IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,

Appellant,

vs. Case No. 89,922

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ALBERT HOLLAND, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or “ST[vol.]” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Given its time and page limitations, the State accepts Appellant's statement of the case and facts as reasonably accurate, but adds the following:

1. At a pretrial hearing, the trial court found Holland competent to stand trial, following the testimony of Doctors Bukstel, Block-Garfield, and Ceros-Livingston, all of whom opined that Holland was competent. (T27 833-943).

2. [redacted] testified that after Holland smoked a second hit of crack, he pushed her to the ground, pinned her arms down, and hit her with a bottle on the side of her head. She begged him not to kill her. Holland continued to hit her with the bottle, breaking it, and told her, "Shut up before I kill you." While beating her, he continued to tell her to be quite before he blew her brains out or cut her throat. He tore her blouse open and then unzipped his pants. He put his penis in her mouth and told her to suck it. When she pushed it out and asked him how she was supposed to suck it with him beating on her, he beat her until she lost consciousness. He beat her with at least two bottles and a rock. She had a fractured skull, a severed ear, a fractured finger, and cuts all over her face that required extensive plastic surgery. (T56 3302-07).

2. Audrey Canion testified that she was sweeping debris out her trailer door when she heard a woman screaming, "Help me, help

me. This guy out here's going to kill me." She saw Holland holding a woman, struggling with her, then grabbing a bottle and hitting her on the left side of the cheek. Ms. Canion went inside to call the police, then came back outside and saw Holland beat the woman some more. He told the woman to "[g]rab this, bitch," but Ms. Canion did not know what he meant. After Ms. Canion's husband told Holland to stop before he killed the woman, Holland threw an object into the woods, wiped his hands on the victim's shirt or shorts, then got up and left "like, you know it was nothing." (T56 3345-55).

3. Westley Hill testified that he was playing cards with others when a man walked through the area wearing a shirt, shorts, and sneakers. The same man walked by again a little while later wearing no shirt and having "quite a bit" of blood on his chest. James Edwards, who was there playing cards, told Holland that he was a policeman and asked Holland what happened. Holland responded that "some guy tried to rob him" down at "The Hole," which is the area where [redacted] was assaulted. Holland had an object wrapped in a shirt. (T57 3389-93, 3406-09).

4. Abraham Bell testified that he was leaving his bait and tackle shop when he saw a police car coming toward him. He heard the officer say over the public address system, "Hey you, get over here." A man whom he later identified as Holland stopped, turned around and walked over to the officer's car, which had stopped 40

to 50 feet from Mr. Bell. The officer got out of his car and told Holland to put his hands on the car, which Holland did. The officer went to use the microphone on his shoulder, but it appeared to be broken, so he reached down to use the radio on his belt. Meanwhile, he held his nightstick on Holland's back. When he reached for the radio on his belt, Holland turned and swung at the officer's head, but Officer Winters ducked, and they started "tussling." During the tussle, Officer Winters got Holland in a headlock and put Holland on the ground. Holland tried to get up, but Officer Winters told him to stay down and hit him in the back two or three times with his nightstick. Holland rose anyway, and he and the officer faced each other in a headlock while they struggled. Holland tried repeatedly to grab Officer Winter's gun, but "he couldn't get enough grip on it." Meanwhile, Officer Winters tried to keep Holland away from the gun. Holland kept "trying to get his weapon," but he could not extract it because it had a "latch" on it. While Holland tried to pull it out, Officer Winters had his hand over Holland's "trying to push down on it." Finally, Holland managed to shift the officer's belt so that the holster was closer to the front of him, and he managed to free the gun from the holster. Officer Winters tried to radio for help and tried to open the car door to let his dog out, but Holland shot him twice and then ran. (T65 4318-35).

5. Dr. Love, who met with Holland, Holland's father, and Holland's attorney for two hours each and who reviewed a box of materials and wrote a report over an 18-hour period in 1991, testified that Holland was insane at the time he assaulted [redacted] and shot Officer Winters. He believed that Holland's schizophrenia, which St. Elizabeth's Hospital had diagnosed, combined with his alcohol and drug use the day of the offenses, prevented him from knowing right from wrong. (T67 4427-52). On cross-examination, however, Dr. Love could not relate the standard for sanity in Florida and did not know that the test for insanity was different in Washington, D.C., at the time of Holland's hospitalizations. (T67 4456). Although he was board certified in neuropsychology, Dr. Love had obtained his Ph.D. in Educational Psychology and had testified in only one or two other criminal cases in the 1970s. (T67 4459-61). Moreover, he did not perform any psychological or neuropsychological testing and had not reviewed any of the materials in this case since 1991. He admitted he had almost no recollection of what he had read. (T67 4468-69, 4481, 4484, 4510). Finally, Dr. Love admitted that he did not question Holland about how much alcohol and crack he had consumed the day of the offenses, and he did not know the half-life of crack, i.e., how long its effects last after ingestion. (T67 4457-58, 4490-91).

6. Dr. Patterson was a psychiatrist at St. Elizabeth's when Holland was referred to the hospital for a competency evaluation following his arrest in July 1981. In September 1981, a multi-disciplinary team determined that Holland was competent to stand trial, but was not criminally responsible for his crimes under the District of Columbia's then-insanity standard, and Holland was returned to jail. Following a hearing in January 1982, Holland was adjudged by the court to be not guilty by reason of insanity and committed to the hospital for an indefinite period of time. Although Dr. Patterson saw no overt evidence of psychosis, the Weschler Adult Intelligence Scale and the Bender-Gestalt Test showed no evidence of psychosis, and Holland's treating psychiatrist questioned the diagnosis, the treatment team diagnosed Holland with chronic undifferentiated schizophrenia. They also diagnosed Holland with Organic Amnestic Disorder because of his beating in prison in 1979 and his apparent lack of memory about the crime, but that diagnosis was ruled out after neurological and neuropsychological tests ruled out any organic brain damage.

Three months after his commitment, while being escorted to see his father in the general hospital, Holland escaped. He was arrested three days later for committing another robbery, found not guilty by reason of insanity, and re-committed to the hospital. In 1984, Holland refused to continue medication, and his treatment team determined that he was competent to waive medication. In

1986, Holland petitioned the court for release, but the hospital recommended against it, and the court denied him release. Two days later, while being escorted out on the grounds with a group of patients, Holland escaped again. Although Dr. Patterson testified that he never considered that Holland was malingering a mental illness, he admitted that an MMPI in 1985 indicated evidence of malingering. He also admitted that the treatment team believed Holland was feigning a lack of memory regarding the robberies. (T69 4658-4749).

7. Holland testified that "went crazy" and started beating [redacted] [redacted] with whatever was around him. (T74 5054-56). He did not remember the incident with Officer Winters and believed that the police were framing him. The police beat him after they arrested him, so he told them what he thought they wanted to hear. (T74 5061-68).

8. In rebuttal, the State called Nathan Jones, an ordained minister, who testified that he had just arrived at a church in Pompano Beach around 5:10 p.m. on July 29, 1990, when Holland called to him from down the street. Holland asked him if he could help him get something to eat because he was hungry. Mr. Jones went inside the church to speak to his brother, the pastor, and Holland followed him in. While he spoke to his brother, Holland accompanied the congregation in song on the piano. Mr. Jones gave Holland $5.00 and escorted him out of the church. Holland did not

appear intoxicated or under the influence of drugs and did not smell of alcohol. After Holland held Mr. Jones' hand in prayer, he left around 5:30 p.m. (T77 5366-75).

SUMMARY OF ARGUMENT

Issue I - Given Holland's history of mental health problems, his history of moving to discharge counsel, his history of disruptive behavior, his use of an insanity defense, and his lack of education or training in general trial procedure, the trial court properly exercised its discretion in denying his requests to represent himself.

Issue II - Holland did not object to the instruction about which he complains; thus, he failed to preserve his argument for review. Regardless, the instruction was a proper statement of the law and was properly included to clarify the State's burden of proof of the underlying felony of sexual battery and the applicability of Holland's voluntary intoxication defense to that underlying felony.

Issue III - Holland failed to preserve this issue for review. Regardless, neither Dr. Block-Garfield nor Dr. Koprowski used Dr. Strauss's report in formulating their opinion; thus, their testimony could not have been tainted by the report. Even had they not testified, numerous other experts testified that Holland was competent to stand trial and sane at the time of the crimes, and that neither statutory mental mitigator applied.

Issue IV - Holland failed to prove actual prejudice from the State's knowledge of Holland's statements to Dr. Strauss that were made in violation of Holland's Fifth Amendment rights. Therefore, the trial court properly denied Holland's motion to disqualify the prosecutor and/or his office from prosecuting Holland's case.

Issue V - Appellant failed to preserve his argument that the discovery rule prohibiting re-deposition of witnesses did not apply in retrials. Regardless, the rule plainly applies "in any case." Here, the trial court did not abuse its discretion in finding no good cause to re-depose ten state witnesses. In any event, Appellant failed to show that he was prejudiced thereby.

Issue VI - The partial inaudibility of Holland's second videotaped interview with the police was not a ground for excluding the recording where the tape was relevant to show Holland's demeanor mere hours after the crimes, to corroborate Detective Butler's testimony of the substance of Holland's statements, and to show, contrary to any claims made by Holland, that the police did not coerce his confession. Any erroneous admission, however, was harmless beyond a reasonable doubt.

Issue VII - The trial court properly admitted Holland's statements to the police. The officers' attempts to obtain biographical information for booking purposes did not coerce Holland to reinitiate questioning. Once Holland reinitiated questioning, he freely, knowingly, and voluntarily waived his

previously invoked right to speak to an attorney. Holland was not coerced, threatened, or promised anything in return for his cooperation.

Issue VIII - The trial court properly allowed the State to use the prior testimony of the medical examiner where the State detailed its substantial, but unsuccessful, efforts at locating the witness prior to trial. Moreover, contrary to Holland's assertion, the trial court had no obligation to force the State to call a substitute medical examiner so that Holland could challenge his or her findings on cross-examination.

Issue IX - Witnesses saw Holland acquiesce to Officer Winter's commands to stop, put his hands on the officer's car, swing at the officer's head when the officer was distracted by his radio, refuse to remain on the ground as the officer commanded, engaged in hand-to-hand combat with the officer, snatch the officer's service weapon from its holster, and then shoot the officer twice before fleeing the area with the weapon. Such evidence established a prima facie case for premeditation. Thus, the trial court properly denied Holland's motion for judgment of acquittal as to premeditation. Regardless, the evidence established first degree felony murder.

Issue X - Witnesses had already testified that Officer Winters' service weapon was found hidden in a remote location, and the State had admitted photographs to show its location. Thus, Dr.

Martell's testimony that Holland's action of hiding the weapon disproved his defense of insanity was cumulative, but relevant nonetheless. If error, however, it was harmless beyond a reasonable doubt.

Issue XI - The trial court did not use Florida's legal sanity standard to reject as nonstatutory mitigation that Holland had two prior adjudications of insanity in Washington, D.C. Rather, it failed to see how Holland's two prior adjudications, separate and apart from the finding of a long-standing history of mental illness, were mitigating in nature. This ruling was proper. If not proper, however, it was harmless beyond a reasonable doubt.

Issue XII - The trial court properly assessed the testimony Doctors Polley and Patterson and made no improper factual findings in its written sentencing order.

Issue XIII - Similarly, the trial court properly rejected the "extreme mental or emotional disturbance" mitigator where Holland failed to introduce testimony to support it.

Issue XIV - Holland failed to inform the trial court that he wanted it to consider certain factors in mitigation; thus, he cannot fault the trial court for failing to specifically analyze those circumstances. Regardless, the circumstances are either not mitigating factors or were considered by the trial court in analyzing other factors.

Issue XV - Holland failed to raise the same objection below that he makes now to the admission of his statement to the victim of one of his Washington, D.C., robberies. Regardless, such testimony was cumulative to evidence previously admitted about the robbery and was relevant nonetheless to support the State's theory that Holland was malingering mental illness.

Issue XVI - There was no improper doubling of the "felony murder" and "prior violent felony" aggravating factors where they were not based on the same evidence.

Issue XVII - Holland's taking of Officer Winters' service weapon was not a mere afterthought. Thus, his robbery of the weapon supported the "felony murder" aggravating factor and its instruction.

Issue XVIII - Holland did not obtain a ruling on his constitutional challenges to the application of the victim impact statute to his case. Therefore, he failed to preserve this issue for review. Regardless, this Court has previously rejected his challenges, and Holland has failed to present any legitimate reason to recede from those cases.

Issue XIX - When the written sentencing order is read in its entirety, it is obvious that the trial court did not apply a presumption that death was the appropriate sentence once it found a single aggravating factor.

Issue XX - This Court has repeatedly rejected Holland's challenge to the "felony murder" aggravating factor, and Holland has presented no legitimate reason why this Court should recede from those cases.

Issue XXI - Holland's sentence of death is proportionate to those sentences of other defendants who committed similar murders under similar circumstances.

Issue XXII - This Court has repeatedly rejected Holland's challenge to the method of execution in this state, and Holland has presented no legitimate reason why this Court should recede from those cases.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT CONDUCTED A PROPER FARETTA INQUIRY AND PROPERLY DENIED APPELLANT THE OPPORTUNITY TO REPRESENT HIMSELF (Restated).

On remand, Judge Charles Greene was assigned to preside over Holland's retrial, since Judge Futch had retired. At the very first hearing, Holland informed the court that he did not want his lawyers from the first trial, Peter Giacoma and Young Tindall, re-appointed to represent him. He wanted "some new faces": "Even if they try to do my in, give me another face, not the same two or

one." (T1 12-13). He did not request to represent himself.[1] Ultimately, Judge Greene decided not to re-appoint Giacoma and Tindall, but only because Judge Futch and Peter Giacoma had formed a partnership sometime after Holland's first trial. (T1 16-17). Instead, on August 24, 1994, he appointed Ken Delegal, who agreed to represent Holland. (R96 7038; T 2 29-38). Five months later, upon Delegal's motion, the trial court appointed Evan Baron to represent Holland at the penalty phase. (R97 7276). Shortly thereafter, Holland's attorneys filed a Notice of Intent to Rely on a Defense of Insanity. (R97 7307-08, 7324-25).

