IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,922
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

FLORIDA RULES OF CRIMINAL PROCEDURE

PRELIMINARY STATEMENT

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

R Record on Appeal

SR Supplemental Record on Appeal

IR Record of Original Trial

AB Answer Brief of Appellee

IB Initial Brief of Appellant

Appellant will rely on his Initial Brief for argument on Points III, IV, V, VI, VIII, X, XI, XIV, XVI, XVII, XIX, and XX.

STATEMENT OF THE FACTS

Mr. Holland will rely on the Statement of Facts in his Initial Brief and add the following matters. The defense called Dr. William Love. He has been a licensed clinical psychologist since 1969 67R4426. He has taught at Nova University 67R4426. He is board certified in neuropsychology 67R4426-7. He was declared an expert in psychology and neuropsychology 67R4428-9. He received his Ph.D. from the University of Texas in 1966 and completed a Post-Doctoral Fellowship at the University of Pittsburgh 67R4427. He has testified as an expert in psychology and neuropsychology in Federal Court in the Southern District of Florida and in state court in the 17th and 20th Circuits 67R4428. He examined Mr. Holland after reviewing extensive records 67R4430-1. He reviewed medical records from when Mr. Holland was beaten in federal prison in 1979 67R4433-4. It was a severe beating and the CAT scans

showed a shift in the brain 67R4434-5. The right frontal horn of Mr. Holland's brain was displaced 67R4471. He spoke to Mr. Holland's father 67R4435. Albert began to develop serious drug problems when he was 16-17 67R4437. It included alcohol, marijuana, heroin, PCP, LSD, cocaine, Dilaudid, Percodan, and bam 67R4439,48.

He interviewed Albert Holland and reviewed records from Mr. Holland's hospitalization in St. Elizabeth's mental hospital 67R4440-1. Mr. Holland was found legally insane 67R4442-3. He was diagnosed as having schizophrenia, a biochemically based disease characterized by a breakdown in the ability to perceive reality 67R4445-6. He was given antipsychotics including Haldol and Thorazine 67R4512. The behavior that was consistent with schizophrenia began after the beating 67R4446. Alcohol and drug abuse can exacerbate schizophrenia 67R4447. Dr. Love testified that Mr. Holland was legally insane during this incident 67R449-52.

Appellee's recounting of the testimony of Dr. Patterson is misleading AB4-5. Appellee's claim that Dr. Patterson "saw no overt psychosis" is misleading AB4-5. Dr. Patterson testified:

> Q And what was the thing that you all felt was irresistible about committing this robbery; didn't you say something about he needed to get money for his father?
>
> A There were a number of family dynamics that came into play about his relationship with his father and his father's relation with his mother, their relationship with each other, that was part of it.
>
> It was also his assertion of "Coop." Coop was his harmonica. And he had a very bazaar [sic] way of describing his harmonica and the way it influenced his

thinking, and electricity running through his body. There's a number of problems running through his mind.

Q That's the first admission. I'm thinking about the second, when you're dealing with the second robbery on March 19, 1982, that you felt that he knew the difference between right and wrong, but he was involved psychotically because he needed to undo his past wrong to his father and his family by expressing concern and support with money?

A Yes.

Q And that he was irresistible impulse --

A That's part of it, yeah.

Q -- to get money for his father?

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

69R4730-32.

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

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

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

A That's right.

Q -- milligrams?

A Yes.

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

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

> Mr. Holland came in on the 1st of July and within twenty-four hours struck another patient for what was no apparent reason. He was also complaining of electricity running through his body, that he was confused.
>
> He was asking for Thorazine. He had been treated with Thorazine at another facility in the District of Columbia between April, when he was arrested, and July when he came to the hospital. So he had already had some familiarity with it and came asking if he can be prescribed Thorazine.
>
> Q Is Thorazine a medication that you can find that patients who are looking to try to get high on some kind of drug ask for?
>
> A Thorazine is not commonly an abused drug....
>
> So when you have someone that comes in asking for a major antipsychotic medication, it gives you some insight that perhaps they are having some serious symptoms.

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

Appellee's assertions concerning the psychological tests are also misleading. Dr. Patterson is a psychiatrist and is not involved in psychological testing 69R4708. A psychologist, Dr. Polley, who was involved in administering the tests testified:

> Q (Prosecutor) Would you -- the testing you did showed manipulation, manipulative behavior?
>
> A (Dr. Polley) It showed that there was an underlying psychotic process that was not evidenced on the surface of his presentation.
>
> Q And that showed up in the testing?
>
> A Yes.
>
> Q Which test showed that?
>
> A In response to the Rorschach.
>
> Q Which response to the Rorschach.

> A The response to some of the cards where there was disorganization as a result of being stimulated by them. Some of the figure drawing indicated psychosis.
>
> Q Which one, do you remember?
>
> A I don't remember which specific card and I don't think that it would be useful to the jury to know what specific card, other than knowing that as we assessed his response to the Rorschach, as I assessed it with the intern, that the pattern of responding was suggestive of a psychotic process.

