IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,

Appellant,

vs. **Case No. SC03-1033**

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 plaintiff in the trial court below and will be referred to herein as “the State." Reference to the various pleadings and transcripts will be as follows:

Record on direct appeal (original trial)- “IR [vol.] [pages]”

Record on direct appeal of the resentencing- “DA [vol.] [pages]”

Postconviction record - “PCR [vol.] [pages]”

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STATEMENT OF THE CASE AND FACTS

Thelma Johnson testified that on July 29, 1990, she was walking to her house and met Holland, who asked if she wanted to smoke crack cocaine (DA Vol. 56 3295-3343). They walked together to a wooded area and he smoked half a cocain rock by himself. After Holland smoked a second hit of crack, "he went off." Holland 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. (DA Vol. 56 3302-07).

Eyewitness 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." (DA Vol. 56 3345-55).

Eyewitness 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 Johnson was assaulted. Holland had an object wrapped in a shirt. (DA Vol. 57 3389-93, 3406-09).

Eyewitness 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. (DA Vol. 65 4318-35).

Eyewitness 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. (DA Vol. 58 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." (DA Vol. 59 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. (DA Vol. 59 3700-05).

The defense presented testimony from Dr. Love, a psychologist, 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 Thelma Johnson and shot Officer Winters. He believed that Holland's schizophrenia, which St. Elizabeth's Hospital in Washington D.C. had diagnosed, combined with his alcohol and drug use the day of the offenses, prevented him from knowing right from wrong. (DA Vol. 67 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. (DA Vol. 67 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. (DA Vol. 67 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. (DA Vol. 67 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. (DA Vol. 67 4457-58, 4490-91).

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. (DA Vol. 69 4658-4749).

Holland's father testified that his son was a normal child until he started using drugs in high school (DA Vol. 70 4768-81). According to Holland's father, Holland suffered a severe head injury, from a beating in federal prison, and thereafter, his behavior changed completely. He was nervous, jumpy, edgy, withdrawn, and depressed. Holland testified that "went crazy" and started beating Thelma Johnson with whatever was around him. (DA Vol. 74 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. (DA Vol. 74 5061-68).

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. (DA Vol. 77 5366-75).

SUMMARY OF ARGUMENT

Issue I - There is competent, substantial evidence supporting the trial court's denial of Appellant's ineffectiveness of guilt phase counsel claim.

Issue II - There is competent, substantial evidence supporting the trial court's denial of Appellant's ineffectiveness of penalty phase counsel claim.

Issue III - The trial court's summary denial of Claims I, II, IV, V and VI was proper.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED HOLLAND'S CLAIM, AFTER AN EVIDENTIARY HEARING, THAT COUNSEL WAS PER SE INEFFECTIVE, UNDER NIXON v. SINGLETARY, 758 So.2d 618 (Fla. 2000), FOR ALLEGEDLY CONCEDING HOLLAND'S GUILT WITHOUT HIS AUTHORIZATION (Restated).

Holland argues that the trial court reversibly erred by denying his claim that guilt phase counsel, Mr. James Lewis, was **per se ineffective**, under Nixon v. Singeltary, 758 So.2d 618 (Fla. 2000), for allegedly conceding Holland's guilt to the charge of Attempted First Degree Murder of Thelma Johnson, without Holland's authorization. Holland contends that the concession was the functional equivalent of a guilty plea. The trial court's factual findings are supported by the record and its legal conclusion that per se ineffective assistance was not established comports with the dictates of Strickland v. Washington, 466 U.S. 688 (1984). This Court should affirm.

The standard of review for ineffective assistance of counsel claims raised in postconviction proceedings, is that "the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003). See Davis v. State, 28 Fla.L.Weekly S835, S836 (Fla. November 20, 2003);

Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel, but recognizing and honoring "trial court's superior vantage point in assessing credibility of witnesses and in making findings of fact"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000) (announcing appellate court's "review the prongs of ... ineffective assistance of counsel as questions of mixed law and fact."); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Rose v. State, 675 So. 2d 567 (Fla. 1996). "The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo." Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

To prove ineffective assistance of counsel, Holland must demonstrate both deficient performance and prejudice arising from that performance. Strickland, 466 U.S. 668. Proving deficiency requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment" and "that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. Continuing, the Court defined "deficient" as:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy

> for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted).

This Court has noted that the Strickland analysis requires:

> First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). Second, the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.; see also Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.") (quoting *Strickland*, 466 U.S. at 686).

Davis, 28 Fla. L. Weekly at S836.

Based on the evidence presented at the evidentiary hearing, the trial court correctly concluded that Holland has failed to prove a Nixon claim. The per se ineffectiveness rule of Nixon applies only in those cases where the defendant is completely denied the effective assistance of counsel, such as when trial counsel “entirely fail[s] to subject the prosecution’s case to meaningful adversarial testing.” Nixon at 622. In Nixon, that

occurred when defense counsel conceded, during **guilt phase** opening and closing argument, that the State had proved beyond a reasonable doubt each and every element of the crimes charged: first-degree murder, kidnaping, robbery and arson. Nixon argued that the attorney's comments were the functional equivalent of a guilty plea and filed a 3.850 motion which was summarily denied.

On appeal, the Supreme Court reversed for an evidentiary hearing, noting that there is an exception to the Strickland standard when trial counsel "entirely fail[s] to subject the prosecution's case to meaningful adversarial testing." Nixon at 622. When that happens, a presumption of ineffective assistance arises, prejudice to the defendant is presumed and counsel is considered per se ineffective. Id. An evidentiary hearing was warranted, the court noted, to determine whether Nixon consented to defense counsel's strategy. The presumption of ineffectiveness could only be overcome by a showing that Nixon consented to the defense counsel's strategy.

Nixon is inapplicable to this case for several reasons: (1) unlike the defendant in Nixon, Holland took the stand and admitted to every element of the crime of Attempted First Degree Murder; (2) Holland's damaging admissions left defense counsel with only the defense of insanity; (3) defense counsel Lewis' statements were not a concession of Holland's guilt, but rather,

an argument that he should be found not guilty by reason of insanity; and (4) the defense of "insanity" admits the fact that a crime has been committed, but denies the requisite mental state. See Hickson v. State, 589 So.2d 1366, 1369 f.n. 2 (Fla. 1st DCA 1991), reversed on other grounds, 630 So.2d 172 (Fla. 1993)(discussing that insanity admits all of the elements of the crime).

Holland failed to establish at the evidentiary hearing that guilt-phase counsel, Mr. Lewis, **conceded** Holland's guilt to the charge of Attempted First Degree Murder of Thelma Johnson. Mr. Lewis **denied** that he conceded Holland's guilt to the charge (PCR 13 141). Lewis explained that once Holland took the stand and admitted to beating Thelma Johnson with bottles and rocks, he had very little choice left about what to argue, the only defense he had to the charge of Attempted First Degree Murder of Thelma Johnson was insanity (PCR 13, 139, 152, 158-59). Lewis explained that is precisely what he was telling the jury, that insanity was the only defense being offered to the charge of Attempted First Degree Murder of Thelma Johnson (PCR 13 141-42):

> Let me talk briefly about the attempted first-degree murder charge of Thelma Johnson. The defendant testified as to the beating, you know, he could have come in here and just, um, I don't remember that. No, I don't remember, you know, if he wanted to stay consistent, he could have done that, but he chose to take the stand and nobody

> forced the defendant to take the stand. He took the stand because he wanted to get up here and tell you his side of the case. And I know you watched him, intently, and if you really followed the things that he was saying, and what his concerns were, then you know he's not all there. You know there is a mental something, something mental going on in there. The way that he's thinking, the way that he's trying to explain things, what he thinks is important. And he wasn't paraded up here to try and convince you that he's mentally ill. That's his choice, his decision. You may not like him as a person. You may not like what he has done. You may not approve of his lifestyle, but he is not guilty of first-degree murder.
>
> **Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes. <u>So if you're not going to believe that, in fact, he was legally insane at the time of the commission of that offense, then the defendant offers no defense to that</u>.**
>
> There are lesser included crimes as to every category and you should consider the lessor included crimes. One of the lessor included crimes of attempted first degree murder is aggravated battery. And you will be given the elements of that offense and you can consider whether or not the State has proven the highest allegation as to that count which I believe is Count Four, the attempted first degree murder charge, and determine what degree of culpability the defendant has.

(DA 5959-60). Read in context, it is clear that Lewis was not conceding Holland's guilt, but rather, was acknowledging Holland's damaging testimony[1] while arguing that Holland was not

[1] Lewis testified that Holland took the stand against his advice (PCR 13 157).

guilty by reason of insanity. Lewis explained at the evidentiary hearing that insanity was Holland's "main" defense in this case and he believed it was a strong defense because Holland had twice before been adjudicated not guilty by reason of insanity and had been hospitalized at St. Elizabeth's mental hospital (PCR 13 134-35, 149). Lewis had specifically elected to rely upon the insanity defense[2] and enjoyed a presumption of insanity because of the prior adjudications (PCR 131 153-54).