In June 1995, the trial court replaced Ken Delegal with James Lewis as Holland's lead attorney, because Delegal was having personal and legal problems. (T21 657-66). It was at this point that Holland began to complain about his representation and the progress of his defense. (T21 662-65). In July, Holland complained about his lack of law library privileges and his confinement in lock-down. (T23 693-99). In September, defense counsel indicated that Holland was refusing to speak to them, and Holland began a tirade about his disappointment in Delegal, his

[1] At his first trial, Holland began complaining about Peter Giacoma a month after his appointment. (IR2 12-13). Then, on the first day of trial, Holland sought to have Giacoma and Tindall replaced with other attorneys. In passing, he commented that he would represent himself if he had to, but he explicitly stated that he was "not waiving [his] right to counsel" and was "not qualified to represent [himself]." (IR12 889-90).

dissatisfaction with Lewis, and his fear of bias by Judge Greene. When questioned by the court about Lewis' representation, Holland complained that Lewis left during their visit with Holland's father and never came back as he said he would, that the jail was taping all of his spoken words through the sprinkler system, that Lewis was going to "sell" Holland to the State to save his friend (Delegal), that Lewis might frame him with drugs from Delegal, and that Lewis was refusing to provide him with depositions and tapes. Holland also wanted to know if Lewis was gay because he thought Lewis' "shaking around the courtroom" might affect the jury. As a result, Holland wanted Judge Greene to appoint another attorney besides Lewis and then to recuse himself. (T24 712-64). Holland did not request to represent himself. The trial court denied Holland's motions to recuse the trial judge and to discharge counsel.[2] (T24 747-48, 756).

[2] Holland's complaints about Giacoma and Tindall in the first trial were similar in nature. Among the reasons for seeking their discharge were that they refused to provide him with depositions, they refused to come see him at the jail, they refused to bring him some tennis shoes, they ignored his inquiries and input, they denied him a speedy trial by an impartial jury, they were pursuing an insanity defense against his wishes, they refused to file a motion to recuse the trial judge, they were working with the prosecution to convict him and sentence him to death, and they were denying him the effective assistance of counsel. (IR12 882-98, 901-04). Holland also moved to recuse Judge Futch because the judge had formerly been a police officer, he had sought to retain Holland's case even after retiring from the bench, he had authorized the mental health experts to videotape their examinations without Holland's knowledge, and he seemed overly concerned about the cost of the trial. (IR12 884-85). After

Six months passed without incident before Holland again refused to cooperate with counsel and a defense expert. When questioned about his conduct, Holland began another tirade about Judge Greene's bias, defense counsels' incompetence, and the State's overreaching. (T31 1174-1205). Near the end of his tirade, when the court noted that Holland had made similar complaints at his first trial and during the pendency of the retrial, Holland insisted that he wanted the court to "[a]ppoint [him] a professional," somebody that would try to help him. (T31 1197). He then asked if he would be entitled to the discovery materials if he represented himself. (T31 1197). The court noted that this was the first time Holland had ever intimated that he wanted to represent himself and stated, "And just not to have the 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." (T31 1198). Thereafter, the trial court denied Holland's motion to discharge counsel, finding that both of them were rendering effective assistance, and denied his motion to recuse the trial judge. (T31 1189-90).

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patiently listening to Holland's complaints and defense counsels' comments (IR12 898-900), the trial court denied Holland's motions to discharge counsel and to recuse the trial judge, and determined that Holland was not competent to represent himself. (IR12 904).

Shortly thereafter, Holland interrupted and asked the court to "go through this procedure of self representation." So the court conducted a Faretta inquiry. Holland told him that he had a general education diploma, and when the court asked what legal or other training he had to assist him in representing himself, Holland responded, "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 all that." (T31 1201-02). When asked if he knew how to question witnesses, Holland responded that he would not be disrespectful and would "ask them as properly as [he could]." (T31 1203). When asked if he knew how to make objections, Holland responded that he would not violate any rules or be disruptive, but he did not know what the rules were that he could violate. (T31 1203). At that point, the trial court ended the inquiry and ruled, "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." (T31 1203-04). Holland then suggested that the court give him "a pamphlet or something to study." (T31 1204).

Three months later, at an emergency hearing, the State informed the trial court that Holland was refusing to cooperate with its expert witness. Holland began another tirade about the

doctor, the State, the judge, and defense counsel. He did not, however, ask to represent himself. (T34 1251-91).

Six weeks later, Holland again requested the appointment of new attorneys. The trial court denied the motion. Holland then complained, as he had previously, about being deprived of discovery materials, and asked if he would be given time to study the materials if he represented himself. (T36 1383-90). In response to Holland's question, the trial court conducted another Faretta inquiry. Holland explained that he had been reading cases and studying the law since he had been given law library privileges. When asked what he knew about the rules of criminal procedure, Holland indicated that he knew he could question jurors and object when the State is "out of line," but shook his head when asked how he would know when it was time to object. He indicated that he would know when a question was inappropriate based on what he learned from "Matlock," the television show. The court thereafter found Holland "not able to adequately [and] appropriately represent himself . . . [n]or to comply with the Court's order, nor with applicable rules of evidence, rules of criminal procedure, as well as case law." (T37 1392-97).

Three weeks later (now four weeks before trial), defense counsel moved to withdraw at Holland's request. (R99 7761-62). At the hearing on the motion, defense counsel indicated that Holland was not cooperating with the State's mental health witnesses or

with the scheduled MRI, and refused to talk to them about the trial until he had an opportunity to speak to the court. (T37 1403-04). In considering the motion to withdraw, the trial court made the following comments: Holland had already been convicted and sentenced to death once; he challenged his attorneys' competency at the first trial; Lewis and Baron were "well seasoned experienced criminal defense lawyers" who had previously litigated capital cases; Holland previously relied on a defense of insanity and was pursuing one again; the court was aware of factors in Holland's childhood that impacted his ability to represent himself; Holland had suffered a head injury and had been hospitalized therefor; and Holland was so disruptive at his first trial that he had been removed from the courtroom for the majority of the trial and had thus evidenced his inability to follow the court's orders and maintain proper decorum. (T37 1405-10).

Before the court could conduct a Nelson/Faretta inquiry, however, Holland interrupted, alleging that his attorneys were incompetent and asking the court to discharge them and appoint new ones. He did not request to represent himself. (T37 1411). When asked how they were incompetent, Holland began another tirade that consumed 57 pages of transcript and that included another motion to recuse the trial court, complaints similar to those that he had previously lodged against Lewis and Baron, comments about Ken Delegal from a newspaper article Holland read to the court, and

quotations from the Bible. (T37 1411-68). After seeking responses from counsel regarding Holland's accusations (T37 1478-85, 1489-93), the trial court denied counsels' motion to withdraw, finding both Lewis and Baron competent. It also noted its previous findings that Holland was not competent to represent himself, and specifically noted Holland's disruptive behavior during the first trial.[3] (T37 1497-1504).

Holland's tirades continued through jury selection. Holland requested new counsel, or alternatively to represent himself, at a hearing a week before the trial (T40 1634-39), prior to jury

[3] Shortly after the trial court denied Holland's motions to appoint new counsel at his first trial, Holland interrupted the trial court's preliminary comments to the jury panel and told the jury that he did not want Giacoma and Tindall as his attorneys. Holland was removed from the courtroom and in a subsequent hearing in chambers the trial court reluctantly struck the panel and admonished Holland that further outbursts would be met with sanctions. (IR12 917-36). The following day, Holland made a similar outburst. Once again, he was removed from the courtroom. (IR13 1148, 1150). In the judge's chambers, Holland renewed his request to discharge counsel but he ultimately became so belligerent that the court removed him from chambers. (IR13 1168-75). The following day, the trial court conducted a Faretta inquiry and determined that Holland was not competent to represent himself. (IR14 1212-37). It then ordered Holland shackled to the chair and his shackles concealed by a covering around the defense table, and it admonished Holland to behave or it would remove him from the courtroom. (IR14 1239). Shortly after returning to the courtroom Holland again began ranting about his attorneys and was removed. (IR14 1249-50). Two weeks later, Holland returned to the courtroom and was offered an opportunity to stay if he behaved, but he immediately jumped up in front of the jury and complained that the court and his attorneys were violating his constitutional rights. He remained out of the courtroom for another three weeks. (IR22 2169-72).

selection (T40 1675-78), and during jury selection (T40 2477-79, 2564-82; T52 3094-3103; T53 3114-29; T55 3181-83). His requests were denied.[4]

In this appeal, Holland complains that the trial court abused its discretion in denying him his right to represent himself. Specifically, he alleges that his "lack of technical legal ability" was not a proper basis for the trial court's decision. In addition, he claims that the trial court's "mention of the insanity defense [was] a post hoc rationalization" made after three previous denials of his request for self-representation, and as such, was also not a proper basis for denial. **Initial brief** at 25-35.

It is well-settled that a criminal defendant has a right to represent himself. However, that right is not absolute. "Florida Rule of Criminal Procedure 3.111(d)(3) contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition. Stated simply, waiver of one's right to counsel must be intelligent and knowing." Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986). See also McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (identifying two instances in which an accused's right to represent himself may be overridden by

[4] Holland made other allegations of ineffectiveness against his attorneys throughout the trial, but he does not challenge the trial court's rulings thereon. He challenges only those rulings made up to and including jury selection.

other concerns, namely, an inability to knowingly and intelligently forgo his right to counsel and an inability or unwillingness to abide by rules of procedure and courtroom protocol).

The decision as to whether a defendant is capable of intelligently and knowingly waiving his right to counsel is within a trial court's discretion. Visage v. State, 664 So. 2d 1101, 1101 (Fla. 1st DCA 1995), rev. denied, 679 So. 2d 735 (Fla. 1996). Thus, this Court should affirm the trial court's decision in this case if it finds that reasonable persons could differ as to the propriety of the trial court's ruling. Id.

Here, Judge Greene's finding that Holland was incompetent to waive his right to represent himself was not, as Holland contends, based principally on Holland's "lack of technical legal ability."[5] Nor was it based on a "post hoc rationalization" that Holland was presenting an insanity defense.[6] Rather, Judge Greene had read the transcripts of the first trial and was well aware of Holland's complaints about his original attorneys, his reliance on an insanity defense, his disruptive behavior that led to his removal from the courtroom during the majority of his first trial, and his

[5] Thus, his cited cases that rise and fall on the lack of legal training or education as the sole basis for denying a request for self-representation are distinguishable.

[6] Likewise, Holland's cited cases that turn on the question of whether an insanity defense precludes self-representation are distinguishable since Judge Greene's decision was based on so much more.

ultimate conviction and sentence of death. Judge Greene was also well aware that, although he had found Holland competent to stand trial, Holland was again pursuing an insanity defense, Holland had been found not guilty by reason of insanity in two prior cases and hospitalized therefor, Holland had twice escaped from a mental health facility, Holland had suffered abuse as a child, Holland had suffered a serious head injury while in federal prison, and Holland had been diagnosed with schizophrenia, chronic undifferentiated type, by doctors from St. Elizabeth's Hospital and by his prior mental health experts. Moreover, Judge Greene was aware that Holland had obtained only a GED, had little familiarity with trial procedure, and intended to conduct himself like the actors on the television show "Matlock." Finally, Judge Greene had the benefit of seeing Holland's demeanor in the courtroom, hearing his complaints and demands, and generally assessing his ability to participate in the legal process in an intelligent and meaningful way. Ultimately, based on all of this information, Judge Greene determined that Holland could not knowingly and intelligently waive his right to counsel. That ruling was proper.

In Visage, the defendant complained on appeal that he was denied the right to represent himself because he lacked "adequate legal training." The district court determined, however, that Visage "was handicapped by more than merely a lack of legal experience":

> A suggestion of mental incompetency was filed in this case, and . . . [the judge] was aware that the appellant had a psychiatric history that included a suicide attempt and hospitalization. More importantly, the appellant had been diagnosed with bipolar disorder for which he was presently taking anti-depressant, tranquilizing and anti-manic medications. Although the report concluded that appellant's cognitive faculties were intact, and he was adjudged mentally competent to stand trial, this in no way mandated a finding that he was capable of making what Florida Rule of Criminal Procedure 3.111(d)(3) describes as "an intelligent and understanding choice" to proceed without counsel. A defendant may be deemed mentally competent to stand trial, yet still be prohibited from waiving the assistance of counsel where, due to a mental condition, the lack of education or experience, or some other factor, he appears unable to make an intelligent and understanding choice to proceed without counsel. Because reasonable minds could differ as to whether appellant was able to make an intelligent choice given his mental condition and lack of legal experience, we cannot find an abuse of discretion.

664 So. 2d at 1102 (citations omitted). See also Johnston, 497 So. 2d at 868 (finding no abuse of discretion in denial of request for self-representation where decision was based on defendant's age, education, reports of psychiatrists and past admissions into mental hospitals); Sweet v. State, 624 So. 2d 1138, 1139-42 (Fla. 1993) (finding no abuse of discretion in denial of request for self-representation where defendant was unprepared to represent himself and did not understand State's case or nature of preparing for defense).

The record reveals that Holland made a number of requests to have Lewis and Baron replaced. The record also reflects that on some of those occasions Holland suggested that he would represent himself. However, it is truly unclear whether Holland ever seriously intended to represent himself. The record is replete with Holland's accusations about the ineffectiveness of his counsel. Yet his assertions to represent himself almost always occurred at a point when the trial court had denied or was about to deny Holland's requests to discharge counsel. In fact, despite his complaints about Giacoma and Tindall during his first trial, and his subsequent conviction and sentence of death, Holland did not immediately seek on remand the opportunity to represent himself. Rather, he merely wanted to see "new faces."

In Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988), this Court stated that when a defendant attempts to dismiss his court-appointed counsel, "it is presumed that he is exercising his right to self-representation." 521 So. 2d at 1074.

> However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel . . . where, as here, the accused indicates that his actual desire is to obtain *different* court-appointed counsel, which is not his constitutional right.
>
> The record before us reflects that the trial court construed Hardwick's comments as effectively requesting self-representation, albeit equivocally, and made the appropriate

> inquiry. The court examined the defendant's ability to make a knowing and intelligent waiver, his age and mental status, and his lack of knowledge or experience in criminal proceedings. Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986). We find no error in the trial court's procedure or its findings.

521 So. 2d at 1074 (citations omitted; emphasis in original).

Hardwick is certainly controlling sub judice. The trial court listened with patience to Holland's ramblings about all of counsels' alleged acts of incompetence. As were the allegations with regard to Giacoma and Tindall, the allegations with regard to Lewis and Baron were generic in nature and in a number of instances were simply delusional. Given Holland's history of mental health problems, his history of moving to discharge counsel, his history of disruptive behavior, his use of an insanity defense, and his lack of education or training in general trial procedure, the trial court properly exercised its discretion in denying his requests to represent himself. Visage, 664 So. 2d at 1102; Johnston, 497 So. 2d at 868; Sweet, 624 So. 2d at 1139-42; Faretta v. California, 422 U.S. 806, 835 n.46 (1975) ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."). Therefore, this Court should affirm Holland's convictions and sentence of death.

ISSUE II

WHETHER THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON THE INTENT ELEMENT OF FELONY MURDER AND ATTEMPTED SEXUAL BATTERY (Restated).