90R6652-6653.

Appellee's claim of "questioning the diagnosis" is misleading. The only reference is during the cross-examination of Dr. Patterson. The prosecutor read from a portion of the St. Elizabeth's records from February, 1982. These were notes from a Dr. Newahy Abudabi 69R4772.

> "Schizophrenia chronic undifferentiated, in remission is the present diagnosis for this patient."
>
> And then in parenthesis "(Am not sure it's the right diagnosis.)"

69R4723. Dr. Abudabi never testified. The State called no witnesses from St. Elizabeth's who stated that they questioned the diagnosis of schizophrenia. There was no testimony as to Dr. Abudabi's experience or training. There was no evidence as to what alternative diagnosis he may have suggested. Dr. Abudabi may have thought that Mr. Holland had some other major mental illness that involved psychosis. He may have had any questions resolved and ultimately agreed with the diagnosis of schizophrenia. This reference is almost meaningless. By contrast, the defense called one psychiatrist and two psychologists who had been involved in Mr.

Holland's treatment in St. Elizabeth's. All three testified that schizophrenia was Mr. Holland's consistent diagnosis at St. Elizabeth's and that it was reviewed every three months over four years 69R4693,90R6620-2,90R6694.

ARGUMENT

POINT I

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

The trial court explicitly relied on the defendant's lack of technical legal knowledge to deny Mr. Holland's right of self representation. This is reversible error.

Appellee attempts to justify the trial judge's ruling by pointing out "other factors" which it claims would support the judge's ruling. These factors were not the basis of the trial judge's ruling, were not articulated by the State below, and do not support denial of this constitutional right. Appellee's reliance on a broad "abuse of discretion" standard is misplaced. Abuse of discretion only applies when the trial judge is applying the right rule of law. Walter v. Walter, 464 So. 2d 538, 539 (Fla. 1985). Here, the trial judge explicitly relied on factors which have been condemned by this Court and the United States Supreme Court. The doctrine has limited application in considering the application of a constitutional right such as the right to go pro se.

> The right of self-representation is personal. See State v. Bowen, 698 So. 2d 248, 250 (Fla. 1997). It is not subject to the discretion of the trial court.

Hutchens v. State, ___ So. 2d ___, 24 Fla. L. Weekly D918, 919 (Fla. 2d DCA April 9, 1999).

Appellee fails to deal with the most important cases in Mr. Holland's Initial Brief; Godinez v. Moran, 509 U.S. 389 (1993); State v. Bowen, 698 So. 2d 248 (Fla. 1997); Hill v. State, 688 So. 2d 901 (Fla. 1996) and Hughes v. State, 700 So. 2d 647 (Fla. 1997). These are the most recent cases from this Court and the United States Supreme Court. They make clear that it is reversible error to rely on a defendant's lack of technical legal knowledge and/or the complexity of the case to deny self representation.

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

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

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

Hill v. State, 688 So. 2d 901, 905 (Fla. 1996).

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

> appreciably higher level of mental functioning than the decision to waive other constitutional rights.

Godinez, 509 So. 2d at 399. A defendant cannot be denied self-representation because he will be denied a fair trial if tried without counsel. Hughes v. State, 700 So. 2d 647 (Fla. 1997).

In 1998, this Court amended Florida Rule of Criminal Procedure 3.111(d) to reflect Bowen:

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent him or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

Fla.R.Crim.P. 3.111(d)(3).

The trial judge's ruling in this case is contrary to the rule and to caselaw. Mr. Holland first requested self-representation on March 22, 1996, six months before the trial 31R1197.

> THE DEFENDANT: One last thing, and if I am allowed to represent myself will I be entitled to those things and present those things and have those things in my possession?
>
> THE COURT: Mr. Holland, the Court will be happy to conduct a Faretta inquiry to make a determination whether or not you're able to represent yourself, but I don't think you have had any training in the law.
>
> Yes, you've sat through your prior trial. You've been involved in capital litigation. You haven't demonstrated -- this is the first time now that you're coming to the Court and even making a suggestion of representing yourself.
>
> THE DEFENDANT: I asked the question would I be entitled to have photographs and be able to even view those victims and to present them and everything I want to know.

> THE COURT: Mr. Holland, just the mere question that you're asking the Court is a procedural question. It's one that is governed by the rules of evidence as well as the criminal rules of procedure.
>
> THE DEFENDANT: I'd like to take procedure --
>
> THE COURT: And just not have to answer to that question and have to ask the Court to answer it evinces to the Court as yet you don't have the requisite legal ability to represent yourself, so I don't think I need to go much further than this.

31R1197-1198. The trial court assumed that Mr. Holland was not qualified to represent himself before it conducted an inquiry.