Holland's mental state permeated the entire trial, affecting every issue.[3] Defense counsel argued in opening statements that Holland was not guilty by reason of insanity (DA 3287-88). He further told the jury that Holland had twice before been found legally insane and had been hospitalized in a mental institution (DA 3286). In support of the insanity defense, defense counsel called Dr. William Love (DA 4425-4514), Dr. Raymond Patterson (DA 4658-4768), Albert Holland, Sr. (DA 4768-4787), Sandra Bass (DA 4915-43), and Dr. Frances Welsig (SDA III T 53-115).

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[2] Holland's counsel from his first trial, Mr. Tindall, had filed an Amended Notice of Intent to Rely upon the Insanity Defense (DA 7324-7325), which Mr. Lewis elected to rely upon (PCR 13 156).

[3] This Court acknowledged that this was an insanity case–"Mr. Holland originally, in 1990, filed a defense, when Mr. Giacoma and Mr. Tindall were representing him, of insanity and that was a defense which was used at trial. After this case was remanded for [a] new trial, Mr. Delegal initially, and then Mr. Lewis and Mr. Baron, again relied on the defense on insanity." Holland v. State, 773 So.2d 1065, 1070 (Fla. 2000). Holland also relied upon his two prior adjudications of insanity as non-statutory mitigators. Id. at 1076.

When Holland took the stand in this case and admitted to all of the elements of attempted first degree murder, Lewis had no defense left except insanity (PCR 13 152). Holland admitted that he became very violent and started "beating" Thelma Johnson when she reneged on her deal to perform oral sex on Holland in exchange for crack. Holland stated that he "went beserk, went crazy," "snapped" (DA 5057, T2 32) and admitted to hitting Ms. Johnson with bottles and rocks (DA 5177, 5057, T2 32-33). Holland admitted that he caused Thelma Johnson "great bodily harm," that he "messed up" her ear and disfigured her face (DA 5056-57, T2 32-33).

While Holland initially denied intending to kill Thelma, he agreed on cross-examination that when you beat somebody with bottles, rocks and other blunt objects and leave them in this condition, there is a chance they are going to die (DA 5182). Further, as defense counsel Lewis testified, a jury can always infer premeditation from the facts (PCR 13 153) and is not limited by a defendant's self-serving denial of intent. Holland's testimony corroborated that of the victim, Thelma Johnson, who testified that Holland became violent after smoking crack cocaine (DA 3302). He pinned her arms down and hit her in the head with a bottle (DA 3302). When Ms. Johnson begged him to not kill her, he told her to "shut up before I kill you." (DA 3302). The bottle broke and cut Ms. Johnson's ear and then

Holland began hitting her with other bottles and stuff. (DA 3302-03). Holland kept telling her to shut up before he blew her brains out or cut her throat (DA 3303-04). The severity and extensiveness of Thelma's injuries were depicted for the jury in pictures. In addition, eyewitnesses Audrey and Rudy Canion testified that they saw Holland beating Thelma with bottles, thought he was going to kill her and yelled at him to stop before he killed her.

Faced with Holland's damaging admissions and the other damaging testimony, Lewis decided to highlight that the defense was insanity and it was the only defense being offered (PCR 13 152). Lewis further explained that sometimes, in order to maintain credibility with the jury, you have to admit things that are not in controversy in order to argue other things that are truly in dispute (PCR 13 141-42). Lewis thought that this strategy would gain credibility for the insanity defense (PCR 13 149). Finally, as the trial court noted, it is clear from the testimony that communication between Holland and Mr. Lewis had deteriorated during the trial. Holland had become totally uncommunicative and therefore counsel had to do what he thought best, which was presenting an insanity defense (PCR 12 54).

Reading Lewis' statements in context and considering his testimony at the evidentiary hearing, it is clear that he was not conceding Holland's guilt to the charge of Attempted First

Degree Murder of Thelma Johnson, but rather, was arguing the only defense he had, insanity. Contrary to Holland's assertions, the trial court's order is supported by substantial, competent evidence. A case from the Fourth District, relied upon by the trial court, is directly on point. In Thompson v. State, 839 So.2d 847 (Fla. 4th DCA 2003), the 18 year-old defendant was charged with a lewd and lascivious act upon a child for having sex with his 13 year-old girlfriend. At trial, the defendant took the stand and testified that he committed the sex act. In closing, defense counsel argued that although the evidence showed that the defendant had sexual intercourse with the victim, this was not the type of crime the legislature intended to cover and asked that the jury not find the defendant guilty.

On post-conviction, the defendant argued, as Holland has here, that defense counsel was per se ineffective under Nixon for conceding the defendant's guilt without authorization. After an evidentiary hearing, the trial court denied relief, noting that although the attorney, who was dealing with overwhelming evidence of her client's guilt, had admitted that the defendant had sex with the victim, she did not admit guilt. In fact, she had argued in opening and closing that the defendant's conduct was not a crime and asked the jury to find him not guilty. The Fourth District agreed, holding that

defense counsel did no more than admit the conduct to which her client had testified and therefore it was not tantamount to a guilty plea. Trial counsel admitted to the sex act but urged the jury to find the defendant not guilty. As such, the court found Nixon distinguishable because defense counsel's argument clearly challenged the State's case.

Similarly, here, defense counsel Lewis was faced with overwhelming evidence establishing Holland's guilt to the charge of Attempted First-Degree Murder. In addition to Holland's damaging testimony, which admitted every element of the crime, there was damaging testimony from the victim and two (2) eyewitnesses. While Holland denied any intent to kill Thelma, his claims were belied by the severity and extensiveness of Thelma's injuries. The jury could clearly infer intent from Holland's actions. Like Thompson, defense counsel Lewis did no more than admit the conduct to which his client testified. He clearly subjected the State's case to meaningful adversarial testing–- Lewis asked the jury in opening to find Holland not guilty by reason of insanity and even moved for a judgment of acquittal on the attempted first-degree murder of Thelma Johnson (DA 4396-4401). Consequently, as in Thompson, defense counsel Lewis was not per se ineffective.

Holland argues that Thompson is distinguishable because the crime in that case, lewd assault on a child, is not a specific

intent crime like first-degree murder and because Holland's counsel never argued to the jury, as counsel in Thompson did, that Holland's conduct did not constitute a crime (IB 51-52). Those distinctions are without merit. The fact that lewd assault on a child is not a specific intent crime does not negate the relevance of Thompson. The importance of the case is that the attorney was faced with a client who had taken the stand and admitted to the elements of the crime, i.e., having sex with a 13 year-old. In closing, she had to admit what her client said, but still argued his was not the type of crime the legislature intended to cover and asked that the jury not find the defendant guilty. Similarly, here, Mr. Lewis was faced with overwhelming evidence of Holland's guilt, including his own damaging admissions to elements of the crime. Lewis argued the best defense he had–insanity-which admits that the defendant committed the crimes. By arguing insanity, Lewis was arguing that Holland was guilty of the attempted first-degree murder or at least should not be held accountable for it.

Holland further argues that the trial court did not have the benefit of Nixon III (Nixon v. State, 857 So.2d 172 (Fla. 2003) and Harvey v. State, 2003 WL 21511339 (Fla. 2003), at the time it rendered its decisions and that those decisions require a reversal. Nixon II had been remanded for an evidentiary hearing to determine whether Nixon had consented to defense counsel's

strategy to concede guilt to try and spare his life. Nixon III is the appeal from that evidentiary hearing. Only one witness testified at the evidentiary hearing, Nixon's guilt-phase counsel. At the evidentiary hearing, Nixon's guilt-phase counsel testified that he discussed the strategy of not contesting guilt with Nixon. Nixon III, at 175. When asked how Nixon responded, counsel stated that Nixon "did nothing". Id. Nixon provided "neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt.

Finding that such testimony, at most, "demonstrates silent acquiescence by Nixon to counsel's strategy of conceding guilt," this Court reversed, reasoning:

> In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense,

> counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

Nixon III, at 176-77. Certiorari has been granted in Nixon III by the United States Supreme Court. 124 S.Ct. 1509, 72 USLW 3451 (2004). The State is arguing that the decision applied an incorrect standard by finding counsel per se ineffective under Cronic despite having found counsel's strategy reasonably calculated to avoid a death sentence and that it misapplies numerous United States Supreme cases which articulate the proper analysis that is to be employed when assessing a Sixth Amendment claim have been misapprehended, including Strickland v. Washington, 466 U.S. 668 (1984), United States v. Cronic, 466 U.S. 648 (1984), Bell v. Cone, 535 U.S. 685 (2002) and Roe v. Flores-Ortega, 528 U.S. 470 (2000).

Holland argues that Nixon III is in the same procedural posture as this case. However, as already argued, Holland has not proved a Nixon claim. Defense counsel Lewis' statements were not a concession of Holland's guilt, but rather, an argument that he should be found not guilty by reason of insanity. Unlike Nixon, the comments in this case were not made in opening, but rather, in closing argument. Further, unlike

the defendant in Nixon, Holland took the stand and admitted to every element of the crime of Attempted First Degree Murder. Holland's damaging admissions left defense counsel with nothing but the defense of insanity, which admits the fact that a crime has been committed, but denies the requisite mental state.