During the guilt-phase charge conference, defense counsel asked the trial court to instruct the jury on voluntary intoxication as a defense to sexual battery and to felony murder based on sexual battery. Citing to Linehan v. State, 476 So. 2d 1262 (Fla. 1985), the State objected, and the trial court denied defense counsel's request. (T81 5788-90).

The trial court properly denied Holland's request. In Linehan, this Court held that "when the underlying felony upon which a felony murder charge is based is a specific intent offense, the defense of voluntary intoxication may apply to felony murder, but when the underlying felony is a general intent crime, the voluntary intoxication defense does not apply." 476 So. 2d at 1265. Then, in Buford v. State, 492 So. 2d 355, 359 (Fla. 1986), this Court held that sexual battery was a general intent crime, and thus voluntary intoxication was not an applicable defense.

To the extent Holland claims that the instruction was applicable to attempted sexual battery, his assertion is in error. In Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993), this Court held that attempted sexual battery was also a general intent crime to which the voluntary intoxication defense did not apply. To support his contrary position, Holland relies on Rogers v. State,

660 So. 2d 237 (Fla. 1995), but he reads this case much too broadly. Rogers did not decide the applicability of the voluntary intoxication defense to sexual battery or attempted sexual battery. Rather, it discussed in terms of sufficiency of the evidence the intent to commit an attempted sexual battery. Thus, Holland reads it out of context and misapplies it to the issue he raises in this case. Obviously, it would be an absurd result if every attempt to commit a general intent crime transformed it into a specific intent crime.

Next, Holland claims that the trial court erred in giving the second paragraph of the following instruction:[7]

> 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 the specific intent to commit a sexual battery in order for you to find that the death of Scott Winters occurred as a consequence of and while the defendant was engaged in, or attempting to commit, or while escaping from the immediate scene of a sexual battery, since specific intent is not an element of the offense of sexual battery.
>
> If you find that the death of Scott Winters occurred as a consequence of and while ALBERT HOLLAND was engaged in, or attempting

[7] Neither the second nor the third paragraphs are included in the standard jury instructions for First Degree Felony Murder. Holland specifically requested the third paragraph. (T84 6046-48, 6078-81, 6083-86). Yet, he objects to the second paragraph.

> to commit, or while escaping from the immediate scene of a robbery, you must first find that the defendant had the specific intent to commit the robbery, since specific intent is an essential element of the offense of robbery.

(SR4 223-24; T84 6107-08).

The record reveals that the State prepared a draft of the jury instructions following the presentation of all the evidence, and defense counsel indicated that he would go to the prosecutor's office the following morning to review the packet. (T80 5746-47). The following day, during the initial charge conference, after the trial court denied defense counsel's request for a voluntary intoxication instruction as to sexual battery, the State noted that voluntary intoxication was a defense to robbery, which is a specific intent crime. To avoid confusion, the parties agreed to inform the jury that voluntary intoxication was a defense to robbery and attempted robbery because it required proof of specific intent, but that it was not a defense to sexual battery because the State was not required to prove intent. (T81 5790-92).

At the next hearing three days later, Holland complained about the felony murder instruction, namely, the specific intent element for robbery, and the State agreed to take out the third paragraph excerpted above because it was not a standard instruction. No one complained about the second paragraph excerpted above, about which Holland now complains. (T82 5814-17, 5848).

At the end of that day's proceedings, the State provided everyone with a revised draft of the instructions for their perusal overnight. (T83 6022). The following day, the State questioned whether the defense really wanted to excise the third paragraph excerpted above, and defense counsel specifically requested that it be included in the instructions for First Degree Felony Murder of a Law Enforcement Officer and First Degree Felony Murder. (T84 6046-48). After the paragraph was reinserted, Holland renewed the objection to it that he had made the previous day. Over his objection, defense counsel insisted that it remain, and the trial court agreed. (T84 6078-81, 6083-86).

Based on the above, Holland had numerous opportunities to object to the second paragraph of the instruction excerpted above. He was provided copies of the original draft and every revision; yet, he made no comment. Thus, implicitly, if not explicitly, Holland agreed to include the instruction he now complains about. Given his tacit agreement, he waived this issue for appeal. Cf. State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994) (recognizing exception to fundamental error doctrine "where defense counsel affirmatively agreed to or requested the incomplete instruction"); Ferrell v. State, 686 So. 2d 1324, 1330 (Fla. 1996) (rejecting challenge to CCP instruction where defense counsel specifically agreed to instructions provided); Armstrong v. State, 579 So. 2d 734 (Fla. 1991) ("By affirmatively requesting the instruction he

now challenges, Armstrong has waived any claim of error in the instruction. Any other holding would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty the conviction will be automatically reversed.").

Regardless, the instruction was not an incorrect statement of the law. As noted above, Linehan, Buford, and Sochor hold that sexual battery and attempted sexual battery are general intent crimes. *A fortiori* the State does not have to prove any specific intent, whether the offenses stand alone or are underlying offenses for felony murder. Since voluntary intoxication is a defense to robbery and felony murder based on the robbery, the trial court properly included the complained-of instruction in order to clarify the State's burden of proof and the applicability of Holland's voluntary intoxication defense. See Rosales v. State, 547 So. 2d 221, 224 (Fla. 3d DCA 1989) ("The determination of the applicable substantive law and the responsibility to properly charge the jury in each individual case rests with the trial judge."); Diggs v. State, 489 So. 2d 1228, 1228 (Fla. 5th DCA 1986) ("The state, like the defendant, is entitled to all applicable jury instructions. It is the court's sole province to instruct the jury on the law."); Butler v. State, 493 So. 2d 451, 452 (Fla. 1986) ("[T]he court should not give instructions which are confusing, contradictory, or

misleading."). Therefore, this Court should affirm the trial court's ruling and Holland's convictions.

ISSUES III AND IV

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS TO EXCLUDE THE TESTIMONY OF THE STATE'S MENTAL HEALTH EXPERTS AND TO RECUSE THE PROSECUTOR AND/OR THE ENTIRE STATE ATTORNEY'S OFFICE (Restated).

Prior to retrial, Holland filed motions to strike the testimony of the Doctors Jordan, Love, Koprowski and Block-Garfield, and to recuse the State Attorney, Michael Satz, and/or the entire State Attorney's Office for the Seventeenth Judicial Circuit from prosecuting the case. (R97 7381-96, 7333-54). Specifically, Holland alleged that, at his original trial, Dr. Abbey Strauss used information to assess Holland's competency and sanity that he improperly obtained from Holland in violation of Holland's fifth and sixth amendment rights. In turn, the State Attorney and the mental health experts were later exposed to the confidential information improperly obtained by Dr. Strauss by either speaking with or reading Dr. Strauss' report. Therefore, according to Holland, "Prosecutor Michael Satz, his office and his staff pose a threat to Defendant's Fifth Amendment privilege against self incrimination because he, his office and his staff have knowledge of privileged information which incriminates the Defendant and might taint evidence presented at trial." (R97 7351). Similarly, Holland alleged, "the testimony of Drs. Jordan;

Love; Koprowski; and Block-Garfield is tainted because they based their expert opinions in part on the information obtained from reports prepared by Dr. Strauss." (R97 7385).

At the hearing on Holland's motions, Holland called as witnesses Drs. Block-Garfield, Love, Jordan, and Strauss. Dr. Block-Garfield testified that she examined Holland five years before for competency. In making her assessment, the State provided her with two boxes of materials. She took notes from her review of the materials, but made no notations relating to any other experts' reports. She specifically testified that she did not review Dr. Strauss' report and never spoke to him at any time. (T12 342-56).

Dr. Love testified that he also evaluated Holland for competency five years before. Defense counsel, not the State, provided him two sets of materials. Included in the materials were Dr. Strauss' report and deposition, which he read. However, he based his opinion on all of the information he had available. (T12 356-61).

Dr. Jordan testified that the State had contacted him several years before and provided him with a file box of documents, a videotape, and a transcript of the tape. He reviewed the records, but not the videotape, before his interview with Holland. Strauss' report was only two pages out of a file box full of documents and that was how much emphasis he gave it. His notes reflected that

Strauss found Holland competent and that two other doctors found Holland incompetent. Although he considered all of the materials provided, he relied on his personal contact with Holland to form his opinion.

Finally, Dr. Strauss testified that he was a contract psychiatrist with Prison Health Services in 1990 when Holland was arrested. He evaluated incoming inmates at the Pompano jail for medication needs and placement in the jail. A jail nurse asked him to evaluate Holland. Dr. Gould had already evaluated Holland and had prescribed medication. Dr. Strauss interviewed Holland on August 3, 1990, for ten to fifteen minutes and did a quick mental status examination. Dr. Strauss met with Holland again on August 10, 1990, for another ten to fifteen minutes. He interviewed Holland a third time on April 21, 1991, pursuant to a court-ordered evaluation, but Holland refused to speak to him. They did not discuss the facts of Holland's case at any of these meetings. Sometime thereafter, the State called Dr. Strauss to see if Dr. Strauss would testify regarding his psychological findings. He agreed to do so and spent 30 to 40 hours reviewing materials that the State provided. He spoke with the State Attorney's Office once or twice and then wrote a report. (T14 406-32).

Dale Nelson, the chief investigator for the State Attorney's Office, also testified. He indicated that he learned the day after Holland's arrest, and after Holland's statement to the police, that

Holland had been a patient at St. Elizabeth's hospital. A week or so later, he and the police called St. Elizabeth's and learned only that Holland was on escape status from the hospital. The Assistant United State's Attorney who had handled Holland's cases in Washington, D.C., told them only that Holland had been a patient, had escaped, had been recaptured, and had escaped again in 1986. (T15 506-10). Somehow he learned that the police believed Holland was malingering to the doctors and nurses at the jail, so he called Dr. Strauss after September 22, 1990. He had no records from St. Elizabeth's when he spoke to Dr. Strauss and had no specific information about Holland's commitment. He only knew that Holland had been committed and why. (T14 481-87). He eventually obtained records from St. Elizabeth's and provided them to Dr. Strauss on October 5, 1990. Dr. Strauss had decided that Holland was malingering and Mr. Nelson wanted to help him substantiate it. Mr. Nelson reviewed Holland's medical file from the jail and spoke to the doctors who were noted in the file. He spoke to Dr. Strauss about six times prior to trial. He did not discuss Dr. Strauss' findings with the State's other mental health experts, but gave them Dr. Strauss' report. (T15 518-34).

After reviewing Holland's medical records from the jail, which were admitted into evidence at the hearing, the trial court noted that Dr. Strauss made virtually no comments regarding the August 3rd and August 10th interviews. On August 3rd, Dr. Strauss requested

blood and urine toxicology screens and an HIV test. His only other comment in the file was, "Very little noted or said by Mr. H." Regarding the August 10th interview, Dr. Strauss noted in the file that Holland refused to speak to him, and Dr. Strauss transferred Holland to general population. Thus, the trial court questioned whether this Court would have made the same finding on appeal had it read Holland's medical file from the jail. In any event, the trial court found that Dr. Strauss' conversation with Holland was not the product of deception and that Dr. Strauss could testify to his observations of Holland. Further, it found that Dr. Jordan could testify because he did not rely on Dr. Strauss' report in forming his opinion. Similarly, Dr. Block-Garfield could testify because she did not review Dr. Strauss' report or speak to him personally. Finally, Dr. Love could testify because the defense provided him with Dr. Strauss' report. Therefore, Holland's motion to strike the testimony of these doctors was denied.[8] As for Holland's motion to recuse the State Attorney's Office, the trial court denied this motion as well, finding that even statements

[8] As for Dr. Koprowski, the trial court noted that no one had presented her testimony, and defense counsel indicated that she was in Washington, D.C., and that it was "virtually impossible for [them] to get her [there] for the hearing." When the State noted that her affidavit was appended to its response, defense counsel complained that it was "not part of the evidence in the hearing." The trial court agreed, noted the content of her affidavit, and made no ruling thereon. (T15 591-92).

obtained in violation of a defendant's Fifth or Sixth Amendment rights did not subject the prosecutor to recusal. (T15 581-95).

A. HOLLAND'S MOTION TO STRIKE THE STATE'S MENTAL HEALTH EXPERTS

In Issue III of this appeal, Holland claims that the trial court abused its discretion in failing to strike the testimony of Dr. Block-Garfield, who testified at Holland's competency hearing, and the testimony of Dr. Koprowski, who testified at the guilt and penalty phases on behalf of the State. Specifically, he claims that Holland's statements to Dr. Strauss were the functional equivalent of immunized testimony, given Holland's prior invocation of his right to counsel. Thus, any use or derivative use of such statements, e.g., by Doctor Strauss in his report and by Doctors Koprowski and Block-Garfield who used Dr. Strauss' report, violated his Fifth and Sixth Amendment rights under Kastigar v. United States, 406 U.S. 441 (1972). **Initial brief** at 39-43.

Initially, the State submits that Holland failed to preserve his argument in two ways. First, he failed to renew his objections when the State offered the testimony of Drs. Block-Garfield and Koprowski. The motion hearing was conducted on April 27, April 28, and May 1, 1995. Dr. Block-Garfield testified at the competency hearing almost eight months later on December 14, 1995, and Dr. Koprowski testified at the trial more than a year and a half later

on October 30, 1996, and again on November 15, 1996. To preserve his objections to their testimony, Holland was required to renew his objections when the testimony was admitted. See Terry v. State, 668 So. 2d 954, 959 (Fla. 1996); Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993), cert. denied, 114 S. Ct. 107, 126 L. Ed. 2d 73 (1994); Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994), cert. denied, 115 S. Ct. 444, 130 L. Ed. 2d 354 (1995); Correll v. State, 523 So. 2d 562, 566 (Fla.), cert. denied, 488 U.S. 871 (1988).

Second, he failed to call Doctor Koprowski at the motion hearing to explain her exposure to Dr. Strauss or his report, he failed to revisit the issue when the State called her as a witness, and he failed to secure a ruling from the trial court regarding her testimony. It is well-settled that an appellant must not only present his claim to the court, but he must also obtain a ruling on his motion in order to raise the issue on appeal. See Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991). Since Holland failed to obtain a ruling, he failed to preserve for review any challenge to Dr. Koprowski's testimony.

Regardless, Dr. Block-Garfield specifically testified that she did not review Dr. Strauss' report and never spoke to him at any time. (T12 350-51). Similarly, Dr. Koprowski averred in her

affidavit, which the trial court read at the hearing, that she "did not rely on, or in any way base [her] opinion or testimony on any reports or examinations conducted by Dr. Abbey Strauss." (R98 7448; T15 591-92). Thus, from a factual standpoint, Holland failed to prove any "taint" from Dr. Strauss' August interviews.