Mr. Holland again expressed his desire to go pro se during the same hearing. The trial court then conducted an inquiry. The judge denied his request based on his lack of legal ability.

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

31R1201-1204.

Mr. Holland again expressed his desire to represent himself on August 2, 1996, and the trial court conducted an additional hearing. The judge again denied Mr. Holland's right of self-representation based on his lack of legal ability.

> THE COURT: The Court having conducted a Faretta Inquiry, the Court finds Mr. Holland is not able to adequately appropriately represent himself.
>
> THE DEFENDANT: Or you can apply me --
>
> THE COURT: The Court's ruling at this juncture.

> Nor to comply with the Court's order, nor with applicable rules of evidence, rules of criminal procedure, as well as case law.
>
> THE DEFENDANT: One last thing.
>
> THE COURT: Mr. Holland is in need of counsel both in --
>
> THE DEFENDANT: What about standby counsel.
>
> THE COURT: -- both in the proof phase or guilt phase of the case, as well as in a possible penalty phase. And as such, Mr. Holland's motion to represent himself is denied.

36R1392-1397.

On two occasions the judge denied Mr. Holland his right of self representation based solely on his lack of technical legal ability. This is reversible error.

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

> The Court's going to deny Mr. Holland the opportunity to represent himself.
>
> The Court specifically finds that both his lack of formal legal training, lack of understanding of both the criminal law as well as procedures, his alleged defense or defense actually, of insanity and the complexity of this case.
>
> THE COURT: With the fact that this is a retrial, which of course -- as stated by Counsel -- makes it even more complex.
>
> It is such that Mr. Holland needs representation and aid of counsel.

37R1502.

Mr. Holland asserted his right to self-representation on several other occasions, which was summarily denied 40R1636-7;41R1675-7;48R2567-8;53R3124-5;55R3183.

During the third hearing, the trial court also mentioned, for the first time, the filing of a notice of insanity as a reason for denying the right of self representation. This was a post hoc rationalization as the court had previously denied this right.

The pursuit of an insanity defense is not a valid reason to deny the right of self-representation. This Court has held that defendants had the right to go *pro se*, despite their counsel filing notices of an insanity defense. Goode v. State, 365 So. 2d 381 (Fla. 1978); Muhammad v. State, 494 So. 2d 969 (Fla. 1986). The Arizona Supreme Court has outlined why the pursuit of an insanity defense is not inconsistent with the right of self representation.

> The Sixth and Fourteenth Amendments to the United States Constitution... guarantee criminal defendants the right to represent themselves at trial... This right is not abrogated merely by the assertion of a particular defense. Although it may not be wise to combine an insanity defense with self-representation, Defendant's argument confuses the wisdom of his waiver with its constitutional propriety. It amounts to a complaint that, even if Defendant knew what he was doing, and thus had the right to waive counsel, the court should have stopped him from making an unwise choice. The court does not have this power; the law guarantees a defendant the right to waive counsel if he is mentally competent to do so.

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

Appellee makes much of remarks which the trial judge made during this hearing and attempts to claim that the trial judge considered other factors and that his decision "was not...based

principally" on Mr. Holland's lack of technical legal ability AB16,19-20. It should be pointed out that the trial judge had already twice denied Mr. Holland's right of self representation, relying solely on Mr. Holland's lack of legal ability. Reversible error had already occurred. In one sense the judge's comments at the third hearing are legally irrelevant. Appellee's argument runs contrary to the judge's stated reasoning. The State never raised these "other factors" in the trial court. It has waived them. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State").

It is dangerous to ignore the judge's stated reasons for his ruling and rely on extraneous comments.

> Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their orders.

Boynton v. State, 473 So. 2d 703, 707 (Fla. 4th DCA 1985).

Assuming arguendo, that this Court feels that it can consider these "other factors" they are not adequate to deny self representation. These factors break down into two general areas; Mr. Holland's history of mental illness and Mr. Holland's behavior during his first trial. Neither is a sufficient reason to deny Mr. Holland his right to go pro se. Mr. Holland had a history of mental illness. However, once he had been found competent to stand trial this is not relevant.

> Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to

> believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.

Godinez, at 399.

Mr. Holland's history of mental illness is relevant to many issues including proportionality. See Point XXI. His mental state at the time of the offense, when his illness was exacerbated by alcohol and cocaine is also relevant to these issues. It is not relevant to the issue of Mr. Holland's right to self representation once he has been found competent to stand trial. Assuming arguendo, that it could have some relevance to this issue there would have to be a showing how his current mental illness impaired his ability to waive the right to counsel. There is no evidence of this. The testimony at the competency hearing is directly contrary. The trial judge rejected this in his sentencing order.

> The defendant correctly argued caselaw and factual issues to the Court.

102R8191.

