IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC 03-1033**
STATE OF FLORIDA,	)	**L.T. No. 90-15905 CF10A**
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit in and
for Broward County, Florida

BRADLEY M. COLLINS, P.A.
Florida Bar Number 369438
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
Telephone (954) 763-7331
Facsimile (954) 764-5040

Attorney for Appellant

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PRELIMINARY STATEMENT

Appellant ALBERT HOLLAND ("Holland") was the defendant and post-conviction movant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee STATE OF FLORIDA ("State") was plaintiff.

References to the Record on Appeal will be designated by the symbol "R" followed appropriate page number(s) and encased in parentheses. Example of citation to Record on Appeal: "(R 152)." The Transcript of the rule 3.850 evidentiary hearing for review will be designated by the symbol "T" followed by appropriate page number(s) and encased in parentheses. Example of citation to rule 3.850 Transcript: "(T 159)." The Record of Appellant's second jury trial, including the trial transcript and other documents, is cited by the volume number preceding the symbol "R" or "SR" followed appropriate page number(s), separated by hyphens and encased in parentheses. Example of citation to Record of Second Trial: (82-R-5959).

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction to review a Circuit Court's ruling upon a motion for post-conviction relief, pursuant to Fla. R. Crim. P. 3.850 and 3.851, in a death penalty case. Art. V, § 3(b)(1), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(A)(1).

STANDARD OF REVIEW

Claims III and VIII

A decision after a rule 3.850 evidentiary hearing must be supported by competent substantial evidence. Nixon v. State, 857 So. 2d 172, 176 (Fla. 2003) ("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. . . . [T]here is no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy.").

Claims I, II, IV, V, VI and VII

To uphold a trial court's *summary* denial of claims raised in a 3.850 motion, the claims must be either facially insufficient or conclusively refuted by the record. *See* Fla. R.Crim. P. 3.850(d). Where no evidentiary hearing is held below, the Supreme Court must accept the defendant's factual allegations to the extent they are not refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

STATEMENT OF THE CASE

Albert Holland was charged by indictment August 16, 1990, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The indictment charged: Count I - First-Degree Murder of a Law Enforcement With a Firearm, contrary to §§ 782.04(1)(a) and 775.0823(1), Fla. Stat.; Count II - Armed Robbery, contrary to §§ 812.13(1), (2)(a) and (3)(a); Count III - Sexual Battery with a Deadly Weapon or Physical Force Likely to Cause Serious Personal Injury, contrary to § 794.011(3); and Count IV - Attempted First Degree Murder With a Deadly Weapon, contrary to § 782.04(1)(a) and 777.04.

Holland entered a plea of not guilty and proceeded to jury trial before Broward Circuit Judge M. Daniel Futch, Jr.[1] The jury returned verdicts of guilty as charged and Holland was sentenced to death. This Court, however, reversed the original judgment and sentence on March 24, 1994, in Holland v. State, 636 So. 2d 1289 (Fla. 1994). On remand, Holland's defense counsel, Kenneth Delegal, had developed a cocaine addiction (24-R-741) and was arrested for disorderly conduct and vandalism. (24-R-739-740). He was removed from the case July 26, 1995 (98-R-7583), *i.e.,* 16 months after this Court's March 24, 1994 remand. Mr. Delegal

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[1] At trial, Holland was represented by James Stewart Lewis, Jr., Esquire (guilt phase counsel), and Evan H. Baron, Esquire (penalty phase counsel).

suspended his practice of law and, in August 1996, was found dead of a drug overdose. (37-R-1407).

Holland proceeded to jury trial before Broward Circuit Judge Charles M. Greene on September 24,1996, and was found guilty as charged on counts I, II, and IV, and convicted of the lesser included offense of attempted sexual battery with great force in count III. The jury recommended death 8-to-4 and the Court sentenced him to death on Count I; to life imprisonment on Count II (consecutive to Count I); to 15 years' imprisonment on Count III (consecutive to Counts I and II); and to 30 years on Count IV (consecutive to counts I and II and concurrent to count III). Holland appealed and this Court affirmed October 5, 2000, stating, *inter alia*:

> Holland alleges that the trial court abused its discretion in denying Holland's objections to certain testimony regarding where Officer Winters' gun was found. The gun was located between some rocks in a field near the murder scene. Dr. Martell, a mental health expert, was called by the State to rebut Holland's defense of insanity. Dr. Martell testified that it was his opinion from looking at the photograph of the location where the gun was found that the gun was hidden by Holland and not randomly dropped.
>
> * * *
>
> Holland argues that the trial court erred in admitting this testimony because Dr. Martell had no expertise which would qualify him to testify as to whether a gun was placed or randomly dropped. We agree.