From a legal standpoint, the State maintains, as the trial court found, that Kastigar and its progeny are not applicable to this case. Contrary to Holland's assertion, the ruling in Kastigar relates only to compelled immunized testimony. In no way can Holland's statements to Dr. Strauss be considered "compelled immunized testimony." Rather, they are like any other statements obtained in violation of the Fifth Amendment--their admission is precluded at trial.

In any event, if admitted erroneously, Dr. Block-Garfield's testimony was harmless beyond a reasonable doubt since Doctors Bukstel and Ceros-Livingston both testified that Holland was competent to stand trial, and no other doctor testified that Holland was incompetent. (T27 835-69, 904-36). Similarly, Dr. Koprowski's testimony, if error, was also harmless, since Dr. Harley Stock and Dr. Daniel Martell both testified in rebuttal that Holland was sane at the time of the crime (T79 5514-44; T80 5634-98), and since Dr. Martell testified in rebuttal at the penalty phase that neither statutory mental mitigator applied (T91 6751-57). See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Therefore, this Court should affirm Holland's convictions and sentences.

B. HOLLAND'S MOTION TO RECUSE THE STATE ATTORNEY'S OFFICE

In Issue IV of this appeal, Holland claims that the trial court abused its discretion in failing to recuse the prosecutor and/or the entire State Attorney's Office because he and his staff had been exposed to immunized testimony, i.e., Holland's statements to Dr. Strauss during the August 3rd and August 10th interviews. Specifically, Holland alleges that the State failed to show that Dr. Strauss's report was not an "investigative lead" under Kastigar and that the State did not use it improperly to focus its investigation, interpret evidence, plan cross-examination, and otherwise plan trial strategy, as prohibited by United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973). **Initial brief** at 43-47.

Again, as argued above, Holland's statements to Dr. Strauss were not the product of compelled immunized testimony, and therefore Kastigar and its progeny do not apply to this case. Just as the knowledge of statements taken in violation of Miranda do not require the recusal of the prosecutor, neither does the knowledge of statements taken by Dr. Strauss in violation of Holland's Fifth Amendment rights.

In order to disqualify a state attorney, a defendant must show actual prejudice. Nunez v. State, 665 So. 2d 301, 302 (Fla. 4th DCA 1995), rev. denied, 675 So. 2d 122 (Fla. 1996); see also Farina

v. State, 679 So. 2d 1151, 1157 (Fla. 1996); State v. Clausell, 474 So. 2d 1189, 1190 (Fla. 1985). "Actual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So. 2d 518, 519 (Fla. 1st DCA 1989). Moreover, "[d]isqualification of a state attorney must be done only to prevent the accused from suffering prejudice that he otherwise would not bear." Id.

Holland made no such showing of prejudice to the trial court. Since neither Dr. Block-Garfield nor Dr. Koprowski used Dr. Strauss' report to form their respective opinions, Holland has failed to prove his claim. Therefore, this Court should affirm his convictions and sentence of death.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RE-DEPOSE CERTAIN WITNESSES (Restated).

Seventeen months after remand, and five months after substitution of counsel, defense counsel mentioned at a hearing that he wanted to re-depose several witnesses to determine if there were any new bases for impeachment since the original trial. The State objected, and the trial court directed Lewis to file a motion, specifying the witnesses he wanted to depose and the subject matter of the deposition. (T28 984-87). Lewis, in fact, filed a motion to re-depose several witnesses and named the

following ten witnesses: [redacted] Abraham Bell, Tyrone Carter, Roland Everson, Dr. Tate, Detective Weslowski, Officer Bader, Officer Garcia, Sergeant Gooding, and Detective Rifield. However, the motion did not include the subject matter of the deposition, or any argument or legal authority for re-deposing these witnesses. (R99 7644).

At a hearing several days later, the State objected to defense counsel's motion to re-depose the witnesses, because the lay witnesses had made pretrial statements to the police, the police officers had all filed written reports, all ten witnesses had been deposed prior to the first trial, seven of the ten had testified at the first trial, and defense counsel had not alleged any good cause for re-deposing the witnesses. (T29 1012-13). Defense counsel acknowledged that the rules of procedure precluded deposing witnesses more than once, but contended that a capital case deserved special consideration, especially since he did not represent Holland at the original trial and did not depose the witnesses originally. (T29 1013-17). The trial court agreed to allow defense counsel to re-depose the witnesses to determine if anything had happened in the previous four years to affect their credibility, but otherwise denied the motion without prejudice to renew the motion upon a showing of good cause. (T29 1018-19).

In this appeal, Holland claims that Florida Rule of Criminal Procedure 3.220(h), which prohibits the deposition of any witness

more than once in any case, "has no application to the retrial situation." According to Appellant, since retrials proceed de novo, "[r]edepositions should be allowed as a matter of right . . . ." Alternatively, Holland contends that the trial court abused its discretion in finding no showing of good cause, because "[r]edeposition should be allowed as a matter of right in retrials in capital cases." **Initial brief** at 48-49.

Initially, the State submits that Holland did not preserve for review his argument that Rule 3.220(h) does not apply to retrials. Not only did defense counsel not make this argument before the trial court, he acknowledged that the rule precluded re-depositions in this case; therefore, Holland may not make this argument on appeal. See Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

In any event, such an argument is without merit. Rule 3.220(h) specifically provides that "[i]n 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 shown." (Emphasis added). Clearly, this rule applies in any case, including a retrial.

As for Holland's alternative argument, the State submits that the trial court properly exercised its discretion in denying Holland's motions to re-depose witnesses. Apparently, Mr. Lewis

failed to follow up on Mr. Delegal's attempts to depose Dr. Tate by tendering a list of questions he desired to ask. The record contains no indication that he pursued that request after Dr. Tate initially agreed to cooperate. As for the other witnesses, defense counsel resisted proffering those questions he wanted to ask the witnesses to establish good cause for re-deposing them. The fact that this is a capital case provides no basis upon which to abandon the criminal rules of procedure. Cf. Sochor v. State, 580 So. 2d 595, 601 (Fla. 1991) (holding that the contemporaneous objection rule has no less force in a capital case). Therefore, absent a showing of "good cause," the trial court properly denied Holland's motions to re-depose state witnesses.

Finally, Holland has made no showing that any of the witnesses provided testimony that prejudiced his trial. He has failed to allege that any of the ten witnesses gave surprise, false, or misleading testimony that he otherwise would have been able to impeach had he been allowed to re-depose them. Therefore, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTIONS TO THE ADMISSIBILITY OF A VIDEOTAPE BECAUSE THE TAPE WAS PARTIALLY INAUDIBLE (Restated).

Although not contained in the record on appeal, Holland's original attorney, Ken Delegal, moved to authorize the appointment of an expert to examine and enhance the videotape of Holland's statements to the police because the videotape was largely inaudible. At a hearing on that motion in April 1995, Dale Nelson, an investigator for the State Attorney's Office, testified that he had sent the tape to the FBI laboratory in Washington, D.C., for enhancement, but that the FBI could not do much with the tape. The State agreed to send the tape back to the FBI for additional evaluation, and the trial court directed Mr. Delegal to indicate in writing those portions of the tape he wanted the FBI to concentrate on. (T12 318-34).

Two weeks later, Mr. Delegal filed a supplemental motion to authorize the appointment of Joel Charles, an expert to evaluate the videotape and/or to be present when the FBI re-examined the tape. (R98 7488-7500). At the hearing on Delegal's supplemental motion, Mr. Nelson indicated that he had plans to fly the videotape to Quantico, Virginia, the following week. Given that representation, the trial court took the defense motion under advisement until June 30, 1995, when the investigator indicated the FBI would have completed its re-examination. (T19 627-30).

Prior to June 30, however, Mr. Delegal was replaced by James Lewis. (R97 7582). Following the substitution of counsel, the

defense made no further attempt to have the tape enhanced or otherwise analyzed.

During the second week of trial, defense counsel objected to the admission of the videotape because it was largely inaudible. The State argued that it was relevant to rebut Holland's insanity defense because it showed how Holland acted during the interview and how the police treated him. (T59 3641-44). Sergeant Butler testified that they had set up the video camera in the interview room for Holland's initial interview, but when Holland invoked his right to counsel, they removed it. Later, when Holland unexpectedly asked to speak to Sergeant Butler, his colleagues saw him take Holland into the interview room and hastily set up the camera on the other side of the one-way glass. The sound from the interview room was piped into the monitoring room, and the video camera did not record the sound well. They later sent the tape to the sound department at Florida Atlantic University, to a sound store in Pompano Beach, to the FBI lab twice, and to the NASA Space Station in Titusville for enhancement, but very little could be done. (T60 3726-31). Ultimately, the trial court ruled that the tape was admissible and not unduly prejudicial. (T60 3734).

In this appeal, Holland claims that the trial court erred in admitting the videotape of Holland's confession because it was inaudible, and thus confusing, misleading, and unduly prejudicial. **Initial brief** at 49-51.

As this Court has previously stated, "[p]artial inaudibility or unintelligibility is not a ground for excluding a recording if the audible parts are relevant, authenticated, and otherwise properly admissible." Odom v. State, 403 So. 2d 936, 940 (Fla. 1981). Moreover, "[t]echnical imperfections alone are not a sufficient basis to have excluded [a] tape which contain[s] relevant evidence." State v. Lewis, 543 So. 2d 760, 767 (Fla. 2d DCA), rev. denied, 549 So. 2d 1014 (Fla. 1989). Rather, such problems affect the weight, not the admissibility, of the evidence. Id.

Appellant's defense was one of insanity. The videotape, even without sound, was relevant to show Holland's demeanor mere hours after the crimes, especially since Holland wanted the first taped statement admitted to show his demeanor. (T59 3650-55). With what sound there was--mostly of Detective Butler's questions--the videotape was relevant to corroborate Detective Butler's testimony of the substance of Holland's statements. Finally, the tape was relevant to show, contrary to any claims made by Holland, that the police did not coerce his confession. See Crews v. State, 442 So. 2d 432, 433 (Fla. 5th DCA 1983) (finding no abuse of discretion in admission of videotape where video was of sufficient clarity and where video combined with partial audio constituted substantial evidence against defendant).

As recommended by case law, the trial court viewed the videotape and heard testimony as to why the videotape was largely inaudible. Ultimately, it determined that the audible portions of the tape, and the tape as a whole, were relevant. Certainly, other reasonable persons would have made that ruling. See Crews, 442 So. 2d at 433; Daniels v. State, 634 So. 2d 187, 192 (Fla. 3d DCA 1994) ("The admission of partially inaudible tapes lies within the discretion of the trial court and should not be reversed in the absence of an abuse of that discretion.").

Were this Court to find, however, that the video was admitted in error, this Court should nevertheless affirm Holland's convictions. [redacted] identified Holland as the person who sexually assaulted and attempted to kill her. (T56 3307). Audrey Canion also identified Holland as the person who attacked [redacted]. (T56 3352). Numerous witnesses saw Holland snatch Officer Winter's service weapon from his holster and shoot him before fleeing with the gun. (T58 3492-98, 3515-18; T59 3660-67, 3684-86, 3700-05; T65 4318-35). Finally, Detective Butler would still have been able to testify to Holland's statements to him during the taped interview. Although Dr. Love testified that Holland was legally insane at the time he committed these offenses (T67 4451-52), the State's evidence sufficiently proved that he, in fact, was not (T77 5366-75, 5387-95; T78 5444-5470; T79 5514-44; T80 5634-98). Therefore, the admission of the videotape, if error, was harmless beyond a

reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As a result, this Court should affirm Holland's convictions.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE (Restated).

Eleven days before trial, defense counsel moved to adopt prior counsel's motion to suppress Holland's second videotaped statement to the police. The parties submitted to the trial court the motion, the State's prior response to the motion, and the transcripts of the suppression hearing held prior to the first trial. The parties made no other argument and submitted no further evidence. The trial court thereafter ruled that "the Court's ruling of 1991 will remain." (T38 1610-13). During the trial, defense counsel renewed the motion to suppress the admission of Holland's second taped statement, which the trial court denied. (T59 3631-32).

In this appeal, Holland claims that the trial court abused its discretion in denying his motion to suppress his second statement to the police. Specifically, Holland alleges that his prior invocation of his right to an attorney precluded any further interrogation of him. Subsequently questioning him about biographical information for booking, Holland claims, undermined his invocation and improperly resulted in Holland making inculpatory statements. **Initial brief** at 51-57.

It is well-established that "[a] trial court's ruling on a motion to suppress comes to the appellate court clothed with a

presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." Rolling v. State, 695 So. 2d 278, 291 (Fla. 1997). Here, Holland has failed to overcome the presumption, as the record supports the trial court's findings.

At the hearing on Holland's motion to suppress, Detective Weslowski testified that Holland was arrested at 7:30 p.m. on July 29, 1990, under the name "Antonio Rivera." (IR9 451-53). Detective Weslowski, who was the lead detective on the case, interviewed Holland in the detective's bureau interview room at around 8:57 p.m. (IR9 453). During the giving of Miranda warnings, Holland invoked his right to an attorney, and the interview ceased. (IR9 455-56). According to Detective Weslowski, Detectives Rios and Perez spoke to Holland later for about thirty minutes to obtain "background information" for booking purposes before Holland was photographed and transported to the jail. (IR9 457-58).

Detective Butler then testified that they believed the name Holland gave them upon his arrest--Antonio Rivera--was false because they could not match the name to his fingerprints. (IR9 470, 497). As a result, Detective Butler went to the jail, to Holland's cell, around 1:00 a.m. on July 30, 1990, and asked Holland for his real name. Holland gave it to him, and Detective

Butler left. (IR9 472-73). About 2:30 a.m., Detective Butler returned to pick up fingerprints and a photograph for booking under the name "Albert Holland." When he got to the jail, Holland was in the booking room being photographed. (IR9 474-75). Holland made eye contact with him and said, "Can I talk to you?" (IR9 476). Detective Butler acknowledged Holland's question and took Holland to the detective bureau's interviewing room. (IR9 476).

At that point, Holland was not in restraints and was given cigarettes and something to drink. (IR9 476-77). Detective Butler told Holland that since he had previously requested an attorney they could not talk to him, but that they would at Holland's request. (IR9 477). Detective Butler then re-read Holland his Miranda rights and went through each right carefully. (IR9 478-79). He asked Holland to read each right, and Holland gave an affirmative response when Detective Butler asked him if he understood that he could speak to an attorney. (IR9 480). When asked if he understood his rights and if he still wanted to speak to him without an attorney present, Holland answered, "I'll talk to you." (IR 480-81). Detective Butler then physically handed the waiver affidavit to Holland, and Holland placed his initials as to every question and answer, and signed the form in the name "Albert Holland, Jr." (IR9 481-82).