Mr. Holland's behavior at the first trial does not allow the denial of his right of self representation. The issue of whether a defendant's disruptive behavior can be a basis for denying self representation as opposed to terminating self representation is somewhat murky. In Faretta v. California, 422 U.S. 806, 834 n.46 (1975), the Court stated that self representation could be terminated if a defendant was disruptive. There is nothing in Faretta suggesting that a judge can deny self representation on this basis. There is dicta in McKaskle v. Wiggins, 465 U.S. 168,

173 (1984) suggesting this. However, the decision provides no guidance as to what circumstances would support this. Appellee cites no cases holding this to be proper. The facts here do not support this. It is true that Mr. Holland was disruptive at one point in his 1991 trial. In these proceedings in 1996 he was never disruptive 37R1501-2. It is irrational to presume disruption based on conduct five years earlier. See Hughes v. State, ___ So. 2d ___, 24 Fla. L. Weekly D840 (Fla. 1st DCA March 30, 1999). In Hughes, the case had previously been reversed due to the denial of the right to self representation. On retrial the defendant asked to have counsel appointed. The trial court denied the motion. The Court of Appeals reversed. This case makes clear that a defendant is not bound by his prior conduct on this issue. This is also demonstrated by Faretta. In Faretta, the United States Supreme Court pointed out that a judge may terminate the right of self representation for a defendant who engages in disruption and cites Illinois v. Allen, 397 U.S. 337 (1970). Allen states:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights... we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

397 U.S. at 343 (footnote omitted).

Allen held that disruptive conduct does not forfeit the right to be present forever. The defendant regains the right upon a showing that he can follow courtroom decorum. (It is important to note that the defendant in Allen was pro se, so the right to self representation was also implicated.) The Court in Faretta by relying on Allen has implicitly adopted the same rationale.

Appellee mentions some other matters in its brief that require comment. Appellee points out that Mr. Holland did not immediately request self representation AB12. This is not a reason to deny self representation. Mr. Holland first requested self representation on March 22, 1996, six months before trial. A request made before the jury is empaneled is timely. Chapman v. United States, 553 F.2d 886 (5th Cir. 1977); Fritz v. Spalding, 682 F.2d 782 (9th Cir. 1982). Appellee has cited no caselaw holding that a request made six months before trial is untimely.

It must also be pointed out why Mr. Holland may have exercised his right at this point. Peter Giacoma was lead counsel at Mr. Holland's first trial. Subsequent to the first trial Mr. Giacoma became law partners with the judge who sentenced Mr. Holland to death 37R1406-7. Lead counsel for his retrial was Ken Delegal. Mr. Delegal had to be removed from the case as he was arrested several times and had a drug habit 37R1407. He died of a drug overdose. 37R1407. At the time of his death he had been arrested for stalking his wife, disorderly conduct and vandalism, possession of cocaine and drug paraphernalia, and fleeing a police officer. 37R1433-1440. The trial judge then appointed Jim Lewis, a former

prosecutor, who shared space with Mr. Delegal as Mr. Holland's attorney. 37R1435-1436. Mr. Lewis was asked about Mr. Delegal's problems and stated: "Yeah, I had heard rumors, but I choose not to know." 37R1435-1436. At this point, Mr. Holland may have felt that he was better off representing himself.

Appellee also points out Mr. Holland had previously asked to have his court appointed counsel removed. However, this is not a reason to deny self representation. Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989). In Adams, the defendant only wished to represent himself if the trial court would not appoint another attorney instead of his current attorney (Mr. Carroll).

> Here, Adams made his preference clear from the start: He wanted to represent himself if the only alternative was representation by Carroll. Although his two self-representation requests were sandwiched around a request for counsel, this was not evidence of vacillation. To the contrary, each of these requests stemmed from one consistent position: Adams first requested to represent himself when his relationship with Carroll broke down. he later requested counsel, but with the express qualification that he did not want Carroll. When Carroll was reappointed, Adams again asked to represent himself. Throughout the period before trial, Adams repeatedly indicated his desire to represent himself if the only alternative was the appointment of Carroll. While his requests no doubt were conditional, they were not equivocal.
>
> This conclusion is reinforced when tested against the purposes underlying the unequivocality requirement. Adams was not seeking to waive his right to counsel in a thoughtless manner; the trial court engaged him in extensive discussion regarding the difficulties of proceeding in pro per. Adams nevertheless persisted, choosing to fend for himself rather than rely on counsel whom he mistrusted. Nor was his request a momentary caprice or the result of thinking out loud; he made the same request over and over again, at nearly every

> opportunity. Had the request been granted, an appeal based on the denial of the assistance of counsel would have been frivolous, in light of the earnestness and frequency of his requests to represent himself. None of the purposes served by the requirement would be furthered by treating a conditional request for self-representation as equivocal.