* * *

> In the present case, Dr. Martell was not qualified as an expert in crime scene evidence. Therefore, the trial court should not have allowed Dr. Martell to give his opinion as to whether the gun was placed or randomly dropped. Nevertheless, we conclude beyond a reasonable doubt that this error did not affect the jury verdict. See *DiGuilio.* Prior to Dr. Martell's testimony, the State had already presented the testimony of Deputy McDonald, who found the gun the day after the murder. Deputy McDonald testified that he believed that the gun was placed between the rocks and not dropped. ***This testimony was given without objection.***

Holland v. State, 773 So. 2d 1065, 1075-1076 (Fla. 2000) (emphasis added).

On October 1, 2001, the United States Supreme Court denied Holland's petition for writ of certiorari. Holland v. Florida, 534 U.S. 834, 122 S.Ct. 83 (2001).

Holland moved to vacate and set aside his Judgment and Sentence pursuant to Fla.R.Crim.P. 3.850. (R 113-386). The State filed a Response to the Motion to Vacate (R 431-982) and Holland filed a Reply to the State's Response (R 984-998), which, together, narrowed the issues originally set forth in the Rule 3.850 motion.

Following a Huff hearing and Case Management Conference, the Court issued its order concerning the conduct of evidentiary proceedings. The Court's *Order Re Huff Hearing Case Management Conference Pursuant to Rule 3.851 Fla.R.Crim.P.*, determined that an evidentiary hearing would only be required in order for the Court to pass upon Claims III and VIII of the Motion. (R 1003-1011).

An evidentiary hearing was held before Judge Greene April 10 and 14, 2003. (T 45-174). On May 19, 2003, the trial court entered an order denying Claims III and VIII on the merits and summarily denying each of Claims I, II, IV, V, VI and VII. (R 1037-1046). Holland filed Notice of Appeal on June 2, 2003. (R 1047).

This Initial Brief follows.

STATEMENT OF FACTS

I. Guilt Phase Testimony

At retrial, Thelma Johnson testified that Holland asked if she had a "hitter" for smoking crack cocaine. (56-R-3297-8). Johnson said she did not have one, but led Holland to a wooded area so they could smoke crack together. (56-R-3299-3300).

Johnson, who had been smoking crack cocaine for two years prior to the incident and had incurred two felony convictions (56-R-3322-3), testified that she had smoked cocaine in this area "plenty of times." (56-R-3331). She got high with a lot of people she did not know. (56-R-3336). Holland began smoking crack through a beer can. Johnson said she did not smoke because she did not like to smoke from a can. (56-R-3300, 3327). Holland had a ten-dollar cocaine rock which he broke in half and smoked. (56-R-3301). The two were relaxed and talking. (56-R-3302). Holland was normal until he smoked the second rock (56-R-3332, 3337), after which he suddenly became violent (56-R-3302-3303), unzipped his pants and put his penis in her mouth. When she pushed it away, he hit her with a bottle. (56-R-3303-3304).

Pompano Beach Police Officer Pepper Shaw testified that Officer Winters came on the radio and said he had a possible suspect and then came on later and said he had been shot. (57-R-3438).

Civilian witness Roland Everson testified that on July 29, 1990, he was living at a nursery on Hammondville Road in Pompano Beach as a caretaker. (58-R-3492). He heard noises and walked out to find a police officer next to a marked K-9 unit holding a man in a headlock. (58-R-3492-3). Everson called 911. (58-R-3494). As Everson was hanging up the phone, he heard 2 shots. (58-R-3495). He saw the officer leaning on the side of the car. Everson testified that he saw Holland kneeling with the gun (58-R-3496), hesitating before he eventually left. (58-R-3498).

