. The jury was instructed on this aggravating circumstance and the trial court found it 92R6851; 102R8173-8174.

Aggravating circumstance (5)(d) states:

> 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.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(2)2.

This aggravating circumstance violates both the United States and Florida Constitutions. Under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410 (1982). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141 (5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance

violates the Eighth and Fourteenth Amendments pursuant to Zant, supra. It also violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or the federal constitution. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should declare this aggravator unconstitutional pursuant to the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

Assuming arguendo, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. The evidence of premeditation is very limited in this case. See Point XI. Additionally, there is undisputed evidence from the prosecution's own witness that Mr. Holland's behavior changed completely after smoking cocaine 56R3301,3337. It is unconstitutional to use the underlying felonies to make the offense first degree murder and also to use them as aggravating circumstances.

The error in this case is clearly harmful. The jury's vote for death was only eight to four. The erroneous consideration of this aggravator could well have tipped the balance towards death.

POINT XXI

THE DEATH PENALTY 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. The death penalty is disproportionate. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). The death sentence in this case also 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 on 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.

> 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.

This Court has followed the reasoning of Fitzpatrick to reduce death sentences to life imprisonment in other cases involving mental illness and/or alcohol or drug abuse. Kramer v. State, 619 So. 2d 274, 277-8 (Fla. 1993); Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997).

In the present case the judge found three aggravating circumstances 102R8172-76. Fitzpatrick involved the same three aggravating circumstances and two additional aggravating circumstances (great risk of death to many persons and pecuniary gain). The homicide was the product of mental illness and cocaine. State witness [redacted] stated Mr. Holland appeared normal until he smoked a second piece of cocaine rock and then his behavior changed completely and he became violent 56R3302. Mr. Holland threw up in the police station and his vomit tested positive for cocaine 62R3885-6. Several State witnesses testified that the shooting occurred while Mr. Holland and the officer were struggling over the gun 58R3492-5; 59R3662-78.

Albert Holland was a good child with positive achievements until he began abusing drugs at age 16 89R6506-14. In prison he was nearly beaten to death and was in a coma for several for several days 89R6514-6. He changed completely after the beating. He was very depressed when he came out 89R6515-6. He often spoke of suicide and jumping off the top of the building 89R6516. He was highly irritated and sensitive, which he had never shown before 89R6517. He would become very angry if he heard a dog barking or heard loud music 89R6517. He eventually was put in St. Elizabeth's mental hospital after being found not guilty by reason of insanity 89R6518. He was also "very, very sensitive about noise" 89R6523. Albert Holland, Jr., was also asked about his son's mental problems.

> Q. There has been some testimony about whether or not Albert actually had any emotional, or psychological

> problems. From what you've observed, I know you're not a doctor, have you seen a change in him that leads you to believe that he was suffering from some type of problem?
>
> A. Unquestionably, differences like day and night, in that he has problems, believe me. He has serious problems. And he needs to be helped.

89R6523.

Mr. Holland was twice found not guilty by reason of insanity and involuntarily hospitalized 90R6559-74. He was diagnosed as having schizophrenia 90R6620-2. He was in St. Elizabeth's for four years and the diagnosis never changed 90R6620-2.

Drugs and alcohol exacerbate mental illness 90R6722-3. Mr. Holland was a severe drug an alcohol abuser 90R6724-5. He used marijuana, heroin, speedballs (which are a heroin and methamphetamine mix), PCP, and drank up to two fifths a day 90R6724-5. Some people self medicate with drugs or alcohol 90R6724. Mr. Holland may have been using street drugs "as a way of calming down the chaos that might be within" 90R6725.

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, 619 So. 2d 274 (Fla. 1993); Robertson v. State, 699 So. 2d 1343 (Fla. 1997).

POINT XXII

ELECTROCUTION VIOLATES THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Mr. Holland filed a motion attacking electrocution as punishment 96R7078-7088. This punishment violates the United States and Florida Constitutions. Electrocution is unconstitutional in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. Indeed, most states have abandoned electrocution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution. Electrocution amounts to excruciating torture. Malfunctions in the electric chair cause unspeakable torture. Buenoano v. State, 565 So. 2d 309 (Fla. 1990).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 by U.S. Mail his _____ day of December, 1998.

_____
Of Counsel