After Detective Butler informed Holland that all of the rooms were monitored and that the session was being videotaped from the

other room, Holland then proceeded to discuss the his encounters with [redacted] and Officer Winters. (IR9 483-87). Following the taped interview, Holland accompanied Detective Butler to the 2700 block of Hammondville Road to help them locate the gun, but they were unsuccessful. (IR9 488).

Based on this testimony, which was not refuted by Holland, it is clear that when Holland initially requested to speak with an attorney, his interview with Detective Weslowski ceased, as required under law. Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981); Minnick v. Mississippi, 498 U.S. 146 (1990). When Detectives Rios and Perez spoke to Holland, following Holland's invocation, it was for the purposes of booking him. They asked Holland his name, address, and place of birth and did not ask him any questions about the offense.

Routine booking questions are not prohibited by Miranda. In Pennsylvania v. Muniz, 496 U.S. 582 (1990), the Supreme Court held that questions regarding a suspect's name, address, height, weight, eye color, date of birth, and current age fall within the "routine booking questions" exception to Miranda, and thus may be secured for the biographical data necessary to complete booking or pretrial services.

Once the police determined that Holland had not given his true name to police, Detective Butler lawfully approached Holland pursuant to Muniz and properly attempted to ascertain his true

identity. As noted in Avila v. State, 545 So. 2d 450 (Fla. 3rd DCA 1989), asking a defendant his real name is not an interrogation within the scope of Miranda. Likewise, Holland's truthful answer to this question, asked only for the purposes of booking, was not subject to suppression, nor did it violate Holland's Miranda rights. See State v. Foster, 562 So. 2d 808 (Fla. 5th DCA 1990); State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990).

The videotaped confession by Holland was a direct and unexpected result of Holland's instigation and initiation of contact. See Keen v. State, 504 So. 2d 396 (Fla. 1987); Cannady v. State, 427 So. 2d 723 (Fla. 1983); Hoffman v. State, 474 So. 2d 1178 (Fla. 1985); Waterhouse v. State, 429 So. 2d 301, 305 (Fla. 1983); Long v. State, 517 So. 2d 664, 666 (Fla. 1987), Slawson v. State, 619 So. 2d 255 (Fla. 1993). Holland's voluntary and knowing waiver of his previously invoked right to counsel was demonstrated by the fact that he voluntarily signed a written waiver. A voluntarily executed written waiver of a previous request for counsel is conclusive proof of a knowing and voluntary waiver of the right to counsel. Cannady, 427 So. 2d at 729; Keen, 504 So. 2d at 400; Witt v. State, 342 So. 2d 497 (Fla. 1977).

Holland's statements were neither coerced nor the product of the police "wearing him down" as Holland contends. While "coercion" that vitiates a confession can be either mental or physical, the facts are clear that Holland was not mentally or

physically coerced into a confession because of the atmosphere. Holland was neither handcuffed nor shackled in the interview room. He was offered cigarettes and beverages throughout the night and at all times was treated with consideration. See Wasko v. State, 505 So. 2d 1314 (Fla. 1987); State v. Chavis, 546 So. 2d 1094 (Fla. 5th DCA 1989) (finding confessions voluntary and admissible where defendant was offered food, drink and cigarettes, was not questioned at length, was not threatened or given false promises, and was treated with consideration), cert. denied, 493 U.S. 1046 (1990).

Moreover, there was no evidence that Holland's statements were a product of direct or implied promises of benefit. Hudson v. State, 538 So. 2d 829 (Fla. 1989); Bruno v. State, 574 So. 2d 76 (Fla. 1991). Moreover, any emotional condition that Holland found himself in was not the product of police conduct, but rather the result of apprehension due to actions of killing Officer Winters. Patterson v. State, 513 So. 2d 1257 (Fla. 1987).

Terminally, Holland's statements were not the product of prolonged detention. Holland made his statements approximately seven hours after he was apprehended. Prior to his statements he was permitted to rest and sleep and was alert at 2:30 a.m. when he initiated contact with Officer Butler. The interviewing session itself was neither lengthy nor prolonged. See Owen v. State, 560 So. 2d 207 (Fla. 1990). Therefore, the trial court properly denied

Holland's motion to suppress his confessions to the police. See Slawson, 619 So. 2d at 257-58; Cannady v. Dugger, 931 F.2d 752 (11th Cir. 1991); Zeigler v. State, 471 So. 2d 172 (Fla. 1st DCA 1985). As a result, this Court should affirm Holland's conviction for the murder of Officer Winters.

Were this Court to find, however, that the trial court admitted Holland's second videotaped statement in error, this Court should nevertheless affirm Holland's conviction for the murder of Officer Winters. Numerous witnesses saw Holland snatch Officer Winter's service weapon from his holster and shoot him before fleeing with the gun. (T58 3492-98, 3515-18; T59 3660-67, 3684-86, 3700-05; T65 4318-35). Although Dr. Love testified that Holland was legally insane at the time he committed these offenses (T67 4451-52), the State's evidence sufficiently proved that he, in fact, was not (T77 5366-75, 5387-95; T78 5444-5470; T79 5514-44; T80 5634-98). Therefore, the admission of Holland's statements, if error, were harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As a result, this Court should affirm Holland's conviction for the first-degree murder of Officer Winters.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE ADMISSION OF DR. TATE'S PRIOR TESTIMONY UPON THE STATE'S SHOWING THAT THE WITNESS WAS UNAVAILABLE FOR TRIAL (Restated).

Shortly after remand for retrial, defense counsel sought to re-depose the medical examiner, Dr. Tate. At a hearing the following week, the State explained that Dr. Tate had retired and was allegedly sailing around the world. It had left messages with the doctor's relatives and the doctor had returned the call, but Dr. Tate was uncomfortable returning to testify in this case because many other attorneys wanted him to testify in other cases and he did not want to do so. The State indicated that, if Dr. Tate was unavailable for trial, it intended to use his testimony from the original trial. The State assured the trial court, however, that if and when Dr. Tate called back, it would impress upon him the importance of returning for trial, and it would ask Dr. Tate to call defense counsel to talk to him about the case. (T12 294-318, 335-40).

A week or so later, the State indicated at a hearing that Dr. Tate had called to learn the outcome of the motion to re-depose him. According to the prosecutor, Dr. Tate was not happy that the trial court was entertaining the idea of a second deposition, but told Mr. Satz that he would call back in a week or so and let him know whether he could come in for a deposition or arrange a telephone conference. (T14 538-42).

A week and a half before trial, the State informed the trial court that Dr. Tate was unavailable as a witness and moved to use the doctor's prior testimony. Dale Nelson, an investigator with

the State Attorney's Office, testified that he and others in the office had been searching for Dr. Tate for a year or so. However, Dr. Tate had retired, had no permanent address, and was living on his boat. In an effort to find him, they had subpoenaed his phone records, made calls to previously obtained phone numbers, left messages with his ailing mother-in-law and her nurse, left messages with his attorney, and sent a letter to his last-known post office box. He believed that Dr. Tate was purposefully trying to evade testifying in this case. (T38 1547-56).

Defense counsel objected to the use of the doctor's prior testimony, because he disagreed with some of the doctor's testimony and wanted to dispute it at trial. As a result, he wanted the State to call another medical examiner to testify from Dr. Tate's notes, so that he could cross-examine the witness. (T38 1556-58).

Ultimately, the trial court found Dr. Tate "unavailable" within the meaning of section 90.804(2)(a), such that the State could use Dr. Tate's prior trial testimony. However, it ordered the State to continue its efforts to locate Dr. Tate. The State agreed to do so and agreed to proffer its efforts to the court, if unsuccessful, prior to its admission of Dr. Tate's testimony. (T38 1558-60).

By the first day of jury selection, the State had not located Dr. Tate, but was continuing its efforts. (T41 1679). Prior to admitting Dr. Tate's original trial testimony, Mr. Nelson again

recounted his and three other investigators' efforts to locate Dr. Tate. Mr. Nelson testified that they ran his name on the AutoTrac system and obtained information from a boat registration, but discovered that he had sold the boat two years previously. They also discovered the registration on a second boat, but the address on the registration was nonexistent. The address on his driver's license was to a mail drop, and the address given to the business that leased the mail drop was nonexistent. The owner of an efficiency apartment that Mrs. Tate rented had not seen either of the Tates in over a year. They ran the doctor's name on the NCIC and FCIC systems, and on Equifax. The Internal Revenue Service, credit reporting agencies and credit card companies would not give out personal information. According to their investigations, Dr. Tate received no pension from the medical examiner's office or the university that funded the medical examiner's office, and he had no visible income. His former colleagues and employers had no knowledge of his whereabouts. Dr. Tate's 85-year-old mother-in-law lived in Palm Beach County, but her nurse insisted that Dr. Tate had not been in contact in several weeks. They had pulled the mother-in-law's phone records a year or so ago, but had found nothing. In all, they had spent around 100 hours searching for Dr. Tate. (T65 4246-60).

Despite Mr. Nelson's detailed efforts at locating Dr. Tate, defense counsel maintained that the State had not made a sufficient

effort to locate him. Instead of reading Dr. Tate's prior testimony into the record, defense counsel wanted the State to call another medical examiner to testify from Dr. Tate's notes so that counsel could cross-examine him or her. (T65 4260-62). Ultimately, the trial court found Dr. Tate "unavailable" and allowed the State to read his prior testimony into the record. (T65 4263-65).

In this appeal, Holland claims that the trial court erred in finding that Dr. Tate was "unavailable" within the meaning of section 90.804(2)(a) because the State failed to make a sufficient effort to find him. Specifically, he alleges that the State could have subpoenaed Dr. Tate's tax records from the IRS, his credit card records, and his mother-in-law's recent phone records. Alternatively, Holland claims that the trial court should have forced the State to call another medical examiner, because "[t]his is a capital case involving the unique need for reliability" and because "[t]he medical examiner's testimony and his theories were sharply at issue." **Initial brief** at 57-59.

Initially, that State submits that the admission of evidence is within a trial court's wide range of discretion, and this Court should reverse only if it believes that no reasonable person would have made the same ruling. See Outlaw v. State, 269 So. 2d 403, 404 (Fla. 4th DCA 1972), cert. denied, 273 So. 2d 80 (Fla. 1973) ("The responsibility for evaluating the adequacy of the showing of

nonavailability rests with the trial judge, and his determination of this issue will not be disturbed unless an abuse of discretion clearly appears."). On this matter, "[t]he use of prior testimony is allowed where (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party in the former proceeding; (3) the issues in the prior case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available." Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993).

Here, Dr. Tate's testimony was taken at Holland's original trial; thus, the first prong was met. Although Holland had different counsel at the original trial, Holland was a party when the testimony was taken; thus, the second prong was met. While Holland wanted to make more of an effort to challenge the trajectory of the shots and their distance from the victim, his defense of insanity was the same as that in the original trial; thus, the facts at issue were the same, and the third prong was met. Finally, the State spent considerable time and money attempting to locate Dr. Tate. Mr. Nelson specifically testified that he contacted the attorneys for the credit reporting agencies and Dr. Tate's credit card companies, who indicated that they would refuse to honor a subpoena issued by the State for Dr. Tate's credit card histories and records. He also testified that he contacted a special agent with the Department of Treasury to obtain

Dr. Tate's income tax returns, but was told that the IRS would not release those records. (T65 4257-59).

As for the mother-in-law's phone records, Mr. Nelson testified that the records they obtained within the year led them nowhere. He surmised that Dr. Tate called in from a cellular phone or a public phone booth, neither of which they could trace. Therefore, given the mother-in-law's poor health, they did not pursue more recent records. (T65 4254).

Nor did they subpoena the mother-in-law to give a sworn statement as to the whereabouts of Dr. Tate because the mother-in-law was bedridden, and her nurse indicated that she was unable to assist them. Mr. Nelson believed that the mother-in-law was suffering from Alzheimer's Disease. (T65 4254-55). Under these circumstances, the State made a sufficient showing that Dr. Tate was unavailable to testify at the retrial. Thus, the fourth prong was met. As a result, the trial court properly admitted Dr. Tate's prior testimony. Cf. Jackson v. State, 575 So. 2d 181, 187 (Fla. 1991).

Contrary to Holland's assertion, the trial court had no obligation to force the State to call a substitute medical examiner so that Holland could challenge his or her findings on cross-examination. Cf. Thompson, 619 So. 2d at 265 ("Because Thompson's cross-examination of the witness in the first trial was brief, his right of confrontation in this second sentencing proceeding is not

constitutionally impaired.”). All that is required under section 90.804(2)(a) is that Holland had an opportunity to cross-examine Dr. Tate at the first trial. That he did not exercise that opportunity to his present counsel’s satisfaction does not preclude admission of Dr. Tate’s former testimony. See id.

That the State called substitute medical examiner’s in two other cases does not support Holland’s position that the trial court had the discretion to force the State to do so in this case. In Geralds v. State, 674 So. 2d 96 (Fla. 1996), the issue was whether the trial court abused its discretion in denying Geralds a continuance to obtain the testimony of the medical examiner who performed the autopsy after the State presented the testimony of a substitute medical examiner. There was no issue regarding the reason for the substitution, nor whether the original medical examiner was even available. Thus, the trial court was not in a position to decide whether the State could call a substitute.

Similarly, in Capehart v. State, 583 So. 2d 1009, 1012 & n.6 (Fla. 1991), the medical examiner who performed the autopsy died before the trial. Obviously, the State had no prior testimony to offer, so it secured a substitute live witness. Again, however, the trial court was not in a position to force the State to substitute a live witness over the former testimony of the original witness. Thus, this case provides no support for Holland’s claim.

Finally, as for Holland's appeal for favored treatment because he is a capital defendant, this Court has rejected such a plea in other cases under similar circumstances. Cf. Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976) ("While death penalty cases command [the Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance."); Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993) (finding that contemporaneous objection rule has no less force in capital cases). As in Cooper and Sochor, this Court should not carve out an exception and impose a different burden on the State when one of its witnesses is unavailable simply because the State is seeking the death penalty against a defendant. Rather, this Court should affirm the trial court's finding that Dr. Tate was unavailable and its admission of Dr. Tate's former testimony.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE PREMEDITATION ELEMENT OF FIRST-DEGREE MURDER (Restated).

At the close of the State's case and again at the close of all the evidence, defense counsel moved for a judgment of acquittal on the first-degree murder count, claiming that the State had failed to make a prima facie showing of premeditation. The trial court denied his motions. (T65 4395-4401; T77 5352-53; T82 5823-24).

According to this Court, "a motion for judgment of acquittal should not be granted unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Davis v. State, 703 So. 2d 1055, 1059 (Fla. 1997). Moreover, in moving for judgment of acquittal, Holland not only admitted the facts in evidence, but also every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. "If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991).