Holland's reliance upon Harvey is, likewise, misplaced. The State would first note that Harvey is not a final decision of this court and a motion for rehearing is still pending. In Harvey, the defendant argued that counsel was per se ineffective for admitting guilt during guilt-phase opening statement. Counsel's opening began with his statement that "Harold Lee Harvey is guilty of murder." This Court rejected the State's argument and the trial court's conclusion that trial counsel was conceding to the lesser-included crime of second-degree murder in light of Harvey's confession. In so holding, this Court relied upon its review of the entire opening statement, which it concluded revealed that counsel admitted that Harvey deliberated his plan to kill. This Court found that admission a concession to Harvey's guilt on first-degree murder and the functional equivalent of a guilty plea. Moreover, this Court noted that Harvey testified at the evidentiary hearing that he did not consent to conceding any degree of murder and that trial counsel testimony revealed only that he informed Harvey of his strategy to concede second-degree.

Harvey like Nixon involves concessions made during opening argument. Here, in contrast, there was no concession made in either opening or closing argument. Here, defense counsel, although faced with overwhelming evidence of guilt, did not concede Holland's guilt on any crime, but instead, argued that Holland was not guilty by reason of insanity. Defense counsel's reference to Holland's testimony was an attempt to gain credibility with the jury on facts not in dispute to give more credence to the insanity defense.[4] He cannot be considered per se ineffective and affirmance is required.

POINT II

THE TRIAL COURT PROPERLY DENIED CLAIM VIII, WHICH ALLEGED INEFFECTIVENESS OF PENALTY PHASE COUNSEL FOR NOT INVESTIGATING AND PRESENTING SUFFICIENT MITIGATION, AFTER AN EVIDENTIARY HEARING (Restated).

Claim VIII alleged that penalty phase counsel, Mr. Evan Baron, was ineffective for failing to properly investigate mitigation evidence "concerning Holland's birth, childhood and early adult life." Even though Holland requested that Mr. Baron

[4] Holland's claim that counsel's admission laid the groundwork for his first-degree murder conviction under a felony-murder theory, has likewise not been proven. The State proceeded under both premeditation and felony-murder theories for the first-degree murder of Officer Winters. The verdict was a general one, so there is no way of knowing which theory the jury relied upon. The jury found Holland guilty of robbery and attempted sexual battery, which constitute predicate felonies. Further, as defense counsel Lewis testified, even if he had argued aggravated battery, it would constitute a predicate felony.

speak only with his father, Albert Holland, Sr., about mitigating circumstances, he argues that counsel had an independent duty to investigate mitigation evidence. This Court will find that the trial court properly denied this claim, after an evidentiary hearing, based on the complete lack of evidence presented at the evidentiary hearing. Holland failed to present any evidence of what mitigation was available that defense counsel did not uncover and therefore, has failed to prove that defense counsel performed deficiently and/or that he was prejudiced.

The standard of review for ineffective assistance of counsel claims raised in postconviction proceedings, is that "the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003). See Davis v. State, 28 Fla.L.Weekly S835, S836 (Fla. November 20, 2003); Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel, but recognizing and honoring "trial court's superior vantage point in assessing credibility of witnesses and in making findings of fact"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000) (announcing appellate court's "review the prongs of ...

ineffective assistance of counsel as questions of mixed law and fact."); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Rose v. State, 675 So. 2d 567 (Fla. 1996). "The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo." Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

In order to be entitled to relief on an ineffectiveness claim, Holland must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong

> presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding reviewing court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000)(same).

Holland has a heavy burden to meet given that a court must, "indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgement." Strickland. In explaining the concept of reasonableness the Florida Supreme Court recently stated the following:

> The *Harich* court held, however, that a defendant must prove that the approach taken by defense counsel would have been used by no professionally competent counsel and that the approach taken by counsel was one which did not fall "within the objective yardstick

> that we apply when considering the question of ineffectiveness of counsel' *quoting* Harich, at 1471. "

State v. Williams, 797 So.2d 1235, 1239 (Fla. 2001). Further, to demonstrate prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As applied to the penalty phase, this means a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different" absent the errors or that the "deficiencies substantially impair confidence in the outcome of the proceedings." Gaskin v. State, 737 So.2d 509, 516 n. 14 (Fla. 1999). See also Robinson v. State, 707 So.2d 688, 696 (Fla. 1998), citing Rose v. State, 675 So.2d 567, 570-71 (Fla. 1996). With these principles in mind it is clear that Holland has failed to establish that defense counsel Baron's penalty phase performance was constitutionally deficient.

Mr. Baron testified, at the evidentiary hearing, that he was appointed to the case on January 25, 1995, as penalty phase counsel, five months prior to the appointment of guilt-phase counsel, Mr. Lewis (PCR 12 53-54, 65).[5] His sole duty was to

[5] Mr. Lewis was appointed in June 1995, to replace Ken Delegal, Holland's original guilt phase counsel, because Delegal was having personal and legal problems. (DA 657-66).

handle the penalty phase, meaning that he was to determine and collect mitigating evidence in case there would be a penalty phase (PCR 12 54). Baron focused on the mental health issue as statutory and non-statutory mitigation (PCR 12 62-63). Further, Mr. Baron was not working from scratch, since this was a re-trial and prior counsel had already investigated and conducted a penalty phase (PCR 12 59).

The defense at re-trial was insanity, the same as it was as Holland's first trial (PCR 12 65). Mr. Baron spoke with Holland's father a number of times and he and Mr. Lewis met with Holland's father, twice, prior to trial (DA 688, 705). At guilt phase, Holland presented testimony from Dr. William Love (psychologist)(DA 4425-4514), Dr. Raymond Patterson (psychiatrist) (DA 4658-4768) and Dr. Frances Welsig (SDA III T 53-115), to establish his insanity. Dr. Love was appointed in 1991 to evaluate Holland and reviewed a "box" of materials, including Holland's prison and medical records (DA 4425-30). When Holland refused to be interviewed, Dr. Love spoke with Holland's father for two (2) hours (DA 4435). Holland's father reported that his son did "very well" in the beginning, he developed normally, had no health or emotional problems and was an "exceptional athlete, liked by others and got along well." (DA 4437). Holland's grades began falling when he was 16-17 years-old once he became involved with drugs and started getting

into trouble with the law (DA 4437-38).

Dr. Patterson was a psychiatrist at St. Elizabeth's Hospital when Holland was referred to the hospital for a competency evaluation following his arrest in July 1981 (DA 4672). In September 1981, a multi-disciplinary team diagnosed Holland with "chronic undifferentiated schizophrenia" which led to him being found not guilty by reason of insanity under the Washington, D.C. standard (DA 4673-75). Dr. Frances Welsig, a psychiatrist from Washington D.C., saw Holland three times for counseling after his escape from St. Elizabeth's (DA 58-73). Holland's father, Albert Holland, Sr., also testified at guilt-phase that Holland Jr., lived at home until he was approximately 17 years-old and was an average student, getting B's and C's (PCR 12 76). Holland Jr.'s problems began when he changed high schools and began taking drugs and getting into trouble (PCR 12 76-77). Holland Jr. had no family problems during his first 17 years and started drifting away from home at 17 years-old (PCR 12 77, DA 4770-71).

At the evidentiary hearing, Mr. Baron explained that he focused on the mental health issue as statutory and non-statutory mitigation (PCR 12 62-63). Regarding his investigation "concerning Holland's birth, childhood and early adult life," Mr. Baron explained that he spoke with Holland, his father and reviewed records (PCR 12 59-60). Holland's father

had assured him that three additional family members (Holland's mother, brother and sister) were coming to testify at Holland's penalty phase (PCR 12 70). Baron never expected a problem with the family members attending and was surprised when the mother, brother and sister did not show up to testify (PCR 12 70).

Baron notified the court immediately prior to the start of the penalty phase, that his original **intention was to have four witnesses testify: Holland's father, mother, sister and brother**, but that only Holland's father had arrived in Florida (DA 6480, PCR 12 69-70). The court asked whether the witnesses would be available to appear the next day or Friday (DA 6480). Mr. Baron wasn't sure and asked that the court inquire of Mr. Holland, Sr. itself (DA 6480). Mr. Holland, Sr. took the stand to explain that his wife, son and daughter were scheduled to attend the penalty phase but his wife, Geneva, could not attend because she was housebound with chronic arthritis (DA 6481-82, T1 28). Also, his son, Christopher, was out-of-town and not reachable and his daughter, Alma, had a job commitment that she could not break (DA 6482-83, PCR 12 71).

Later that afternoon, Mr. Baron updated the court that Mr. Holland, Sr. had contacted his son, Christopher, who was back in town, but was informed that Christopher would not be coming to testify (DA 6603-04). Mr. Baron requested a telephone number

for Christopher so that he could contact him directly, but stated “it was obvious to [him], from the response [he] got, that it was not something the family had any desire for [him] to do.” (DA 6605). Mr. Baron noted that his only contact with the other family members was through Holland’s father (DA 6605). Holland had advised him that everything would be done through his father and Baron had abided by his wishes (DA 6605, PCR 73). Mr. Baron explained at the evidentiary hearing that it was not uncommon for him to have left it up to Holland Sr., to gather these family witnesses, he noted that you generally don’t have to subpoena family witnesses because they come voluntarily (PCR 86). In his 25 years of experience as a trial lawyer, Mr. Baron has learned that family members who don’t want to testify aren’t good witnesses (PCR 12 52, 88).