875 F.2d at 1444-45 (footnote omitted).

None of the cases cited by Appellee control. The reasoning of Johnston v. State, 497 So. 2d 863 (Fla. 1986) has been disapproved by subsequent cases. The Court in Johnston concluded:

> The trial court was correct in concluding that Johnston would not receive a fair trial without assistance of counsel.

497 So. 2d at 868. This is contrary to this Court's opinion in Bowen. Bowen held that concern for a fair trial was not a proper reason to deny self-representation. 698 So. 2d at 249.

Sweet v. State, 624 So. 2d 1138 (Fla. 1993) is distinguishable. In Sweet, the defendant had waived his right by expressing satisfaction with his counsel. Id. at 1411-2. In Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), the defendant stated, "I'm not choosing to represent myself." Id. at 1074. This Court noted that this could be grounds for denying the motion.

The decisions in Visage v. State, 679 So. 2d 735 (Fla. 1996) and Visage v. State, 664 So. 2d 1101 (Fla. 1st DCA 1995) do not control. The value of this Court's opinion in Visage is problematic. The holding is to discharge jurisdiction. It is questionable whether anything in the opinion has precedential value. This Court answers a certified question in the abstract and does not

apply it to any set of facts. It gives little guidance. It is doubtful whether Visage is still the law.

Visage was based on Florida Rule of Criminal Procedure 3.111(d)(3). This rule has been changed to conform to the decision in Bowens. The rule at the time of Visage read:

> (3) No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of a mental condition, age, education, experience, the nature or complexity of the case, or other factors.

Rule 3.111(d)(3) now reads:

> (3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

The opinion in Bowen and the subsequent amendment of the rule leave Visage in grave doubt. Visage is also questionable in light of Godinez which makes clear there is no higher level of competence to go pro se.

The First District's opinion in Visage is clearly incorrect. First, it must be pointed out that it is rendered by a sharply divided Court, with a strong dissent by Judge Benton. Second, the majority opinion relies on factors specifically prohibited by the new rule and Bowen, such as lack of legal experience.

The trial court explicitly and solely relied on Mr. Holland's lack of technical legal ability to deny him his right of self representation on at least two occasions. A new trial is required.

POINT II

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

This issue involves two related jury instruction errors. The trial judge incorrectly instructed the jury that the State did not need to show an intent to commit sexual battery in order to convict Mr. Holland of attempted sexual battery or to use attempted sexual battery as a theory of felony murder. The trial court also incorrectly instructed the jury that voluntary intoxication was not a defense to attempted sexual battery or to attempted sexual battery as a theory of felony murder.

Appellee points out that Sochor v. State, 619 So. 2d 285 (Fla. 1993) discusses the question of whether voluntary intoxication is a defense to attempted sexual battery. Several points are in order as to Sochor. (1) The issue of whether attempted sexual battery is a specific or general intent crime was not briefed in the case. (2) The opinion does not deal with the question of whether attempted sexual battery requires an intent to commit a sexual battery. (3) The opinion is prior to this Court's decisions in Rogers v. State, 660 So. 2d 237 (Fla. 1995) and State v. Gray, 654 So. 2d 552 (Fla. 1995). In Rogers, this Court reversed a conviction for attempted sexual battery based on sufficiency of the evidence and outlined the necessary intent to sustain a conviction.

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

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

Rogers holds that "a specific intent" to commit a sexual battery is required to be guilty of attempted sexual battery. Appellee claims that Mr. Holland reads Rogers "out of context" AB24. Rogers dealt with whether the evidence was legally sufficient to show attempted sexual battery. This Court held that it was not and stated that attempted sexual battery requires "the State to prove a specific intent" to commit sexual battery. Id. at 241. The special jury instruction here was erroneous.

Gray also supports the idea that attempted sexual battery requires an intent to commit sexual battery. In Gray, this Court held that there was no crime of attempted felony murder. Gray overruled Amlotte v. State, 456 So. 2d 448 (Fla. 1984).

> Justice Overton maintained in a dissent that the crime of attempted felony murder is logically impossible. Id. *at 450 (Overton, J., dissenting). He pointed out that a conviction for the offense of attempt requires proof of the specific intent to commit the underlying crime. Id.; see also § 777.04(1), Fla. Stat. (1991)....*
>
> *We now believe that the application of the majority's holding in Amlotte has proven more troublesome than beneficial and that Justice Overton's view is the more logical and correct position.*

654 So. 2d at 523. Gray supports the idea that attempted sexual battery requires proof of an intent to commit sexual battery.