Betty Bouie testified that she was in a car on July 29, 1990 when she saw a man with a police officer in a headlock. She saw the man take a gun from the officer and shoot him with it. (58-R-3516-3518). The two were in a face-to-face headlock and that the man had to reach over the officer's back to get the gun. (35-R-352l-3522). She was standing only 3-4 feet away (58-R-3526) and heard two shots. (58-R-3531). In her statement to police in 1990, however, she had denied seeing the shooting. (58-R-3535-3536). Ms. Bouie had three felony convictions. (58-R-35l9).

Pompano Beach Police Officer Michael Powell testified that he was the first officer on the scene when Winters was shot. (58-R-3538-3539). Winters was outside his car. (58-R-3540). The car was running. The windows were closed. The dog was in the backseat barking (58-R-355l-2).

Ms. Dorothy Horne testified that on July 29, 1990, she was in an automobile on Hammondville Road with her husband and daughter. (59-R-3660-l366). She saw a man and a police officer in a field, struggling over a gun. (59-R-3662). The men were close and their hands were moving up and down in the air. (59-R-3664). A shot rang out and the officer fell. (59-R-3664). Mrs. Horne heard a single shot (59-R-3665) and could not tell whose hands were on the gun. (59-R-3678).

Nicki Horne testified she was in the car with her parents on Hammondville Road (59-R-3684-3685) when she saw an officer and man struggling. (59-R-3685). Ms. Horne claimed two were struggling face-to-face when the man succeeded in taking the gun from the officer's side. She said she heard three shots. (59-R-3686-3687). The shots occurred quickly with very little time between. (59-R-3694-3695).

Parish Horne stated that on July 29, 1990, he was driving with his wife and child on Hammondville Road. (59-R-3700-370l). He saw the struggle in his mirror. (59-R-370l-3702). The officer had Holland in a headlock when Holland reached around, took the gun and shot him. (59-R-3703-3704). Parish said he heard two or three shots (59-R-3705) and that Holland left right after the shooting. (59-R-37l3).

Pompano Beach Police Officer Kevin Butler testified that Thelma Johnson and Officer Winters had been found seven-tenths of a mile apart. (60-R-3721).

Officer Butler stated Holland had vomited at 8:50 p.m. on July 29, 1990 and police collected the vomit. (60-R-3770). Holland told Butler he had smoked crack cocaine and drank that day. (6l-R-3807). Butler said he interviewed Holland in Spanish through an interpreter at 9:30 p.m. and Holland said his name was Antonio Rivera. (60-R-3738-3739). Butler testified that he again interviewed Holland at 2:30 a.m. on July 30, 1990 (60-R-3730), and claimed Holland told him the officer had threatened to put the dog on him and that the two started struggling. (60-R-3745). Officer Butler claimed Holland told him that the officer had pulled out the gun and that Holland had managed to get it from the officer, shooting him twice. (60-R-3745). Holland stated that the officer had pulled out his gun and threatened to shoot him. (61-R-3834). Police never tested Holland's hands for gunshot residue. (6l-R-3849).

Forensic toxicologist Gene Detuscan tested Holland's vomit (62-R-3878-3879) whose alcohol content was 0.03. (62-R-3879). The cocaine present (62-R-3881) must have been taken orally or nasally (not only smoked) and must have been ingested in the previous 60-75 minutes. (62-R-3885-3886). Toxicologist Michael Wagner also found Holland's vomit positive for cocaine. (62-R-3889-3890).

Crime Scene Technician Deborah Pollock testified that she arrived at the Thelma Johnson crime scene at 6:54 p.m. (62-R-3906). At 7:26 p.m., she left for

2600 Hammondville Road because she heard Winters call-in on the radio that he had been shot. (62-R-3908-3909). Pollock collected Winter's nightstick, sunglasses, two empty shell-casings and a spring. (62-R-3909). Fingerprint Examiner Robert Holbrook testified that a latent fingerprint on the hood of Winters' cruiser matched a latent print from the thumb of Holland's left hand. (62-R-3935, 3944-3945).