Mr. Holland, Sr. was put on speaker phone at the penalty phase and stated that he spoke with his son Christopher who informed him that he would not be able to participate in the proceedings, even if they were delayed for several days or until next week to await his arrival (DA 6604-08). According to Mr. Holland, Sr., no other family members, neither his son, daughters nor wife were available or desirous of coming to the trial (DA 608-11). Mr. Baron then asked for telephone numbers for Christopher and the other family members so that he could contact them directly (DA 6610-11), but was told the mother and

sister didn't have phones and he was not given Christopher's number (DA 6611). Mr Holland, Sr. stated that he would have Christopher contact Mr. Baron or his investigator (DA 6611). Thereafter, the court inquired whether that had been done and Mr. Baron noted that it had not happened (DA 6664-65). Prior to resting the defendant's penalty phase case, Mr. Baron indicated that the investigator had not received any telephone calls from Christopher or any other family member (DA 6745-47). The State offered to have the sister, Rebecca Holland's, testimony from the first trial read into the record, but Mr. Baron declined. Holland's father and sister, Rebecca Holland, were the only two family witnesses who testified at the penalty phase in the first trial (PCR 12 59).

At the evidentiary hearing, Mr. Baron explained that he purposely chose to not have Rebecca Holland's testimony read into the record because it was "worthless" since she hadn't seen her brother in a number of years and really knew nothing about him (PCR 12 62, 81). Mr. Baron felt the testimony wouldn't mean much to the jury without the sister present and could have been viewed negatively by the jury, so it could have done more harm than good (PCR 12 81-82). He believed that was the case for all the brothers or sisters, that none of them had contact with Holland throughout the years and that the only family member who had continuing contact with Holland was his father (PCR 12 82).

At penalty phase, Mr. Baron presented Holland's family history through his father, who was able to give the jury a total picture of Holland's life (PCR 12 63). Holland Sr. again took the stand during the penalty phase and testified that Holland had five (5) siblings, one brother is a police officer (PCR 12 77) and the other four (4) sisters work for the government or private business (PCR 12 77). The family was poor, but Holland Jr. was an average student, was not in trouble and liked sports and music (PCR 12 78). Holland Jr. played the trumpet, guitar, harmonica and basketball (PCR 12 78). The family took martial arts together and played tennis together (PCR 12 78). Holland Jr.'s personality changed when he changed high schools in the 11th grade, he started taking drugs and getting into trouble with the police (PCR 12 79). Mr. Baron was not aware that the brother or sisters would say anything different about Holland's life to age 17 and was not aware of any additional information that other family members would have (PCR 12 83, 87). He believed that he got everything he was going to get through the father (PCR 12 88).

Mr. Baron further noted that he relied upon the testimony of Drs. William Love, Raymond Patterson and Frances Welsig, who testified during guilt phase, as to Holland's insanity, as establishing mitigation and also presented testimony from Drs.

Thomas Polley and Robert Madsen, two psychiatrists from St. Elizabeth's, and Roger Durban, Holland's attorney from Washington D.C., to establish mental health mitigation (PCR 12 84). These experts had all obtained background information on Holland, including his childhood history and medical, hospital and other records (PCR 12 84, 96). All of those records and background information were consistent with Holland Sr.'s testimony (PCR 12 95-96).

As the trial court found, Holland failed to demonstrate that Baron's investigation of mitigation evidence concerning Holland's "birth, childhood and early adult life" was deficient (PCR 1042). Holland did not present a shred of evidence at the evidentiary hearing that was different than that presented at his penalty phase. Further, he did not show that there was mitigation evidence available that defense counsel Baron failed to uncover. Counsel cannot be deemed deficient for failing to investigate/present mitigation evidence unless mitigation exists. See Asay v. State, 769 So.2d 974 (Fla. 2000); State v. Riechmann, 777 So.2d 342 (Fla. 2000). Here, as already noted, there was absolutely no evidence presented at the evidentiary hearing as to what the mother, brother, sisters and/or any other witness would have testified to in mitigation and whether they were, in fact, available to testify at the penalty phase. Consequently, there's been no showing that there was any

mitigation evidence available to uncover and relief must be denied. See Gore v. State, 2003 WL 1883690 (Fla. 2003)(holding, in part, that defendant had failed to prove ineffectiveness claim by failing to present any evidence at evidentiary hearing from witnesses who he claimed would be helpful); Rivera v. State, 717 So.2d 477, 486 (Fla. 1998)(holding ineffectiveness had not been proven where mental health experts **did not** testify that defendant's admissions were merely sexual fantasies; because there was no testimony at the evidentiary hearing no support for claim); Cherry v. State, 781 So.2d 1040 (Fla. 2000)(noting that if the record reflected that there were no mitigating circumstances that existed to be discovered by a lawyer conducting a reasonable investigation, the defendant would be hard pressed to demonstrate that his lawyer's default made any difference).

Moreover, as the trial court found, this is not a situation where no attempt was made to investigate. Rose v. State, 675 So.2d 567 (Fla. 1996); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). The trial court concluded that the investigation by Mr. Baron was reasonable under the circumstances. Here, Mr. Baron explained that both his client and Mr. Holland, Sr. wanted Mr. Holland, Sr. to coordinate bringing the other family members to testify. Holland's father had assured Mr. Baron that he would bring these witness to testify and Mr. Baron had no reason not

to believe his representations. Mr. Baron had spoken with Holland's father on a number of occasions and both he and Mr. Lewis met with him, twice, in Florida before the trial to discuss his son's case. He was actively involved in his son's case and it was reasonable for Mr. Baron to rely upon Holland's father to coordinate and bring the family witnesses to testify.

Finally, it is clear from the evidentiary hearing that the other family members' testimony would have been cumulative to the testimony elicited from Holland's father. Defense counsel cannot be deemed deficient for failing to present cumulative evidence. See Downs v. State, 740 So.2d 506, 516 (Fla.1999) (affirming trial court's denial of defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing); see also Patton v. State, 784 So.2d 380 (Fla. 2000); Rutherford v. State, 727 So.2d 216, 224-25 (Fla.1998); Valle, 705 So.2d at 1334-35.

Holland not only failed to prove deficiency but also failed to prove prejudice by failing to show that counsel's ineffectiveness actually "deprived the defendant of a reliable penalty phase proceeding." Rutherford, at 223. The United States Supreme Court made it clear in Williams v. Taylor, 529 U.S. 362 (2000) that the focus is on what efforts were undertaken in the way of an investigation of the defendant's

background and why a specific course of strategy was ultimately chosen over a different one. The inquiry into a trial attorney's performance is not an analysis between what one counsel could have done in comparison to what was actually done:

> The standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *accord Williams v. Taylor*, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by *Strickland*). The purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland*, 104 S.Ct. at 2065; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled."[12] *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)(emphasis added).
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[12] "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.' " *Wate*rs, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler v. United States, 218 F.3d 1305, 1313 n. 12 (11th Cir. 2000). It is always possible to suggest further avenues of defense, especially in hindsight; however, the focus must be on what strategies were employed and whether that course of action was reasonable in light of what was known at the time. Because Holland failed to present any evidence different than that presented at his penalty phase, no prejudice has been shown. Further, it is clear that the family members' testimony would have been cumulative to that presented through Holland's father and therefore, could not have resulted in a different outcome for the penalty phase. Because Holland failed to prove deficiency and prejudice, his claim for relief must be denied.

Holland's reliance upon Gaskins v. State, 737 So.2d 509, 516 n. 14 (Fla. 1999), Deaton v. State, 635 So.2d 4 (Fla. 1993), State v. Lewis, 838 So.2d 1102 (Fla. 2002), and Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), as proving that he established prejudice in this case is misplaced. Gaskin holds only that the defendant in that case was entitled to an evidentiary hearing on his claim of ineffective assistance of penalty phase counsel. Further, Deaton and Lewis are cases upholding a trial court's grant of a new penalty phase after finding waivers of mitigation invalid based on no opportunity to make an informed decision since counsel had done no

investigation into mitigation. In Deaton, this Court affirmed the granting of a new penalty phase finding that Deaton's waiver of mitigation was not knowing, intelligent and voluntary because Deaton's counsel had failed to adequately investigate mitigation and presented no evidence whatsoever of mitigation at the penalty phase. The evidentiary hearing showed that several mitigators would have applied had counsel properly investigated and given the defendant the opportunity to make an informed waiver. This Court agreed with the trial court's finding of no ineffectiveness "[b]ased on the facts known to guilt phase counsel at the time of trial, he presented the only possible defense available." Id. This Court found no basis to "second guess" trial counsel's strategy during the guilt phase of the trial.