The jury instruction in this case told the jury that attempted sexual battery did not require an intent to commit sexual battery. This was an inaccurate instruction on an element of the offense. Appellee does not dispute that an erroneous instruction on an

element of the offense is fundamental error AB26-27. Rojas v. State, 552 So. 2d 914 (Fla. 1989); Viveros v. State, 699 So. 2d 822 (Fla. 4th DCA 1997); Blandon v. State, 657 So. 2d 1198 (Fla. 5th DCA 1995). Appellee claims that Appellant's silence creates an exception to the fundamental error doctrine and relies on State v. Lucas, 645 So. 2d 425 (Fla. 1994); Ferrell v. State, 686 So. 2d 1324 (Fla. 1996); and Armstrong v. State, 579 So. 2d 734 (Fla. 1991) AB26-27. These cases are distinguishable. Lucas held that the erroneous instruction was fundamental error, thus it does not support the State's position. Ferrell involved an erroneous instruction on CCP, not on an element of the offense. This Court has not held this instruction to be fundamental error. In Armstrong, the defendant affirmatively requested the erroneous instruction.

Silence does not come under the exception to fundamental error described in Armstrong. Blandon; Hall v. State, 677 So. 2d 1353 (Fla. 5th DCA 1996); Ortiz v. State, 682 So. 2d 217 (Fla. 5th DCA 1996). The Court explained the limited nature of the Armstrong exception in Ortiz.

> The jury was not instructed on justifiable homicide. After the charge conference, defense counsel stated to the court: "Judge, we have looked over [the charges], and we don't have any objection to any of the instructions." The state contends that this language constitutes an express waiver of the justifiable homicide charges in accordance with the opinion in Armstrong v. State, 579 So. 2d 723 (Fla. 1991). As we read Armstrong and Blandon v. State, 657 So. 2d 1198 (Fla. 5th DCA 1995), there was no express waiver.

682 So. 2d at 218. The instruction is fundamental error.

The trial court also erred in denying Mr. Holland's requested instruction on voluntary intoxication as a defense to attempted sexual battery as a substantive offense and as a theory of felony murder. Rogers specifically holds that attempted sexual battery requires the "specific intent" to commit sexual battery. Thus, voluntary intoxication would be a defense to attempted sexual battery. A new trial is required as to attempted sexual battery and first degree murder.

POINT XI

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

Appellee claims that the trial judge was not using the sanity standard to reject mental mitigation. A review of the judge's order clearly reveals that this is what the judge was doing.

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

> dence presented before this Court established beyond and to the exclusion of every reasonable doubt, that the defendant was not insane at the time of the commission of the acts pending before this Court. Accordingly, the applicability of this mitigating circumstance has not been established by a preponderance of the evidence.

102R8192-93. The trial court relied solely on the fact that the prior adjudications of insanity were under a different standard and that Mr. Holland was not "insane" at the time of the offense to reject this as mitigation.

Appellee claims that the judge found that it was not "separate and distinct" mitigation from his long standing history of mental illness AB64-66. This has no support in the order. At no point does he say that he is rejecting this mitigator because it is duplicative. He rejects it because it did not meet the Florida sanity standard. This distinguishes this case from the cases relied on by Appellee, Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994) and Cole v. State, 701 So. 2d 845, 852 (Fla. 1997). In Reaves and Cole the trial judge explicitly grouped related categories of mitigation. Here, the judge was rejecting this due to the fact that the evidence did not meet the Florida sanity standard.

It would turn capital jurisprudence on its head for this Court to ignore the explicit reasoning of the trial judge. This Court has repeatedly stressed the importance of the trial judge's written order in a death penalty case. Campbell v. State, 571 So. 2d 415-19 (Fla. 1990); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995).

Appellee claims that the erroneous use of the sanity standard to reject mental mitigation is harmless error. It cites no cases

to this effect. This Court has consistently held it to be harmful. Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982); Campbell v. State, 571 So. 2d 415, 418-9 (Fla. 1990). The cases relied on by Appellee are clearly distinguishable. Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987) and Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991) both involved the erroneous finding of an aggravating circumstance.

The homicide was the product of mental illness and cocaine. [redacted] stated Mr. Holland appeared normal until he smoked a second cocaine rock and then became violent 56R3302. Mr. Holland's vomit tested positive for cocaine 62R3885-6. Several State witnesses testified that the shooting occurred while Mr. Holland and the officer were struggling over the gun 58R3492-5; 59R3662-78.

Albert Holland was a good child with positive achievements until he began abusing drugs at age 16 89R6506-14. In prison he was nearly beaten to death and was in a coma for several days 89R6514-6. He changed completely after the beating. He was very depressed 89R6515-6. He often spoke of suicide 89R6516. He was highly irritated and sensitive 89R6517. He would become very angry if he heard a dog barking or loud music 89R6517. He was twice found not guilty by reason of insanity and involuntarily hospitalized 90R6559-74. He was diagnosed as having schizophrenia 90R6620-2. He was in St. Elizabeth's for four years and the diagnosis never changed 90R6620-2. Drugs and alcohol exacerbate mental illness 90R6722-3. Mr. Holland was a severe drug and alcohol

abuser 90R6724-5. He used marijuana, heroin, speedballs, PCP, and drank up to two fifths a day 90R6724-5.