Contrary to Holland's factual recitation, more than two people saw him take Officer Winter's service weapon out of its holster and shoot him with it twice at very close range. Betty Bouie testified that she was a backseat passenger in a car traveling east on Hammondville Road when she saw Holland and Officer Winters struggling beside a police car. Holland had Officer Winters in a headlock and "took the gun out of [the officer's] holster." Holland shot the officer and ran west on Hammondville Road. (T58 3516-18). Nikki Horne testified that she was riding west on Hammondville Road with her mother and father when she saw a police officer and a man struggling face to face. Then "the man took the

policeman's gun from the side and the gun went off three times." (T59 3684-86). Her father, Parrish Horne, also testified that, as he was driving by, he saw Holland in a headlock with a police officer. He then saw Holland reach around the officer and take the gun from the officer's holster. He shot the officer in the side. (T59 3700-05). Finally, Abraham Bell testified that he was leaving his bait and tackle shop on Hammondville Road when he saw Officer Winters driving towards him from N.W. 26th Avenue. He heard Officer Winters say over his P.A. system, "[H]ey you, get over here." A man whom he later identified as Holland stopped, turned around and walked over to the officer's car, which had stopped 40 to 50 feet from Mr. Bell. The officer got out of his car and told Holland to put his hands on the car, which Holland did. The officer went to use the microphone on his shoulder, but it appeared to be broken, so he reached down to use the radio on his belt. Meanwhile, he held his nightstick on Holland's back. When he reached for the radio on his belt, Holland turned and swung at the officer's head, but Officer Winters ducked, and they started "tussling." During the tussle, Officer Winters got Holland in a headlock and put Holland on the ground. Holland tried to get up, but Officer Winters told him to stay down and hit him in the back two or three times with his nightstick. Holland rose anyway, and he and the officer faced each other in a headlock while they struggled. Holland tried repeatedly to grab Officer Winter's gun,

but “he couldn’t get enough grip on it.” Meanwhile, Officer Winters tried to keep Holland away from the gun. Holland kept “trying to get his weapon,” but he could not extract it because it had a “latch” on it. Moreover, while Holland tried to pull it out, Officer Winters had his hand over Holland’s “trying to push down on it.” Finally, Holland managed to shift the officer’s belt so that the holster was closer to the front of him, and he managed to free the gun from the holster. Officer Winters tried to radio for help and tried to open the car door to let his dog out, but Holland shot him twice and then ran. (T65 4318-35).

Taken in the light most favorable to the State, the evidence and reasonable inferences therefrom showed that Holland walked calmly to Officer Winter’s police car and submitted to his authority. When Officer Winters attempted to arrest Holland and handcuff him, Holland made a conscious and thoughtful decision to resist, and then swung at the officer. And when the officer managed to put Holland on the ground, Holland made a conscious and thoughtful decision to ignore the officer’s demands to remain there. During the ensuing struggle, Holland forcibly removed Officer Winter’s service weapon from its holster, despite the officer’s attempts to restrain him from doing so, and Holland consciously and thoughtfully shot Officer Winters twice before fleeing with the gun. This evidence conclusively established a prima facie case for premeditation. Therefore, the trial court

properly denied Holland's motion for judgment of acquittal and allowed the jury to consider the issue. See Pietri v. State, 644 So. 2d 1347, 1352-53 (Fla. 1994) (finding motion for acquittal properly denied where defendant shot officer at close range after being stopped for speeding); cf. Kearse v. State, 662 So. 2d 677, 683 (Fla. 1995) (finding evidence sufficient to support conviction for premeditated murder where defendant wrestled gun away from officer and shot him); Burns v. State, 609 So. 2d 600 (Fla. 1992) (same); Reaves v. State, 639 So. 2d 1 (Fla. 1994) (same).

Were this Court to find, however, that the State failed to make a prima facie showing of premeditation, "this error would be harmless because the evidence clearly supported a first-degree murder conviction on a felony-murder theory." Jenkins v. State, 692 So. 2d 893, 894 (Fla. 1997). Here, Holland used force and/or violence to permanently deprive Officer Winters of his service weapon, thereby committing the offense of robbery. Cf. Kearse v. State, 662 So. 2d 677, 683 (Fla. 1995) (finding evidence sufficient to support conviction for felony murder based on robbery of victim's service weapon). Moreover, Holland killed Officer Winters while fleeing from the commission of the sexual battery and attempted murder of [redacted]. Therefore, even if the evidence failed to prove premeditation, it sufficiently established first degree felony murder. As a result, this Court should affirm Holland's conviction for the murder of Officer Winters.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S OBJECTIONS TO DR. MARTELL'S TESTIMONY (Restated).

During the guilt phase, the State called Dr. Daniel Martell to rebut Holland's defense of insanity. In explaining his opinion that Holland was sane at the time of the crimes, Dr. Martell opined that Holland's flight from the scene showed his appreciation of the situation and the wrongfulness of his conduct. (T80 5693). He then commented that Holland did not drop the officer's weapon or cast it aside, but rather purposefully hid the gun: "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." (T80 5693).

At that point, defense counsel objected that "[a] lot of what this doctor is saying is not in evidence in the case" and is "speculation upon speculation." (T80 5694). Before the trial court could rule on the objection, the State asked the doctor if he had seen a photograph of the gun as it was found, and Dr. Martell testified that he had and that "[i]t was clear to [him], 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." (T80 5694). Defense counsel renewed his objection that the doctor was speculating and complained that the doctor

should not be allowed "to treat it as fact for purposes of basing an opinion." (T80 5694). The trial court overruled the objection.

In this appeal, Holland renews his complaint that the doctor's testimony regarding the position of the gun was speculative, and therefore harmful. **Initial brief** at 64-66. However, "[a] trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld." Finney v. State, 660 So. 2d 674, 682 (Fla. 1995). Here, Officer Brian McDonald of the Pompano Beach Police Department had previously testified that many officers participated in a grid search for Officer Winter's service weapon that Holland took from the scene. According to Officer McDonald, there was a business located next to a field where they had been searching. The business had a cement pile and a rock pit with some equipment in the back. While searching there, he bent down and saw the gun between some rocks and some pieces of equipment: "It was, to me, it didn't appear it was dropped. It was actually like a little cave, a crevice that you had to bend down and look and had to reach in to touch the gun." (T65 4373-75). Sergeant Gooding photographed the weapon in its surroundings before Deputy Cerat took it into evidence. (T65 4377, 4386). Officer McDonald identified the photographs, and the State published those photographs to the jury. (T65 4375-77). Doctor Martell reviewed those photographs in forming his opinion

that the gun was purposefully placed there. Given the predicate that had been laid, this testimony was proper.

Were the doctor's opinion admitted improperly, however, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Whether Holland dropped the gun in the crevice or placed it there purposefully was not the pith of the doctor's testimony. Ultimately, many other actions Holland took at the time of the offenses formed the bases for the doctor's opinion that Holland was sane at the time. Since there is no reasonable possibility that the jury's verdict and recommendation would have been different had Dr. Martell not been allowed to testified that Holland purposefully hid the gun, this Court should affirm Holland's convictions and sentence of death.

ISSUE XI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION AS NONSTATUTORY MITIGATION THAT HOLLAND HAD TWO PRIOR ADJUDICATIONS OF INSANITY IN WASHINGTON, D.C. (Restated).

In mitigation, Holland offered evidence of and argument on his two prior adjudications of insanity from Washington, D.C. In justifying its rejection of this mitigating evidence, the trial court made the following findings in its written sentencing order:

> 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 testimony 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.

(R102 8192-93).

Holland claims that the trial court used the wrong legal standard in rejecting his two prior adjudications of insanity as nonstatutory mitigation. Specifically, he alleges that the trial court improperly "used the sanity standard in rejecting a nonstatutory mitigating circumstance." **Initial brief** at 66-67.

Holland raised insanity as a defense to the charges against him. That defense was obviously rejected by the jury. At the penalty phase, he reiterated evidence of, among other things, his involuntary hospitalizations at St. Elizabeth's Hospital in Washington D.C., as well as his various diagnoses for mental and/or personality disorders. (T90 6554-76, 6612-38, 6665-6727). In mitigation, the trial court found that Holland had a long-standing history of mental illness, noting his hospitalizations and diagnoses. (R102 8191-92). It refused to find as separate and distinct mitigation, however, that Holland had been adjudicated insane within Washington D.C.'s legal definition of that term. (R102 8192-93).

Contrary to Holland's assertion, it was not using Florida's legal sanity standard to reject this as mitigation. Rather, it failed to see how Holland's two prior adjudications, separate and apart from the finding of a long-standing history of mental illness, were mitigating in nature. The Washington, D.C., doctors testified that Holland knew the difference between right and wrong when he committed the offenses in Washington, D.C. However, the

District of Columbia had a lesser standard for adjudicating someone legally insane. Since Holland was found legally sane for the current offenses, his previous adjudications of insanity under a lesser standard was not mitigating in nature. The trial court had already found as nonstatutory mitigation that Holland had a long-standing history of mental illness. Included in that analysis were Holland's prior hospitalizations and diagnoses. Thus, the trial court was not obligated to find Holland's prior adjudications of insanity as separate and distinct mitigation. Cf. Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994) (finding no abuse of discretion where trial judge grouped several proffered mitigating factors into three); Cole v. State, 701 So. 2d 845, 852 (Fla. 1997) (affirming trial court's treatment of mitigation where court classified nonstatutory mitigation into three categories).

Even were his prior adjudications of insanity mitigating by themselves, this Court should nevertheless affirm Holland's sentence of death. As the State will analyze more fully in Issue XXI, infra, there are three valid aggravating factors in this case. Holland not only committed the contemporaneous offenses of attempted first-degree murder and attempted sexual battery with great force on [redacted], but he had previously been found guilty of an assault with intent to commit robbery while armed. Further, Holland killed Officer Winters during his flight from the attempted murder and attempted sexual battery of [redacted]

And he did so to avoid arrest for those antecedent crimes. In mitigation, Holland only established that he had a history of drug and alcohol abuse, and that he had a history of mental illness, both of which the trial court gave "little weight." Under the facts and circumstances of this case, there is no reasonable possibility that the trial court would have sentenced Holland to life imprisonment had it found Holland's two previous adjudications of insanity as distinct nonstatutory mitigation. See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Therefore, this Court should affirm Holland's sentence of death for the murder of Officer Winters.

ISSUE XII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDINGS IN MITIGATION REGARDING THE TESTIMONY OF DRS. POLLEY AND PATTERSON (Restated).

Holland takes issue with the following findings of the trial court regarding the testimony of Dr. Polley, one of Holland's penalty phase witnesses:

> The Bender Gestalt, Wechsler Adult Intelligence Scale 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 or psychosis or overt psychosis.

(R102 8181-83) (emphasis added). Specifically, he contends that Dr. Polley did, in fact, testify that the Rorschach test indicated evidence of psychosis. **Initial brief** at 68-69.

The record, however, supports the trial court's finding. During Dr. Polley's cross-examination, the following exchange took place:

> Q [By the prosecutor]. The Bender Gestalt showed no evidence of psychosis, active?
>
> A [By Dr. Polley]. That's correct.
>
> Q. Would you - the testing you did showed manipulative, manipulative behavior?
>
> A. 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. Okay. But you saw no overt psychosis?
>
> A. There was no overt psychosis.

(T90 6652-53) (emphasis added).

Holland also takes issue with this finding: "Dr. Polley in 1983, 1985 and 1986 saw no evidence of any psychotic symptoms nor any delusions or hallucinations." (R102 8183); **initial brief** at

69-70. However, the record supports this finding as well. During cross-examination, Dr. Polley made the following statements:

> Q. During the time that you saw him, you saw no symptoms of delusions, or any direct clear evidence of any hallucinations, right?
>
> A. I did not directly observe them. Evidence of hallucinations was reported by the staff and apparent auditory [sic] nurses responding to him.
>
> Q. But you never saw any hallucinations, did you?
>
> A. I never saw them directly or had them reported to me.
>
> * * * *
>
> Q. So, when you saw him on April 12, 1982, that was three days after his arrest, there was no evidence of loose associations?
>
> A. No.
>
> Q. There was no evidence of ideal [sic] flights?
>
> A. No.
>
> Q. No evidence of hallucinations?
>
> A. No.
>
> Q. No delusional content was present in his thinking?
>
> A. No.

(T90 6655-56).

Holland also takes issue with the following findings regarding the testimony of Dr. Patterson, another of Holland's guilt phase

witnesses: "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 symptomology." (R102 8184-85) (emphasis added). Specifically, he contends that Dr. Patterson did, in fact, testify that Holland exhibited evidence of psychosis. **Initial brief** at 70-72.

Once again, contrary to Holland's assertion, the record supports the trial court's findings. On cross-examination by the State, Dr. Patterson testified that when the court system referred Holland in July 1981 for a competency evaluation they performed psychological tests on him. (T69 4705). After finding Holland competent to proceed to trial, the hospital released him back to the court system in September 1981. (T69 4715-16). At a hearing in January 1982, the District of Columbia superior court found Holland not guilty by reason of insanity and committed him to St. Elizabeth's for treatment. (T69 4716-21). Dr. Patterson admitted that, although Holland's doctor diagnosed him as a schizophrenic, chronic undifferentiated type, he questioned that diagnosis. (T69 4722-23). He also admitted that Holland's master treatment plan indicated that Holland no longer had any psychotic symptoms. (T69 4723). Finally, he admitted that the psychological tests, namely, the Wechsler Adult Intelligence Scale and the Bender-Gestalt Test,

showed no evidence in February 1982 of any active psychosis. (T69 4734-35).[9]

As the jury was so often instructed during this trial, an expert is like any other witness, except that an expert witness may give an opinion. However, the finder of fact may accept or reject any or all of the witness' testimony. See Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987) ("In determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness."); Walls v. State, 641 So. 2d 381 (Fla. 1994) ("Certain kinds of opinion testimony clearly are admissible--and especially qualified expert opinion testimony--but they are not necessarily binding even if uncontroverted."); Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994); Rose v. State, 617 So. 2d 291, 293 (Fla. 1993) ("The trial court has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of

[9] To support his contention to the contrary, Holland cites to pages 4730 through 4732, but when read in context it is clear that Dr. Patterson was explaining why the hospital believed that Holland was psychotic at the time of the crime, as opposed to at the time of his later evaluations, which was the focus of the trial court's findings. Similarly, Holland cites to pages 4687 through 4688 of Dr. Patterson's testimony, but, again, when read in context, it is clear that Holland reported symptoms of psychosis upon his arrival to St. Elizabeth's, but that the treatment team later found no evidence of active psychosis and, in fact, questioned its diagnosis of schizophrenia.

an expert witness."). Here, the trial court evaluated these two witnesses' testimony and made findings thereon. Since the record supports the trial court's findings, Holland's claim fails, and this Court should affirm his sentence of death for the murder of Officer Winters.