Likewise, in Lewis, a state appeal, this Court upheld the grant of a new penalty phase for the same reason: the defendant's waiver of mitigation was invalid since defense counsel failed to conduct an adequate penalty phase investigation and therefore, did not properly advise Lewis relative to the ramifications of waiving mitigation. As in Deaton, there was plenty of mitigation evidence presented at the evidentiary hearing that could have been presented at the penalty phase. Here, in contrast to Deaton and Lewis there was absolutely no evidence presented at the 3.850 evidentiary

hearing that was not presented at the penalty phase. Consequently, those cases are inapplicable. Similarly, in contrast to Harris, this was not a case where counsel's failure to present mitigation resulted from neglect, a belief that someone else was doing the investigation.

Moreover, Wiggins, 123 S.Ct. at 2527, is inapplicable. Defense counsel's performance in Wiggins was found deficient because he "never attempted to meaningfully investigate mitigation" although substantial mitigation could have been presented. Here, it is clear that Mr. Baron conducted an extensive meaningful investigation and presented substantial mitigation on Holland's behalf.

POINT III

THE TRIAL COURT DID NOT ERR BY SUMMARILY DENYING CLAIMS I, II, IV, V, VI & VII (Restated).

Holland's last claim is that the trial court erred by summarily denying Claims I, II, IV, V and VI. The State's first argument is that Holland's counsel, at the case management hearing, that he was entitled to a hearing only on Claims III and VIII. Consequently, he cannot claim now that the trial court erred by summarily denying the other claims. At the case management hearing, Holland's counsel stated:

> **MR. COLLINS**: Judge, I would suggest that it is our position that there are two claims that would require an evidentiary hearing.
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> Claim three, which is counsel's unauthorized concession of Holland's guilt of attempt to commit first-degree murder, constituted ineffective assistance. Claim four– I'm sorry not claim four. Claim eight, having to do with failure to adequately investigate evidence in litigation.
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> All the claims, our position is that it is sufficiently plead by both sides. You have the record of the trial. I think based on what we present to you, you can make a ruling. I don't know if you'll do that today.
>
> **THE COURT**: No, by writing.
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> **MR. COLLINS**: So I would suggest to you that you do that by writing or maybe have a status before we have an evidentiary hearing. To shortcut things, those are the only things we propose we think that are sufficiently pleaded in what we submitted. If that helps narrow things for you.
>
> If you have want to run through the other claims as we go.
>
> **THE COURT**: The other claims are legal issues and candidly, or maybe legal issues and the Court will address them as such in their order.

(PCR Vol. 9 3-4). Thus, counsel conceded that he was only entitled to an evidentiary hearing on Claims III and VIII and he cannot argue now that the trial court erred by summarily denying those claims.

Additionally, a review of Claims I, II, IV, V and VI shows that the trial court's summary denial of them was proper. "To

uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them." Gordon v. State, 863 So.2d 1215, 1218 (Fla. 2003), citing Occhicone v. State, 768 So.2d 1037, 1041 (Fla.2000). This Court further explained in LeCroy v. Dugger, 727 So.2d 236 (Fla.1998):

> A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.

LeCroy, 727 So.2d at 239 (quoting Kennedy v. State, 547 So.2d 912, 913 (Fla.1989)).

Claim I alleges that trial counsel was ineffective for failing to object to testimony from Deputy Brian McDonald, the officer who found the murder weapon, that “he believed the gun had been intentionally placed and hidden between the rocks rather than dropped.” The trial court agreed with the State that this claim was legally insufficient, procedurally barred and without merit (PCR 1007-08, 1043-44). The trial court also found that the claim was refuted by the record (PCR 1007-08,

1043-44). Regarding legal insufficiency, it is clear that Claim I fails to allege the requisite prejudice under Strickland, i.e., a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different. The proceeding referred to in Strickland is the trial. Claim I fails to allege how the results of Holland's **trial** would have been different had defense counsel objected to Deputy McDonald's testimony. Instead, he improperly contends that the outcome of his **appeal** would have been different had counsel objected. According to Holland, had defense counsel objected to Deputy McDonald's testimony, the Supreme Court would have been precluded from relying upon it, on appeal, in finding Dr. Martell's testimony to be harmless. See Holland, 773 So.2d at 1075-76.

Holland "may not simply file a motion for postconviction relief containing conclusory allegations . . trial counsel was ineffective and then expect to receive an evidentiary hearing." Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) (opining that a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record").

Additionally, Holland's claim is procedurally barred. The

admission of Dr. Martell's opinion testimony, that the gun was placed down, was challenged on appeal and found to be harmless error. The Florida Supreme Court has repeatedly held that it is inappropriate to recast a substantive claim as one of ineffective assistance in order to avoid a procedural bar. E.g., Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990) ("A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel."); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."). Claim I is a re-cast or sub-claim of the objection to Dr. Martell's testimony into an ineffectiveness claim; arguing that defense counsel should have objected to Deputy McDonald's testimony on the same subject so that the Supreme Court would have been precluded from relying upon it in support of its harmless error rationale.

Relying upon Jackson v. State, 711 So.2d 1371, 1372 (Fla. 1998) and Corzo v. State, 806 So.2d642 (Fla. 2d DCA 2002), Holland argues that Claim I cannot be considered procedurally barred. Those cases are inapplicable. In Jackson the Fourth District held that an argument is not procedurally barred if it is raised on direct appeal but not addressed because unpreserved. Similarly, in Corzo, the Second District held that

a defendant is not procedurally barred from raising an ineffectiveness claim in his post-conviction motion just because he raised the same ineffectiveness claim on direct appeal since there was no written opinion and thus, no way of knowing whether the claim had been rejected or merely dismissed as premature. See also Wells v. State, 598 So.2d 259 (Fla. 1992)(claim cannot be considered procedurally barred if not objected to and therefore not preserved for appellate review).

Here, Holland's argument is not simply that counsel was ineffective for failing to object to Deputy McDonald's testimony but that counsel was ineffective for not objecting to the testimony and thereby preventing it from being used to find the improper admission of Dr. Martell's opinion testimony, that the gun was placed down, to be harmless error. As such, it is a re-cast or sub-claim of the Dr. Martell claim and procedurally barred.

The trial court also agreed that Claim I was without merit. To begin with, Deputy McDonald **did not** make the statement, on direct examination, that "he believed the gun had been intentionally placed and hidden between the rocks rather than dropped," as Holland alleges. Rather, Deputy McDonald explained that he was searching in a field and that as he "looked in between some rocks and some pieces of equipment, [he] did locate a gun." (DA Vol. 65, p. 4374). When asked "[h]ow it was placed

in there," Deputy McDonald responded:

> DEPUTY MCDONALD: To the best of my knowledge it was facing, the barrel of the gun was facing south. It was actually on the ground, but you had to bend down to actually see the gun.
>
> PROSECUTOR: What do you mean you had to look down to see the gun; was it dropped or placed or what?
>
> DEPUTY MCDONALD: It was, to me, it didn't appear 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.

(T Vol. 65, 4374-75).[6]

Defense counsel cannot be deemed ineffective for failing to object to Deputy McDonald's testimony that it didn't appear to him that the gun had been dropped. "[O]pinion testimony of a

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[6] Holland's page cites include cross-examination:

> DEFENSE COUNSEL: **So it's your belief that the gun was placed there as opposed to being dropped or being thrown down?**
>
> DEPUTY MCDONALD: **From the way I observed it, yes.**
>
> DEFENSE COUNSEL: And what makes you say that or believe that?
>
> DEPUTY MCDONALD: Basically from first looking at it. As I said, you had to crouch down and take a look inside of there. I didn't see it from where I was standing. I was looking down toward the ground as I did find it.

(DA Vol. 65, 4381). Defense counsel could not object to his own questions.

lay witness is only permitted if based on what the witness has personally observed." Nardone v. State, 798 So.2d 870, 873 (Fla. 4th DCA 2001), citing Fino v. Nodine, 646 So.2d 746 (Fla. 4th DCA 1994). See also Sec. 90.701, Fla. Stat. (2001). Here, Deputy McDonald's testimony was clearly based upon his personal observations as the finder of the gun. Thus, defense counsel was not ineffective for failing to object to clearly admissible testimony. Nardone, relied upon by Holland, is immediately distinguishable from this case because it involved opinion testimony from a police officer, who was not an eyewitness and whose testimony was not based on personal observations, as to how an "aluminum strip" was used.

Moreover, Holland has failed to show the necessary prejudice because he has failed to show a reasonable probability that the result of his trial would have been different had defense counsel objected. Because Deputy McDonald's testimony was clearly admissible, any objection would have been overruled and any motion for mistrial denied. Further, even assuming arguendo that the testimony was objectionable, the result of the trial would not have been different. There were several eyewitnesses in this case who testified that they saw Officer Winters struggling with Holland and then saw/heard Holland shoot the officer.

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 resisted, trying “to push down on [the gun].” 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. (DA Vol. 65 4318-35).

Betty Bouie testified that she was riding in her car when she saw a tall man have a police officer in a headlock, take the officer's gun out of his holster and shoot the man (DA Vol.58, 3516-18). The Horne family was also riding in their car when they saw the struggle. Mr. Horne saw the man reach around, take the officer's gun and shoot him (DA Vol. 59, 3700-13). His daughter, Nikki Horne, also saw the man take the gun from the officer's side and then she heard three shots (DA Vol. 59, 3684-95). Based on the eyewitness testimony, there is no reasonable probability that the result of the proceeding would have been different.