This Court has consistently held the use of the sanity standard to reject mental mitigation to be reversible error. Mines, Ferguson, Campbell. Resentencing is required.

POINT XII

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

The trial court made several factual errors in its evaluation of the testimony of key defense witnesses as to mental mitigation. The trial judge made a crucial error as to the testimony of Dr. Polley, a mental health expert who treated Mr. Holland at St. Elizabeth's Hospital. The judge stated:

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

102R8181-83.

Appellee's reliance on the cross-examination of Dr. Polley to support this statement is misplaced AB67-8. Dr. Polley's cross-examination testimony concerning the Rorschach indicates that this test showed psychosis. Statement of the Facts at p. 4-5. This is contrary to the judge's finding that there was "no evidence of psychosis." This was error.

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

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

102R8183.

Dr. Polley actually testified somewhat differently.

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

90R6655.

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

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

102R8184-85. Dr. Patterson testified concerning evidence of psychosis. Statement of the Facts at p. 2-4.

Appellee does not dispute this testimony of psychosis. It claims that when "read in context" this testimony means something other than what it says AB69-70. However, it never quotes any portion of Dr. Patterson's testimony to support this. The testimony of Dr. Patterson shows that contrary to the judge's findings, there was evidence of psychosis in 1981-2.

Appellee also mistakenly claims that Dr. Patterson questioned the diagnosis of schizophrenia AB70. It cites 69R4722-3 for this proposition. It also claims that "the treatment team" questioned the diagnosis AB70. It does not provide any record cite for this

proposition. Neither of these statements is accurate. See Statement of the Facts at p.5-6

The trial court made several factual errors in its evaluation of evidence as to mental mitigation. This error is harmful. The statutory mental mitigating circumstances are among the most significant mitigating circumstances in a capital case. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Errors concerning the application of the statutory mental mitigating circumstances are harmful. Campbell; Ferguson; Mines. In Ferguson, this Court explained why:

> In our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.
>
> 417 So. 2d at 638.

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

> The trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."
>
> 655 So. 2d at 100.

The mental mitigating factors were a crucial issue at the penalty phase. The error is harmful.

POINT XIII

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

Appellee's argument on this issue is misplaced. Appellee incorrectly claims that "none of Holland's witnesses supported the existence of this mitigating circumstance" AB72. Dr. Love testified that Mr. Holland was legally insane during the incident 67R449-52. As the judge recognized, this is evidence of the "extreme disturbance" mitigator 102R8189. Mr. Holland's other mental health experts did not express an opinion as to the applicability of this mitigator. However, they did testify to his history of schizophrenia and involuntary hospitalization, which point to this circumstance. Both State and defense witnesses provided evidence that Mr. Holland was under the influence of alcohol and cocaine at the time of the incident. State witness, [redacted] testified that Mr. Holland completely changed when he smoked the second piece of cocaine rock. All of this is evidence on which the judge could have found this mitigator.

Appellee concludes by saying that "the trial court made a proper factual finding in rejecting this mitigator" AB72. However, the issue is the trial judge relying on a factual error concerning the testimony of three mental health experts. The trial court could not properly exercise its discretion. Appellee's reliance on Raleigh v. State, 705 So. 2d 1324 (Fla. 1997) and San Martin v. State, 705 So. 2d 1337 (Fla. 1997) is misplaced. Neither involves factual errors as to the testimony of mental health experts.

This Court has repeatedly held errors concerning the statutory mental mitigating circumstances to be harmful. Campbell; Ferguson. This Court recently reversed, in part, on a similar error. Larkins. Resentencing is required.

POINT XV

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

Appellee incorrectly asserts that Mr. Holland did not preserve the issue that this evidence was non-statutory aggravation. Defense counsel stated:

> I still don't see the relevancy in the fact that he made threats to Linda Barns whether that has to do with anything we're discussing at this time.
>
> The only reason that particular crime has come into evidence is because it's a result of -- it is the crime wherein he was found not guilty by reason of insanity. It is not a statutory aggravating circumstance and so I'm concerned about getting too deep into the facts of the particular case.

90R6596 (Emphasis supplied).

Appellee is correct that there was some reference to this robbery in the State's cross-examination of Dr. Patterson 69R4724-6. However, it was extremely brief and had no reference to Mr. Holland claiming that he was from St. Elizabeth's and making threats to Ms. Barns.

Appellee's reliance on Rogers and Capehart is misplaced. Both Rogers and Capehart involve the trial judge making improper findings as to aggravating circumstances. The present case involves the admission of improper evidence before the jury. The

jury's recommendation was only eight to four. Thus, the error is likely to be harmful. Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991). Neither involved the extensive mitigation present in the current case including having been twice been found not guilty by reason of insanity and having been involuntarily hospitalized for a number of years. Resentencing is required.