ISSUE XIII

WHETHER THE TRIAL COURT RELIED ON A FACTUAL ERROR IN REJECTING THE "EXTREME MENTAL OR EMOTIONAL DISTURBANCE" MITIGATOR (Restated).

Holland takes issue with the following statement by the trial court in its written sentencing order:

> The statutory mitigating circumstances relied upon by the defendant were not established by the evidence presented. To the contrary, each and every defense expert witness, 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.

(R102 8189). Specifically, Holland complains that none of his expert witnesses expressed an opinion as to the applicability of this mitigating factor. Thus, the trial court was wrong to say that they testified to the contrary. **Initial brief** at 74-75.

Holland's argument, however, is a matter of semantics. The trial court spent twelve and a half pages in its sentencing order analyzing all of the experts' testimony. (R102 8178-90). The fact is that none of Holland's witnesses supported the existence of this mitigating circumstance--whether they directly testified that it

did not apply or whether they gave no opinion on the matter. The State's witnesses, however, specifically testified that this mitigator did not apply. (T91 6751-57; T92 6790-91). Absent any contradictory evidence, the trial court made a proper factual finding in rejecting this mitigator. Cf. Raleigh v. State, 705 So. 2d 1324, 1330 (Fla. 1997) (affirming rejection of "extreme mental or emotional disturbance" mitigator); San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997) (same).

ISSUE XIV

WHETHER THE TRIAL COURT FAILED TO CONSIDER NONSTATUTORY MITIGATING EVIDENCE (Restated).

In this appeal, Holland claims that the trial court failed to consider the following five nonstatutory mitigating circumstances:

> (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."

Initial brief at 76.

In Lucas v. State, 568 So. 2d 18, 23-24 (Fla. 1990), this Court held that "the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Holland failed to meet this burden. In his sentencing memorandum to the trial court, Holland listed the

statutory and nonstatutory mitigation that he believed he established during the trial. He did not list these five nonstatutory mitigators. Nor did he mention them at the Spencer hearing when he pleaded with the court to impose a life sentence. Therefore, under Lucas, Holland cannot now be heard to complain that the trial court did not consider in mitigation circumstances that Holland failed to bring to its attention.

Regardless, the State submits that the additional mitigation either is not proper mitigation or was, in fact, considered by the trial court. For example, this Court has steadfastly maintained that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. E.g., Waterhouse v. State, 596 So. 2d 1008, 1011 (Fla. 1992); King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988); and cases cited therein. It is also a well-established rule of law that "premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act." Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1984). Holland's claim that he did not premeditate or that his premeditation was of short duration was a direct attack on his conviction for first-degree murder and thus is not a mitigating circumstance.

As for Holland's drug use at the time of the murder, Holland concedes that the trial court found his history of drug and alcohol

use as a nonstatutory mitigating circumstance. He also concedes that the trial court discussed his use of cocaine on the day of the murder. However, he complains that the trial court did not specifically mention the testimony of [redacted] and toxicologist Michael Wagner. **Initial brief** at 76-77. Its failure to mention this testimony, however, does not mean that he failed to consider such evidence. Obviously, it considered Holland's drug use on the day of the murder, as it specifically mentioned it when finding the existence of Holland's history of drug use. And although it did not mention [redacted]'s testimony in its analysis of this mitigation, it mentioned her testimony when analyzing the "felony murder" and "avoid arrest" aggravators. Thus, Holland's complaint has no merit.

As for the traumatic effect of Holland's prison beating, the trial court was well-aware that Holland was beaten in prison. It discussed this fact in analyzing the statutory mental mitigators and the nonstatutory mitigator of "[o]rganic brain damage due to a severe beating while in prison." (R102 8179, 8192). In fact, it noted that Holland's father described Holland after the beating as "depressed, angry and violent." (R102 8179). Thus, the trial court considered this circumstance.

As for Holland's "positive childhood activities and loving family relationships prior to drug addiction," Holland lists the evidence from the record that he alleges the trial court failed to

consider. The trial court detailed all of that evidence, however, in its sentencing order:

> The defendant grew up with four (4) sisters and one(1) brother in the inner city of Washington D.C. His family had moved several times during his childhood, as his father attempted to make ends meet for his family. The Holland family was of a lower income range. The defendant was an average student, and spoke Spanish and some Chinese and French. He participated in sports, music and became accomplished in martial arts. He traveled with his martial arts team to various competitions.

(R102 8178-79). Contrary to Holland's assertion, the trial court considered such evidence.

Finally, Holland claims that the trial court "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." **Initial brief** at 80-81. In its sentencing order, the trial court spent twelve and a half pages analyzing the evidence relating to the two statutory mental mitigating factors. (R102 8178-90). Ultimately, it rejected both, but then found and weighed as a nonstatutory mitigating factor that Holland had a long-standing history of mental illness. (R102 8191-92). Thus, contrary to Holland's contention, the trial court considered his evidence of a mental disturbance that was less than "extreme." This Court should affirm Holland's sentence of death for the murder of Officer Winters.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING ROGER DURBAN'S TESTIMONY THAT RELATED TO ONE OF HOLLAND'S PRIOR OFFENSES FOR WHICH HE WAS FOUND NOT GUILTY BY REASON OF INSANITY (Restated).

During the penalty phase, Holland called Roger Durban, an attorney that had represented him on two robbery charges in Washington, D.C., during the early 1980s. Mr. Durban testified that, upon his appointment for the first crime, he immediately questioned Holland's competency to stand trial and his sanity at the time of the offense. He had Holland evaluated and believed that Holland was mentally ill. He never thought that Holland was malingering. Ultimately, he and the prosecutor agreed to plead Holland not guilty by reason of insanity, which the trial court adjudged after a hearing. (T90 6555-75).

On cross-examination, the State sought to elicit from Mr. Durban that Holland told the first robbery victim that he was from St. Elizabeth's hospital and had made threats to her. According to the prosecutor, such testimony was relevant on the issue of malingering since Holland had not yet been committed to St. Elizabeth's. Defense counsel noted that Holland had also told the victim that he had killed a doctor, and the State assured the court that it would not relate that part of the statement. (T90 6594-96). Defense counsel nevertheless renewed his relevancy objection, which the trial court overruled, finding the testimony relevant to

test the bases for Mr. Durban's strategy in pleading Holland not guilty by reason of insanity. (T90 6596).

In this appeal, Holland claims that "[i]t 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." Specifically, he alleges that admission of the facts of the prior crime constituted nonstatutory aggravation. **Initial brief** at 81-82.

Initially, the State submits that Holland failed to preserve this argument below, since his relevancy objection did not encompass this argument. See Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). If the purpose of a contemporaneous objection is to put the trial court on notice of a purported error so that it can ameliorate any potential damage, the trial court was not attuned to this argument. When later explaining to Holland the substance of the sidebar conference, the trial court related its understanding of the conference as follows:

> [A] question . . . was raised as to Mr. Satz' questioning Mr. Durban, regarding what the victim of the first robbery had indicated Mr. Holland had said, that he was from Saint Elizabeth's and that he had made threats.
>
> Mr. Baron was concerned that the question may have been phrased that Mr. Holland had told the victim of the robbery that he was from Saint Elizabeth's, that he escaped from there and that he had murdered or killed a

> doctor there as part of the threats. That portion of the question, Mr. Satz indicated he was not asking, and the Court initially ordered that that portion be redacted from the question.

(T90 6602). Obviously, the trial court was not aware that defense counsel was objecting to <u>any reference</u> to the prior crime because it constituted nonstatutory aggravation. And defense counsel made no effort to clarify his objection as such. Thus, Holland may not make a new objection on appeal that was not made before the trial court.

Regardless, Holland's claim has no merit. First, the State was not attempting to elicit all of the facts surrounding the prior robberies, but rather a statement made by Holland to the first victim. Second, throughout the guilt phase of the trial, witnesses referred to Holland's robbery arrests in Washington, D.C., which formed the bases for his two commitments to St. Elizabeth's hospital. In fact, the State elicited the basic facts of the offenses, <u>without objection</u>, during the testimony of Dr. Patterson. (T69 4715, 4724-26). Thus, the admission during the penalty phase of Holland's statement to one of the victims was cumulative, at worst.

In any event, the testimony was relevant to rebut Holland's lingering doubt evidence that he was truly insane at the time of the 1981 and 1982 offenses, and not malingering as the State's experts testified. Mr. Durban was convinced at the time that

Holland was legally insane and needed hospitalization. Yet, Holland had told the first victim that he was from St. Elizabeth's Hospital before he was ever committed there.

This Court has previously held that "[o]nce the defense advances a theory of mitigation, the State has a right to rebut through any means permitted by the rules of evidence." Wuornos v. State, 644 So. 2d 1012, 1017-18 (Fla. 1994) (affirming admission of evidence that defendant had claimed a religious conversion during her incarceration on other charges in the early 1980s to rebut defense theory that defendant had undergone a recent religious conversion). Moreover, "[w]hen the defense puts the defendant's character in issue in the penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes tending to undermine the defense's theory." Johnson v. State, 660 So. 2d 637 (Fla. 1995) (affirming admission of testimony by defendant's companion that she and defendant had violent arguments to rebut companion's testimony that defendant was loving and good father figure to his son and her daughter). Thus, the State's cross of Mr. Durban was proper.

Were it somehow not, however, this Court should nevertheless affirm Holland's sentence. As the State will analyze more fully in Issue XXI, infra, there are three valid aggravating factors in this case. Holland not only committed the contemporaneous offenses of attempted first-degree murder and attempted sexual battery with

great force on [redacted], but he had previously been found guilty of an assault with intent to commit robbery while armed. Further, Holland killed Officer Winters during his flight from the attempted murder and attempted sexual battery of [redacted]. And he did so to avoid arrest for those antecedent crimes. In mitigation, Holland established only that he had a history of drug and alcohol abuse, and that he had a history of mental illness, both of which the trial court gave "little weight." Under the facts and circumstances of this case, there is no reasonable possibility that the jury's recommendation and the trial court's ultimate sentence would have been different had the State not elicited from Mr. Durban Holland's statement to the robbery victim. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Therefore, this Court should affirm Holland's sentence of death for the murder of Officer Winters.

ISSUE XVI

WHETHER THE TRIAL COURT IMPROPERLY DOUBLED THE "FELONY MURDER" AND "PRIOR VIOLENT FELONY" AGGRAVATORS BASED ON APPELLANT'S CONTEMPORANEOUS CONVICTION FOR ATTEMPTED SEXUAL BATTERY ON A SECOND VICTIM (Restated).

In this appeal, Holland claims that the trial court improperly used his conviction for the attempted sexual battery on [redacted] to support both the "prior violent felony" and the "felony

murder" aggravating factors. He contends that such use constituted improper doubling of these aggravating factors. **Initial brief** at 82-86.

In imposing a sentence of death, the trial court based the "prior violent felony" aggravating factor not only on the contemporaneous offenses against [redacted] but also on a previous conviction in Washington, D.C., for Assault with Intent to Commit Robbery While Armed. (R102 8172-73). Similarly, it based the "felony murder" aggravator not only on Holland's flight from the attempted sexual battery on [redacted] but also on the robbery of Officer Winter's service weapon. (R102 8173-74). Thus, where different evidence is used to support two or more aggravating factors, no improper doubling occurs. Armstrong v. State, 642 So. 2d 730 (Fla. 1994); Henyard v. State, 689 So. 2d 239, 252 n.15 (Fla. 1996).

ISSUE XVII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON, AND THE RECORD SUPPORTED THE FINDING OF, THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

In addition to the murder Officer Winters, Holland was convicted for robbery of Officer Winter's service weapon, and the attempted first-degree murder and attempted sexual battery of [redacted] (R101 8033-34). Over Holland's objection, the trial court instructed the jury that it could use the robbery and

attempted sexual battery offenses to support the "felony murder" aggravating factor. (T87 6399; T92 6850-51). In finding the existence of the "felony murder" aggravating factor, the trial court relied on Holland's flight from the sexual battery and his robbery of the officer's weapon to support this aggravator. (R102 8173-74.

In this appeal, Holland claims that the trial court abused its discretion in instructing the jury, and finding, that Holland's robbery of the officer's weapon supported the "felony murder" aggravator. Specifically, Holland contends that his robbery of the weapon was merely incidental to the murder, i.e., an afterthought, and thus could not form the basis for this aggravator. **Initial brief** at 86-88.

Holland relies on Jones v. State, 580 So. 2d 143, 146 (Fla. 1991), for this proposition, but this case is distinguishable. In Jones, the defendant shot a police officer with the defendant's own weapon and then grabbed the officer's service weapon upon leaving the scene. As a result, this Court found that the taking of the weapon, though technically a robbery, was merely incidental to the killing and did not support the "felony murder" aggravating factor.

Here, however, as in Kearse v. State, 662 So. 2d 677, 685 (Fla. 1995), Holland "took the firearm of Scott Winters by force and/or violence with the intent to permanently or temporarily deprive Scott Winters of his right to the property or any benefit

from it." (R102 8173). See also Grossman v. State, 525 So. 2d 833 (Fla. 1988) (finding that evidence supported felony murder instruction based on robbery where defendant wrestled officer's weapon away and fired fatal shot into officer's head), cert. denied, 489 U.S. 1071 (1989). "Under section 812.13, the force, violence, or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of force, violence, or intimidation and the taking constitute a continuous series of acts or events." Kearse, 662 So. 2d at 685. Therefore, the trial court properly instructed the jury on, and found the existence of, the "felony murder" aggravator based on the robbery of the victim's weapon.

Even if the trial court improperly instructed the jury on, and found the existence of, the "felony murder" aggravator based on robbery, this Court should nevertheless affirm the finding of this aggravator. The trial court alternatively instructed the jury on, and found the existence of, this aggravator based on Holland's flight from his attempted sexual battery of [redacted]. In fact, in his written sentencing order, the trial court specifically stated that

> for the purpose of this Order of Sentence, the Court considers each of these offenses separate and apart from the other. Each offense, to wit: Robbery and Attempted Sexual Battery alone, without consideration of the other offense for which the defendant Albert Holland, Jr. was convicted, is sufficient to

> support beyond a reasonable doubt the applicability of this aggravating circumstance.

(R102 8174). Therefore, any error was harmless, and this Court should affirm the finding of this aggravating factor and Holland's sentence of death.

ISSUE XVIII

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING VICTIM-IMPACT EVIDENCE (Restated).