Holland does not challenge the State's legally insufficient and without merit arguments. Rather, he argues that Claim I should be reversed because the trial court found the claim was "refuted by the record," but did not attach the record portions refuting the claim. The trial court is only required to attach the record portions showing the prisoner is not entitled to relief when the denial is not predicated upon the legal insufficiency of the motion on its face. See Lightbourne v. State, 471 So.2d 27 (Fla.1985) (attachments not required when

claim is legally insufficient). Here, since the denial was predicated, in part, on the legal insufficiency and procedurally barred nature of the claim, attachment of the records was not required (PCR 1007-08, 1043-44). Further, in Bland v. State, 563 So.2d 794 (Fla. 1st DCA), rev. dismissed, 574 So.2d 139 (Fla.1990), it was held that failure to attach portions of the record was not reversible error where the trial court considered the transcript from direct appeal and it was part of the record in the rule 3.850 proceeding. Here, the trial transcript was filed with the trial court and part of the 3.850 proceedings. The trial court's order specifically states that ti relied upon the trial record (PCR 1003). Roberts v. State, 678 So.2d 1232 (Fla. 678 So.2d 1232 (Fla. 1996) and Flores v. State, 662 So.2d 1350 (Fla. 1995) are distinguishable as they did not involve express reliance by the trial judge upon the trial transcript and there was no indication in those cases that it was part of the record in the 3.850 proceeding. Consequently, affirmance is required.

Claim II alleges that trial counsel was ineffective for failing to object to ten (10) comments by the State Attorney during guilt phase closing argument. The trial court agreed with the State that Claim II is also legally insufficient (PCR 1008-09, 1044). The claim under sub-point A, which alleges that the State Attorney misstated the "expert testimony concerning the

relationship between schizophrenia and insanity [by stating] '[a]ll the doctors agree, even schitzophrenics (sic) know the difference between right and wrong,'" is factually insufficient because Holland does not explain which expert's testimony differed from the statement and how it differed. Additionally, Holland has failed to allege, other than in mere conclusory terms, how he was prejudiced by trial counsel's failure to object to all ten comments. Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (opining that a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy, 547 So. 2d at 913 (opining that "[a] defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). See, Gorham, 521 So. 2d at 1069 (finding claim legally insufficient where defendant asserted that undisclosed photographs might have proven another person was responsible for crime).

Moreover, Claim II is without merit. Trial counsel was not deficient for failing to object to the comments during the State Attorney's guilt phase closing argument. Considered in context, the comments were not objectionable and even if they were

objectionable, Holland cannot prove prejudice because there is no reasonable probability that the result of the guilt phase would have been different had trial counsel objected.

A. ALLEGATION THAT STATE ATTORNEY MISSTATED THE EVIDENCE

The State began closing arguments by telling the jurors that it was important for them to take the evidence back with them during deliberations because the items in this case were "worth a thousand words . . . ." (DA Vol. 82, 5868-69). The State Attorney noted that the 50 second audiotape of Officer Scott Winters' radio broadcast for help was important because it rebutted portions of Holland's testimony:

> So, take that statement back, that video tape back with you and look it over carefully. Also, the recording, the one minute or fifty seconds of the voice of Officer Scott Winters saying, "1094, Code 3. I have him in custody."
> And then the next thing you hear, he gives his call numbers.
>
> **"I've been shot. He's got my gun. Running west."**
>
> Listen to that, it's fifty seconds. And it's important to listen to that because when the defendant took the stand– and by the way, you have to view and consider his testimony, his credibility, just like any other witness– and he took the stand and told you, listen to this tape that when he started that broadcast, "1094, Code 3. He's in custody." He was still in the patrol car.
>
> Well, I submit to you that is ridiculous. Just by listening to the tape you can hear Officer Winters is obviously in a struggle. And "1094, Code 3" means lights and sirens,

> I need a back up right now.
>
> And you can hear in his voice. One of the last things he ever said, you can hear the struggle in his voice, the emergency of needing a response from his fellow officers.

(DA Vol. 82, 5870-71). Holland argues that defense counsel was ineffective for failing to object when the State Attorney misquoted Officer Winters as saying "[h]e's got my gun." The record shows that Officer Winters said:

> "Fox-Trot six-two. (Inaudible) 2111 Northwest four court, apartment four. (Inaudible) ten-eight. (inaudible) He went where.
>
> "Thank you. (inaudible) code two. I got him in custody. 656 ninety-four code three. 2600 Hammond. I got him in custody.
>
> "656, ten-nine your twenty?
>
> "(Inaudible) Unable to raise.
>
> "All units India 6-5-6 possibly needs a ninety-four code three 2600 Hammond. ninety-four code three (inaudible).
>
> "656 is at 2600 Hammond. Ten-ninety-four code three (inaudible).
>
> "All units ten-three. We're trying to get 656's ten-twenty. 6-5-6 go ahead. You're too close to your microphone and you're yelling.
>
> "(Inaudible) **He's westbound. I've been shot**.
>
> "All units ten ninety-four code three 2600 Hammond, Hammond Units do not advise if you are fifty-one, just go, I want to leave the radio open."

(DA Vol. 77, 5315-16). Holland is correct that Officer Winters

did not say "he's got my gun." However, any error was harmless because the State Attorney expressly advised the jury to listen to the tape during deliberations and therefore, was not asking it to rely upon his representation of what was on the tape. Further, the misstatement of fact was an innocent one–- Officer Winters was indeed shot with his own gun which Holland wrested from him during the struggle. See Williams v. State, 824 So.2d 1050 (Fla. 4th DCA 2002) (holding that an unobjected to misstatement of the law by the prosecutor in closing argument was harmless when viewed in the context of the entire closing argument; the considerable number of times during argument where the prosecutor made the correct statement of law; the court's instructions that what the lawyers say is neither evidence nor argument; and the court's proper instructions of the law. Skanes v. State, 821 So.2d 1102, 1105 (Fla. 5th DCA 2002) (finding no abuse of discretion where trial court overruled an objection to the prosecutor's misstatement of testimony during closing argument on ground that trial court instructed the jurors that lawyers are not witnesses and if the jurors' recollection of the evidence differed from that of counsel, they should disregard counsel's recollection).

State v. Cutler, 785 So.2d 1288, 1289-90 (Fla. 5th DCA 2001), relied upon by Holland, is completely inapplicable. In that case, defense counsel **objected** after the prosecutor misstated the

defendant's testimony, effectively telling the jury that the defendant's testimony had stopped short of a virtual confession to the offense charged. The trial court overruled the objection finding the statement was a "fair characterization" of the testimony; however, the Fifth District disagreed, holding that the prosecutor's statements were either a figment of his imagination or mis-memory. Either way, the court concluded, it was harmful error because it interjected evidence never adduced at trial, which was tantamount to a confession, in a case where credibility was a key issue. Considering the overwhelming eyewitness testimony presented in this case and the fact that any error is clearly harmless, there is no reasonable probability that the result of Holland's trial would have been different and therefore, he has failed to prove the requisite prejudice.

B. ALLEGED ARGUING OF MATTERS NOT IN EVIDENCE

Holland next contends that the State Attorney argued "matters not in evidence" when he analogized Holland's actions to avoid detection with those of a little kid who, after breaking a window, runs, hides and lies about it when caught:

> [T]he way I look at this case is common sense. And three words when you're talking about what somebody is thinking; what are their actions; how do they do the crime; what do they say?
>
> For instance, telling Thelma Johnson to shut up, bitch, or I'm going to kill you; why does he tell her that?

> He tells her that because he doesn't want to be detected.
>
> Where does he commit that crime? In an isolated area so he won't be detected. Those things are critical.
>
> And what does he do afterwards?
>
> It's like a little kid throw a rock and break a window; what does he do? He runs away. And if somebody is looking for him; what does he do? He hides.
>
> And if he's caught: Did you break that window?
>
> No, I didn't beak (sic) that window. He lies.
>
> In this case, you have Albert Holland running, hiding, and lying. So it's really important to put your common sense and evaluate the physical evidence and the sworn testimony in reaching your conclusions.

(DA Vol. 82, 5871-72). It is clear that the State Attorney was not arguing "matters not in evidence," but rather, was merely making an analogy to get his point across to the jury. See Rimmer v. State, 825 So.2d 304, 324 f.n.16 (Fla. 2002) (finding use of baseball analogy permissible). Silva v. Nightingale, 619 So.2d 4 (Fla. 5th DCA 1993), relied upon by Holland, is inapposite as it did not even involve the use of an analogy, but rather, the prosecutor's expression of his opinion regarding the credibility of witnesses. Because the analogy was permissible, defense counsel was not required to object. Further, Holland cannot establish the requisite prejudice. Any objection by defense

counsel would have been overruled; thus, there is no reasonable probability that the result of Holland's trial would have been different.