POINT XXI

THE DEATH PENALTY IS DISPROPORTIONATE.

Appellee attempts to unduly restrict this Court's required proportionality review AB91. This Court has made it clear that it will examine the entire record and reach its own conclusions as to whether the death penalty is disproportionate. Woods v. State, ___ So.2d ___, 24 Fla. L. Weekly S183 (Fla. April 15, 1999); Jones v. State, 705 So. 2d 1364 (Fla. 1998). *In Woods, the trial court* gave "little weight" to Woods' IQ of 77 and "moderate weight" to his lack of convictions for violent offenses. This Court found those circumstances "most significant" in reducing the sentence to life imprisonment. In Jones, the trial judge found no statutory mitigation and "little nonstatutory mitigation." 705 So. 2d at 1365. This Court's review revealed copious unrebutted mitigation.

Appellee relies on a series of cases that it claims control this case AB92-95. None of these cases involve the significant mental health history that this case does. Mr. Holland was twice found not guilty by reason of insanity and involuntarily hospitalized 90R6449-74. He was diagnosed as having schizophrenia 90R6620-2. He was in St. Elizabeth's for four years and the diagnosis

never changed 90R6620-2. Indeed, Mr. Holland had escaped from a mental hospital at the time of this offense. This sort of history is not present in any of the cases cited by Appellee.

Appellee's attempts to distinguish Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Kramer v. State, 619 So. 2d 274 (Fla. 1993); and Robertson v. State, 699 So. 2d 1343 (Fla. 1997) are misplaced. Appellee claims that Robertson was not reversed on proportionality. This is simply false. This Court stated:

> Although the trial court found two valid aggravating circumstances, we find that death is not proportionately warranted in the light of the substantial mitigation present in this case: 1) Robertson's age of nineteen; 2) Robertson's impaired capacity at the time of the murder due to drug and alcohol use; 3) Robertson's abused and deprived childhood; 4) Robertson's history of mental illness; and 5) his borderline intelligence. When compared to other death penalty cases, death is disproportionate under the circumstances present here.... For no apparent reason, Robertson strangled a young woman who he believed had befriended him. It was an unplanned, senseless murder committed by a nineteen-year-old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time. This clearly is not one of the most aggravated and least mitigated murders for which the ultimate penalty is reserved.

699 So. 2d at 1347. This case possesses many of the same factors as Robertson; a history of mental illness, drug and alcohol abuse and an unplanned homicide. Indeed, the history of mental illness is far more extensive here than in Robertson. Mr. Holland had twice been found not guilty by reason of insanity and had been involuntarily hospitalized for years.

The present case involves fewer aggravating factors than Fitzpatrick, and has a similar history of mental illness.

Additionally this case involves drug and alcohol use at the time of the crime as well as a history of drug and alcohol abuse.

This Court's reasoning in Kramer applies here.

> In this case, the trial court found two aggravating factors: prior violent felony conviction, and the fact that the murder was heinous, atrocious, or cruel. The first of these factors clearly exists. We assume arguendo that the second exists.
>
> The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive here. While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point.

619 So. 2d at 277.

The present case involves many of the same factors. The homicide was the product of mental illness and cocaine. [redacted] stated Mr. Holland appeared normal until he smoked a second piece of cocaine rock and then he became violent 56R3302. Mr. Holland's vomit tested positive for cocaine 62R3885-6. Several State witnesses testified that the shooting occurred while Mr. Holland and the officer were struggling over the gun 58R3492-5; 59R3662-78.

Albert Holland was a good child with positive achievements until he began abusing drugs at age 16 89R6506-14. In prison he was nearly beaten to death and was in a coma for several days 89R6514-6. He changed after the beating. He was very depressed afterward 89R6515-6. He often spoke of suicide and jumping off a building 89R6516. He was highly irritated and sensitive 89R6517. He would become very angry if he heard a dog barking or heard loud

music 89R6517. He was twice found not guilty by reason of insanity and involuntarily hospitalized 90R6559-74. He was diagnosed as having schizophrenia 90R6620-2. He was in St. Elizabeth's for four years and the diagnosis never changed 90R6620-2. Drugs and alcohol exacerbate mental illness 90R6722-3. Mr. Holland was a severe drug and alcohol abuser 90R6724-5.

He had a long term history of drug abuse. He was nearly beaten to death and his behavior completely changed. He had a history of mental illness which was aggravated by the effects of cocaine. The violence in the current offense was the result of a complete personality change after the ingestion of cocaine. The homicide in this case was not planned, but was the result of grabbing a gun during a struggle. These facts show the same sort of irrational homicide that is the product of mental illness as in Fitzpatrick, *Robertson, and Kramer. Death is disproportionate.*

CONCLUSION

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

Respectfully submitted,

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CERTIFICATION OF TYPE FACE

Appellant certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of July, 1999.

_____
Attorney for Albert Holland