Prior to trial, Holland filed a "Motion to Prohibit Victim Impact Statements During the Penalty Phase of a Capital Case."[10] He claimed that the admission of victim impact evidence would (1) violate the due process and cruel or unusual clauses of the state and federal constitutions because such evidence is irrelevant, inflammatory, and unguided, and (2) violate the ex post facto clauses of the state and federal constitutions because the victim impact statute became effective after Holland committed the instant offenses. At a hearing, the trial court took Holland's motion under advisement, pending the State's proffer of such evidence at trial. (T38 1609-10). When the State proffered the testimony at trial, defense counsel failed to obtain a ruling on his motion. (T89 6467-78). His failure to do so precludes review of his claims

[10] This motion does not appear in the record on appeal, and Holland has not moved for its supplementation. Rather, he merely appended it to his brief as Appendix B.

on appeal. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where trial court took motion under advisement, but never made ruling); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983) (holding that defendant failed to preserve evidentiary issue for review by failing to obtain ruling on motion for mistrial); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting clarity of rule that failure to obtain ruling on motion effectively waives motion).

Regardless, Holland concedes that this Court has previously rejected his arguments in Windom v. State, 656 So. 2d 432 (Fla. 1995). He contends that this Court should reconsider that decision in light of intervening case law from this Court and the United States Supreme Court, but his "intervening case law" provides no basis for his assertion. Neither State v. Hootman, 709 So. 2d 1357 (Fla. 1998) (finding application of new aggravating factor an ex post facto violation), nor Lynce v. Mathis, 117 S.Ct. 891 (1997) (finding that Florida's retroactive cancellation of provisional credits to inmates violated the ex post facto clause), discusses the constitutionality of a victim impact statute, or any like statute. More importantly, Holland provides no analysis with his conclusory statements that Hootman and Lynce mandate receding from Windom. Therefore, this Court should deny this claim and affirm Holland's conviction for the murder of Officer Scott Winters.

ISSUE XIX

WHETHER THE TRIAL COURT APPLIED A PRESUMPTION THAT DEATH WAS THE APPROPRIATE PENALTY WHEN IT FOUND THE EXISTENCE OF ONE AGGRAVATING FACTOR (Restated).

In the concluding paragraphs of its written sentencing order, the trial court made the following comments:

> In summary, this Court finds that there are three (3) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt. The Court finds zero (0) statutory and two (2) non-statutory mitigating circumstances of little weight were proven by a preponderance of the evidence. After independently evaluating all of the evidence presented, it is this Court's reasoned judgment that the aggravating circumstances outweigh the mitigating circumstances.
>
> On November 15th, 1996, the jury recommended that this Court impose the death penalty upon ALBERT HOLLAND, JR. by a majority vote of eight (8) to four (4). This Court must give great weight to the jury's sentencing recommendation. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Death is presumed to be the proper sentence when one (1) or more aggravating circumstances are found to exist unless they are outweighed by one (1) or more mitigating circumstances. White v. State, 403 So. 2d 331 (Fla. 1981).
>
> The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So. 2d 826 (Fla. 1977). Additionally, the sentencing scheme requires more than a mere counting of the aggravating and mitigating circumstances. It requires the Court to make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances.

> Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Jackson v. State, 498 So. 2d 406 (Fla. 1986).
>
> Based upon the above analysis, it is the sentence of this Court that you, ALBERT HOLLAND, JR., be sentenced to DEATH for the murder of Scott Winters.

(R102 8193-94) (emphasis added).

Appellant seizes on the underscored sentence to claim that the trial court improperly presumed that death was the appropriate sentence where the State had proven at least one aggravating factor. **Initial brief** at 90-93. It is clear from the order in its entirety, however, that the trial court properly performed its function of independently weighing the aggravating and mitigating factors. Given the depth of its analysis, it cannot be said that the trial court failed to perform its duty under the statute. See Elledge v. State, 706 So. 2d 1340, 1346 (Fla. 1997) (finding no error where trial judge allegedly applied presumption of death upon finding single aggravating factor). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Officer Scott Winters.

ISSUE XX

WHETHER THE "FELONY MURDER" AGGRAVATING FACTOR IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED (Restated).

Prior to trial, Holland challenged the constitutionality of the "felony murder" aggravator, claiming that a conviction for first-degree felony murder in Florida creates an automatic presumption that death is the appropriate sentence because the "felony murder" aggravating factor automatically applies. Specifically, he claimed that the automatic application of this aggravating factor to those convicted of felony murder, but not premeditated murder, renders Florida's death penalty fundamentally unfair. (R96 7128-35). The trial court denied the motion at a later hearing. (R38 1593-94).

Holland renews his challenge to the "felony murder" aggravator, but fails to acknowledge that this Court as repeatedly rejected this argument, most recently in Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997). Holland has provided no legitimate basis for this Court to recede from Blanco regarding the constitutionality of this aggravating factor. Absent such a basis, this Court should affirm Holland's sentence of death for the murder of Officer Winters.

ISSUE XXI

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATELY WARRANTED (Restated).

Regarding the murder of Officer Winters, the trial court found the existence of three aggravating factors: "prior violent felony," "committed during the course of a robbery/attempted sexual battery" and "avoid arrest/murder of a law enforcement officer." Although it also found the existence of two nonstatutory mitigating factors, to which it gave little weight, it ultimately determined that "the aggravating circumstances outweigh the mitigating circumstances." (R102 8193).

As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990).

Here, the evidence established that Holland approached [redacted] on the street, and the two entered a wooded lot to smoke crack cocaine. After Holland had taken two "hits" of crack, he began brutalizing [redacted], at one point, forcing his penis into her mouth and demanding that she perform oral copulation. After beating her into a coma, Holland walked out of the woods and down the street where Officer Winters approached him with his marked

police car. Over his public address system, Officer Winters ordered Holland to stop, which he did, and Holland walked over to the officer's car and put his hands on the hood as directed by Officer Winters. As Officer Winters attempted to radio dispatch, Holland turned and swung at the officer. During the ensuing struggle, Holland snatched Officer Winters' service weapon from its holster and shot the officer twice, killing him, before running from the scene with the officer's weapon.

To mitigate this senseless murder, Appellant presented evidence to establish that he had a history of drug and alcohol abuse. Although the trial court found this mitigator to exist, it gave it "little weight" for the following reasons:

> The defendant has established by the evidence a history back to his teenage years, of the use and abuse of both drugs and alcohol. Earlier in the day of Officer Winters' murder, the defendant smoked a five-dollar ($5.00) crack cocaine rock with Jose Padilla and Venon Johnson. These two witnesses testified that the cocaine rock took only 4 to 5 seconds to smoke and provided each of them with one hit of cocaine. Jose Padilla testified that Albert Holland, Jr. did not seem to be high after they smoked the rock of crack cocaine.
>
> Dr. Martell, during the guilt portion of the trial, testified that crack cocaine has a short-lived euphoric high. This high, the doctor testified, lasts a matter of a couple of minutes. Crack cocaine, Dr. Martell opined, does not place a person in a position where he does not know right from wrong. Dr. Martell further testified that, in his opinion, Albert Holland, Jr. was sober by the

> time Officer Scott Winters was shot. As a result, based upon the evidence presented, this non-statutory mitigating circumstance had little or no role in the murder of Officer Scott Winters. The Court recognizes that the defendant has abused both drugs and alcohol during much of his non-incarcerated lifetime. However, based upon the evidence presented and the facts of this case, the Court finds this mitigating circumstance to apply, but gives it little weight.

(R102 8190-91).

Holland also alleged as a mitigating circumstance that he had a long-standing history of mental illness. Although the trial court found this mitigator to exist, it gave it "little weight" for the following reasons:

> The defendant was involuntarily hospitalized on two occasions at St. Elizabeth's Hospital in Washington, D.C. His original diagnosis was schizophrenia and organic amnestic syndrome. After evaluations and testings the diagnosis of organic amnestic syndrome was ruled out. During the defendant's stays at St. Elizabeth's Hospital, at least one of his doctors, Dr. Abudabbeh, questioned the diagnosis of schizophrenia. Psychological and neurological testing conducted since the defendant's apprehension for the instant charges suggest that the defendant attempted to malinger his mental illness.
>
> The experts presented by both the defendant and State testified that in their opinions the defendant, whether in Washington D.C. in the 1980's or in Florida at the time of Officer Winters' murder, knew the difference between right and wrong. The defendant correctly argued case law and factual issues to the Court. He assisted his attorneys as he determined it was to his

> advantage in the preparation of his defense. He testified at great length to the jury during the guilt phase of the trial. The defendant's active participation during his trial and volitional decision at times not to respond to the Court outside the presence of the jury, clearly establish his ability to participate, manipulate and engineer his actions.
>
> The Court finds that the defendant has established the existence of a prior "long-standing" mental illness. However, when considered in light of the defendant's factual conduct during the criminal episodes considered by this Court, this mitigating circumstance is given little weight.

(R102 8191-92).

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991), cert. denied, 116 L. Ed. 2d 102 (1992); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So. 2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

Those cases cited to by Appellant to support his claim that his sentence is disproportionate are easily distinguishable. In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), although the defendant shot two police officers while holding others hostage, this Court found his death sentence disproportionate where there was substantial evidence by a "panel of experts" that Fitzpatrick had extensive brain damage and that his emotional age was between nine and twelve years of age. Such evidence established two statutory mental mitigators and the statutory mitigator of age: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." 527 So. 2d at 811-12. Given that the trial court found no evidence of organic brain damage or a low emotional age in mitigation in Appellant's case, Appellant can hardly compare himself to Fitzpatrick.

In Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993), this Court found that "[t]he evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Such was hardly the case here. Officer Winters was apprehending Holland in conjunction with the attempted murder and sexual battery of [redacted] Holland made a conscious decision to evade arrest by engaging the officer in hand-to-hand

combat, during which Holland snatched the officer's service weapon from its holster and shot Officer Winters twice.

Finally, in Robertson v. State, 699 So. 2d 1343 (Fla. 1997), this Court remanded for reweighing after striking two aggravators and merging two others. It did not find Robertson's sentence disproportionate, and thus Holland's reliance on it therefor is misplaced.

On the other hand, Burns, 609 So. 2d at 649-50, Armstrong v. State, 642 So. 2d 730 (Fla. 1994), and Reaves v. State, 639 So. 2d 1 (Fla. 1994), are dispositive.[11] In Burns, a highway patrol officer pulled over Burns and a companion, ran a computer check, then asked if he could search the car. While searching the trunk,

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[11] See also Grossman v. State, 525 So. 2d 833 (Fla. 1988) (affirming death sentence for murder of wildlife officer with "felony murder," "avoid arrest/hinder law enforcement," and HAC in aggravation, and nothing in mitigation); Phillips v. State, 705 So. 2d 1320 (Fla. 1997) (affirming death sentence for murder of parole supervisor with "under sentence of imprisonment," "prior violent felony," "hinder law enforcement," and CCP in aggravation, and low intelligence, poor family background, and abusive childhood in mitigation); Rivera v. State, 545 So. 2d 864 (Fla. 1989) (affirming death sentence for murder of police officer with "prior violent felony," "great risk," "felony murder," and "avoid arrest" in aggravation, and nothing in mitigation); Street v. State, 636 So. 2d 1297 (Fla. 1994) (affirming death sentence for murder of two police officers with "prior violent felony," "felony murder," and "avoid arrest/hinder law enforcement/murder of a law enforcement officer" in aggravation, and some degree of mental or emotional disturbance, a lack of formal education, a low I.Q., and a low level of brain functioning in mitigation); Jones v. State, 440 So. 2d 570 (Fla. 1983) (affirming death sentence for murder of police officer with "prior violent felony," "hinder law enforcement," and CCP in aggravation, and nothing in mitigation).

the trooper found cocaine. A struggle between Burns and the trooper ensued, Burns gained control over the trooper's gun and shot him, then fled. The trial court found only one aggravating factor: "avoid arrest/hinder law enforcement/murder of a law enforcement officer." In mitigation, it found Burns' age (42) and lack of a significant criminal history as statutory mitigation, and as nonstatutory mitigation that Burns had a poor childhood environment, was socially disadvantaged, was intelligent, was continuously employed after high school, contributed to society, supported his family, had an honorable discharge from the military, showed remorse, had a good prison record, exhibited appropriate behavior in court, and showed spiritual growth. 609 So. 2d at 648-49. This Court found Burns' sentence proportionate, finding the merged aggravators entitled to great weight, noting the absence of statutory mental mitigators, and noting that the trial court gave the statutory and nonstatutory mitigators only minimal weight.

Similarly, in Armstrong, the defendant and a companion robbed a Church's Fried Chicken restaurant and shot to death one of the two police officers who responded to the silent alarm. 642 So. 2d 733. In aggravation, the trial court found the "prior violent felony," "felony murder," and "avoid arrest/murder of a law enforcement officer" aggravators. Id. at 734. In mitigation, it found no statutory mitigating circumstances, but it found the following nonstatutory circumstances: significant physical

problems as a child, helped others, good father and provider, witnessed physical abuse as a child against his mother, could be productive in prison, good prospect for rehabilitation, codefendant received a life sentence, life imprisonment without parole is other sentencing option, religious beliefs, and failed to receive adequate medical care as child. Id. This Court found Armstrong's sentence proportionately warranted. Id. at 739-40.

Likewise, in Reaves, a deputy sheriff responded to a 911 call at a convenience store and upon arrival ran a records check on Reaves. When a gun fell out of Reaves' shorts, the deputy put his foot on it, but Reaves managed to retrieve it and shoot the deputy seven times. 639 So. 2d at 3. In aggravation, the trial court found the "prior violent felony," "avoid arrest," and HAC factors, the latter of which this Court struck on appeal. In mitigation, the trial court found no statutory mitigating circumstances, but found as nonstatutory mitigation that Reaves had been honorably discharged from the service, had a good reputation in the community up to the age of sixteen, was a considerate son to his mother, and was good to his siblings. Id. at 3 nn.2,3. This Court found Reaves' sentence proportionately warranted, given the two "strong aggravating factors found and relatively weak mitigation." Id. at 3 (footnote omitted).[12]

[12] Notably, this Court used Armstrong and Reaves to support its affirmance of Burns' sentence, even though Armstrong and Reaves had

As in Burns, Armstrong, and Reaves, Appellant's death sentence is proportionate to those of other defendants in similar cases. Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Officer Winters.

ISSUE XXII

WHETHER ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS THEREFORE UNCONSTITUTIONAL (Restated).

Appellant renews his argument made in the trial court that Florida's method of execution constitutes cruel and unusual punishment. **Brief of Appellant** at 98-99. However, Appellant has presented nothing in his one-paragraph argument which would warrant receding from this Court's long line of cases, most recently that of Jones v. Butterworth, 701 So. 2d 76 (Fla. 1997). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Officer Scott Winters.

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additional aggravators and slightly less mitigation than did Burns. Burns, 609 So. 2d at 650.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** Appellant's convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Richard B. Greene, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, this date: October 6, 2000.

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