C. ALLEGED EXPRESSION OF PERSONAL BELIEF IN HOLLAND'S GUILT

Holland next argues that the State Attorney improperly expressed his personal belief in Holland's guilt when he stated: "and [defense counsel] says something about a robbery. The reason the robbery is in the indictment is because the robbery occurred; he took the gun away by force, violence and assault." (DA Vol. 83, 5998). This statement was made during the State Attorney's **rebuttal** closing argument and was clearly in response to defense counsel's assertion that this case was not about the robbery of the gun and that the only reason it was charged was to be the predicate offense for first-degree felony murder of Officer Winters (DA Vol. 82, 5961-62). Thus, the comment was "fair reply" to defense counsel's argument. See Hazelwood v. State, 658 So.2d 1241, 1243 (Fla. 4th DCA 1995) (it is "universal that counsel is accorded a wide latitude in making arguments to the jury particularly in retaliation to prior comments made by opposing counsel.").

Further, the cases relied upon by Holland do not support his claim because they involve materially different comments from the one made here. Two of the cases involve prosecutors who actually stated that they thought the defendant was guilty, Buckhann v.

State, 356 So.2d 1327 (Fla. 4th DCA 1978) ("don't you think for one second that the Sate of Florida does not believe that [defendant] is guilty, or we would not be here"); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976)("we prosecute them because we believe they are guilty of the crimes"). The others involve overt suggestions that the defendant was guilty-- "What interest do we as representatives of the citizens of this county have in convicting somebody other than the person –" Ruiz v. State, 743 So.2d 1, 5 (Fla. 1999), "It is not my job to prosecute innocent people," McGuire v. State, 411 So.2d 939, 940 (Fla. 4th DCA 1992), "I don't come into a courtroom with the wrong persons," Duque v. State, 460 So.2d 416 (Fla. 2d DCA 1984), and "Do you think that they would bring this to you and have the State spend its time and money if there wasn't evidence that they wanted you to consider?" Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984). The comment in this case, made during rebuttal closing argument, was "fair reply" to defense counsel's assertion that the only reason robbery was charged here was to have a predicate offense for felony-murder. The State Attorney was explaining that robbery was charged because it occurred; thus, his comment cannot reasonably be construed as a personal opinion that the defendant was guilty.[7]

[7] Holland also argues, in a footnote, that the State Attorney expressed his personal opinion by using the phrase "I submit to you" throughout his closing argument. However, the use of the phrase 'I submit to you" is not an improper assertion

D. ALLEGED SHIFTING OF THE BURDEN OF PROOF.

Holland next alleges that the State Attorney improperly "shifted the burden of proof" regarding insanity when he stated "[t]here has been no person to ever say in this courtroom or anyone that testified out of this courtroom, who ever said that the defendant, Albert Holland, didn't know the difference or the consequences of his actions, except for Doctor Love." (DA Vol. 82, 5889). This comment, likewise, was not objectionable because the State Attorney was not commenting on the parties' burdens of proof, but rather, was merely reviewing the evidence presented and explaining the legal test for insanity in Florida.

> THE STATE ATTORNEY: It's very interesting when you look at the history of this case that there has been only one person, only one person who ever said the defendant didn't know right from wrong, and that was Doctor Love. All the doctors, all the famous doctors, psychiatrists and psychologists at Saint Elizabeth's Hospital, all said the defendant knew the difference from right and wrong and the wrongfulness of his conduct. It was the second prong where if somebody has a mental disease or defect, that substantially they couldn't conform their conduct to the requirements of the law and as Doctor Patterson said, it's an irresistable (sic) impulse. That's not the test in Florida.
>
> The test in Florida, do you know the consequences of your actions? Do you know the difference between right and wrong? Do you know the nature and quality of your actions? Do know if it's right and wrong? If it's

---

of personal belief. See U.S. v. Lacayo, 758 F.2d 1559 (11th Cir. 1985).

> wrong, then you're sane. If you know the nature and quality and the consequences of your actions and you know your actions are wrong, you're sane in the State of Florida.
>
> There has been no person to ever say in this courtroom or anyone that testified out of this courtroom, who ever said that the defendant, Albert Holland, didn't know the difference or the consequences of his actions, except for Doctor Love.

(DA Vol. 82, 5888-89). In criminal cases, a person is presumed sane, and the burden is on the defense to present evidence of insanity. Hall v. State, 568 So.2d 882, 885 (Fla.1990). "If a defendant introduces evidence sufficient to create a reasonable doubt about sanity, the presumption of sanity vanishes and the state must prove the defendant's sanity beyond a reasonable doubt." Bourriague v. State, 820 So.2d 997, 998 (Fla. 1st DCA 2002), citing Hall, 568 So.2d at 885. The defendant is entitled to an acquittal if the state does not prove the defendant's sanity beyond a reasonable doubt. Id.

It is clear that the State Attorney's comment here was not a reference, either explicit or implicit, to the respective burdens of proof. Instead, it was merely a review of the testimony and an explanation of the legal test for insanity in Florida. See Overton v. State, 801 So.2d 877 (Fla. 2001) (noting that prosecutor is allowed to make fair comment on the evidence); Monlyn v. State, 705 So.2d 1 (Fla. 1997). Milburn v. State, 742

So.2d 362 (Fla. 2d DCA 1999),[8] cited by Holland, is distinguishable because the prosecutor in that case completely misstated the law regarding the shifting burdens of proof during rebuttal closing argument. The prosecutor argued that the defense expert had failed to prove beyond a reasonable doubt that Milburn was insane and that the defense had failed to sustain its burden of showing insanity by a preponderance of the evidence.

Noting that the argument by the state was clearly erroneous, the Second District reversed:

> Here, the State argues that the comments were proper because the jury is allowed to determine whether the defense has provided sufficient evidence to shift the burden to the State. While the jury does make that determination, the State is incorrect in supporting an argument that the burden does not shift unless the defense has shown insanity by a preponderance of the evidence. The presumption of sanity vanishes when the defense has presented any competent evidence of insanity. See Yohn v. State, 476 So.2d 123 (Fla.1985) (holding that standard jury instruction on insanity was inaccurate because it "confuses the burden of presenting some competent evidence as to insanity, commonly referred to as the burden of going forward with evidence, with the ultimate burden of proof") (quoting Reese v. State, 452 So.2d 1079, 1081 (Fla. 4th DCA 1984) (Anstead, J., concurring in part and dissenting in part), quashed, 476 So.2d 129 (Fla.1985)). Without quantifying the defense burden, it is far less than the preponderance of the evidence argued to the jury. We cannot

[8] The other case cited by Holland, Yohn v. State, 476 So.2d 123 (Fla. 1985), is inapplicable as it involved the propriety of the jury instruction on insanity, not comments made during closing.

> say that the error was harmless because, as to count one, the jury's sole decision rested on whether it accepted or rejected the insanity defense.

Id. at 363-64. Defense counsel cannot be deemed deficient for failing to object to a comment that did not "shift the burden of proof." Further, as any objection would have been overruled, Holland has failed to establish the requisite prejudice.

Similarly, the State Attorney's comments in rebuttal closing argument did not "shift the burden of proof." Defense counsel argued that there had been a rush to judgment in this case because it was investigated by Officer Winters' fellow officers at the Pompano Beach Police Department who could not possibly be fair and objective considering the tragic loss they suffered (DA Vol. 82, 5928-31). Defense counsel attacked the investigation and methods used by the Pompano Beach Police Department and clearly suggested that the officers were lying. Thus, it was 'fair reply" for the State Attorney to argue "And I'd like to know what police officer wasn't objective and what police officer did you hear that came in to testify that did anything wrong?", "where is this big lie?" (T Vol. 83, 5996). Further, since any objection would have been overruled, Holland has also failed to establish the requisite prejudice.

E. ALLEGED ATTACK ON THE DEFENDANT AND HIS DEFENSE.

Holland next argues that the State Attorney improperly attacked the defendant and his defense. Again, the comments

Holland objects to were either "fair comment" on the evidence, fair inferences that could be drawn from the evidence or "fair reply" to comments made by defense counsel during his closing argument. See Overton; Monlyn; Ruiz v. State, 743 So.2d 1, 4 (Fla.1999)("a prosecuting attorney may comment on the jury's duty to analyze and evaluate the evidence and state his or her contention relative to what conclusions may be drawn from the evidence); Hazelwood v. State, 658 So.2d 1241, 1243 (Fla. 4th DCA 1995) (it is "universal that counsel is accorded a wide latitude in making arguments to the jury particularly in retaliation to prior comments made by opposing counsel").

The results of Dr. Martell's psychopathy test was "fair comment" on the evidence (DA Vol. 82, 5886), as were the references to the fact that Holland ran, hid and lied after committing the crimes (DA Vol. 82, 5872, 5890). Contrary to Holland's assertions, the State Attorney did not disparage Holland's theory of "self-defense." The statement Holland objects to was made during the State Attorney's rebuttal closing argument, after defense counsel had attacked the state's case and argued self-defense. The State Attorney told the jury that it was "going to hear an instruction on self-defense," and explained that "[s]elf defense is like, I don't remember, I didn't do it, intoxication, accident, and insanity." (DA Vol. 83, 6016). Again, this was appropriate rebuttal to defense counsel's closing

and distinguishable from Henry v. State, 743 So.2d 52 (Fla. 5th DCA 1999) and Ross v. State, 726 So.2d 317 (Fla. 2d DCA 1998), relied upon by Holland, wherein the prosecutors called the defense ridiculous.[9] Finally, even if any of the comments were objectionable, Holland has failed to establish the requisite prejudice as there is no reasonable probability, given the evidence in this case (see Point I), that the result of the proceeding would have been different.

F. ALLEGED ACCUSATION DEFENSE DENIGRATED WITNESSES.

Holland next objects to the State Attorney's comment, during rebuttal closing argument that "it's really interesting that [defense counsel] denegrates (sic) all the witnesses who came in here." Holland alleges that the statement criticized him for exercising his constitutional right to confront witnesses; however, he fails to cite a single case supporting that argument. It is clear that the State Attorney's argument was "fair reply" to defense counsel's attack on the credibility of the eyewitnesses during his closing argument.

G. ALLEGED INFLAMMATORY ARGUMENT

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[9] Holland argues that the State Attorney called his defense "ridiculous"; however, the transcript cite (DA Vol. 82, 5871), reveals that the State Attorney was referring to Holland's testimony that he was still in the patrol car while Officer Winters was making his last emergency call. The State Attorney noted that you could hear in Officer Winters' voice that he was engaged in a struggle while he was calling for help and that's why Holland's testimony that he was sitting in the patrol car at the time was ridiculous.

Holland next argues that the State Attorney's reference to the fact that Holland beat Thelma Johnson "mercilessly", "savagely", and "brutally", (DA Vol. 82, 5880, 5920) was impermissible inflammatory argument. Holland has failed to cite any case law in support of this argument, as required by rule 3.851, Florida Rules of Criminal Procedure and therefore, it should be summarily denied. Further, the comments were valid conclusions that could be drawn from the pictures of Thelma Johnson which depicted extensive, severe injuries and which the State Attorney advised the jury to examine during deliberations. Finally, even if any of the comments were objectionable, they were single, isolated references and there is no reasonable probability that the result of the proceeding would have been different had defense counsel objected.

H. ALLEGED VOUCHING FOR CREDIBILITY OF STATE WITNESS

Holland next argues that the State Attorney vouched for the credibility of state eyewitness Abraham Bell by stating that his testimony was "almost like a videotape." Regarding eyewitness Abraham Bell, the State Attorney said:

> You know, Abraham Bell's testimony it was almost like a videotape. He didn't see parts of it like some of the other witnesses, he saw the entirety of the transaction.
>
> And he said from the very get go, after Albert Holland swung his fists at Officer Winters' head, he continually struggled with him and went for that gun and snatched at it and held it, and even brought it around to

> the front of him and pulled it out and just fired into his body.

(DA Vol. 82, 5874). A short while later, the prosecutor again stated "you almost have like a videotape, because Abraham Bell is watching the entirety of the situation. He saw everything." (DA Vol. 82, 5891). Read in context, this was "fair comment" or a fair characterization of the evidence presented and not impermissible vouching. Abraham Bell was the only eyewitness who saw the entire struggle/shooting of Officer Winters and the State Attorney was merely arguing that his account of the events was credible (DA Vol 65, 4318-35). This is simply not the type of statement that constitutes vouching. See e.g Brown v. State, 787 So.2d 229 (Fla. 2001) (finding statement "who's got more motive to lie?" to be impermissible vouching); State v. Ramos, 579 So.2d 360 (Fla. 4th DCA 1991)(finding statement "And Susan testified, I believe she testified totally truthfully to you," to be impermissible vouching), but see U.S. v. Fuentes, 877 F.2d 895, (11th Cir. 1989)(holding that prosecutor who commented that a government witness's testimony was "very forthright" "very honest" and that he told the jury "the truth," was not vouching for the credibility of the witness, but rather, was proper argument of his credibility based on the evidence in the record).

None of the cases cited by Holland support his assertion that this comment constitutes impermissible vouching. For

example, the statement in Gorby v. State, 630 So.2d 544, 547 (Fla. 1993), was held to not even be improper bolstering; instead, the Court found held the comment was simply designed to draw the jury's attention to evidence of the handwriting expert's experience and qualifications after defense counsel sought to cast doubt on her testimony in cross-examination.[10] Finally, even if the comment was objectionable, there is no reasonable probability that the result of the proceeding would have been different had defense counsel objected.

I. ALLEGED COMMENTING ON POST-ARREST SILENCE

Holland's last argument is that the State Attorney impermissibly commented on his post-arrest silence by stating, "[b]ut remember on the tape, Detective Butler said, well, was it a fight? . . . He didn't say anything about the beating of Thelma, but he did make up an excuse of the shooting of Officer Winters." (DA Vol. 82, 5898). Holland's quote takes what was said out of context. After noting that Holland had signed his rights waiver forms, the State Attorney said:

> And he [Holland] speaks to Detective Butler. And, again, tape was introduced by us to show his demeanor, what you could understand him saying, how Detective Butler was treating him, and what went on. Of course, Detective Butler testified that he recalled the conversation and said what the conversation was, that when he's talking to Albert Holland, Albert Holland doesn't tell him

[10] The other cases cited by Holland involve the prosecutor's stating their personal beliefs, not impermissible vouching.

> about the beating of Thelma Johnson. He said he had sex with a woman a while ago.
>
> But remember on the tape, Detective Butler said, well, was it a fight. Did you -- he was going like this with his fists, and he didn't acknowledge any of that. He didn't say anything about the beating of Thelma, but he did make up an excuse of the shooting of Officer Winters. He said he was afraid of the dog. He was afraid Officer Winters was going to put the dog on him . . . .

(DA Vol. 82, 5898).

The State Attorney did not impermissibly comment upon Holland's post-arrest silence. One of Holland's recorded statements was inaudible but was admitted to show Holland's demeanor and the voluntariness of what he told Detective Butler (T Vol. 60, 3731-34). Detective Butler testified to the substance of the conversation, which included the fact that Holland didn't say anything about the sexual battery of Thelma Johnson. Holland denied the conversation, testifying that he was merely telling Detective Butler what other officers told him had happened. It was for the jury to determine whether Holland waived his rights and what he said to Detective Butler. The State Attorney was merely reviewing the contradictory evidence for the jury. His statements cannot be considered comments on Holland's post-arrest silence. Moreover, Holland cannot establish the requisite prejudice. There is no reasonable probability that the result of his proceeding would have been different had defense counsel objected to the statement.

Holland argues that Claim II should be reversed because the trial court found the claim refuted from the record but did not attach record portions. He relies upon the same cases cited for Claim I. However, as noted under Claim I, the trial court is only required to attach the record portions showing the prisoner is not entitled to relief when the denial is not predicated upon the legal insufficiency of the motion on its face. See Lightbourne v. State, 471 So.2d 27 (Fla.1985) (attachments not required when claim is legally insufficient). Here, since the denial was predicated, in part, on the legal insufficiency of the claim, attachment of the records was not required (PCR 1007-08, 1043-44). Further, in Bland v. State, 563 So.2d 794 (Fla. 1st DCA), rev. dismissed, 574 So.2d 139 (Fla.1990), it was held that failure to attach portions of the record was not reversible error where the trial court considered the transcript from direct appeal and it was part of the record in the rule 3.850 proceeding. Here, the trial transcript was filed with the trial court and part of the 3.850 proceedings. The trial court's order specifically states that ti relied upon the trial record (PCR 1003). Roberts v. State, 678 So.2d 1232 (Fla. 678 So.2d 1232 (Fla. 1996) and Flores v. State, 662 So.2d 1350 (Fla. 1995) are distinguishable as they did not involve express reliance by the trial judge upon the trial transcript and there was no indication in those cases that it was part of the record in the 3.850

proceeding. Consequently, affirmance is required.

Holland argues that the summary denial of Claim IV should be reversed because the trial court delegated to the State, the court's duty to independently review the claim. A review of the record shows the claim is without merit. The trial court's order notes that Claim IV alleged that the cumulative effect of defense counsel's failure to object to Claims I and II and counsel's unauthorized concession in Claim III deprived him of a fair trial. It further notes that the State claimed that Holland's individual claims were either legally insufficient, procedurally barred or without merit and, *a fortiori*, Holland has suffered no cumulative effect which rendered his sentence invalid. See Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not be seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."). The Court noted that although it was granting a hearing on Claim III, it agreed with the State's reasoning regarding Claims I and II and therefore, found this claim to be legally insufficient (PCR 1009, 1045). Thus, contrary to Holland's assertions, the trial court independently reviewed this claim and summarily denied it as legally insufficient.

Holland's last argument is that the trial court improperly lumped Claims V, VI, and VII together. These claims were properly joined as they are all Ring claims or variants of it.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's order denying Appellant's motion for postconviction relief.

Respectfully submitted,

CHARLES J. CRIST, Jr.
Attorney General

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DEBRA RESCIGNO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by

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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.

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DEBRA RESCIGNO
Assistant Attorney General