Forensic DNA Expert Jeffrey Ban testified that blood evidence obtained from the outside of the driver's door of Officer Winters' patrol car was consistent with blood belonging to Holland. (63-R-4035). Ban testified blood found on Winters' shirt was consistent with that of Holland (63-R-4043-4045) and that human blood of unknown origin was detected on Holland's pants and sneakers. (63-R-4055-4062).

Evidence technician Monica Datz attended Officer Winters' autopsy (63-R-4l25-4126), where two projectiles were obtained: one loose in Winters' underwear and one removed from his left pelvis area. (63-R-4l28-4132). There was a bullet fragment on a white t-shirt. (63-R-4142).

Firearms Examiner Dennis Grey testified that he had examined a semi-automatic Smith and Wesson handgun which held eight rounds in the magazine and one in the chamber (63-R-4l59-4161). Gray, who received seven projectiles along with the weapon (64-R-4166), testified that the cartridges from the autopsy were

consistent with having been fired from this handgun. (63-R-4168-4169). He believed that the right magazine pouch had been damaged from being hit by both shots (63-R-4173-4178), each of which had been fired from a distance of 3-6 inches. (63-R-4l78-4182). Grey ruled-out contact wounds or that the gun had been purposely shoved under Winter's bullet-proof vest (64-R-4l99-4200), and testified it could fire if another person were to strike the hand of the person holding it. (64-R-4203-4).

Crime Lab Analyst Daniel Radcliffe testified Officer Winters' hands were positive for gunshot residue on both palms and the back of one hand. (65-R-4230).

The former testimony of Dr. Larry Tate was read to the jury. (65-R-4266). Dr. Tate stated that there had been two gunshot wounds to the body: one to the left of the navel and one where the abdomen reaches the thigh. (65-R-4276,4284). The abdominal wound was fatal; the other superficial. (65-R-4290-4292). A fragment was retrieved from the victim's underwear and one from his abdomen. (65-R-4294). Both had gone through the ammunition pouch on Winter's belt. (65-R-4298). Though he could not determine the order the shots were fired in (65-R-430l), the abdominal shot had pierced the bullet-proof vest. (65-R-4303-4304).

Abraham Bell was leaving his shop about 7:15 or 7:20 p.m. when he heard an officer say, "Hey you, get over here." (65-R-4320-432l). Bell was 40-50 feet away.

(65-R-4325). The man stopped and went back to the cruiser. The officer exited and told the man to put his hands on the cruiser and he complied. (65-R-4321-4324).

The officer placed his night stick in the man's back (65-R-4324), a struggle ensued and the officer grabbed the man, placing him in a headlock and taking him down to the ground. (65-R-4324). Bell said the two were facing one another. (65-R-4325). The man tried to rise to his feet and the officer hit him 2 or 3 times with the nightstick across the back. (65-R-4325-4326). The officer lost his night stick (65-R-4327) and the two began struggling over the officer's firearm. (65-R-4327-4328-4330). The gun came out of the holster and discharged twice. (65-R-4331).

The man then left the scene. (65-R-4332). Bell identified Holland as the man who struggled with the victim. (65-R-4328). Bell, who has a felony conviction (65-R-4332), claimed to witness this through four lanes of traffic. (65-R-4336). He says both men's hands were on the gun (65-R-4347) when it discharged. (65-R-4355).

The State next presented the testimony of Deputy Brian McDonald, who had found the firearm the day after the incident. Deputy McDonald was permitted to testify that he believed the gun had been intentionally placed and hidden between the rocks rather than dropped. (65-R-4371-4381). Though the State had referred to Deputy McDonald's expected testimony in its opening statement (56-R-3271-3272),

this testimony was given without any objection by the defense. During its closing, the State capitalized on the proposition that the gun had been hidden. (82-R-5873).

The prosecution rested and a judgment of acquittal was denied. (65-R-4396-4401). The defense called Dr. William Love, a clinical psychologist for nearly 30 years. (67-R-4426). Dr. Love, a former professor at Nova University (67-R-4426), was a board certified neuropsychologist (67-R-4426-4427) who had been declared an expert in neuropsychology. (67-R-4428-4429). Dr. Love examined Holland in 1991 after reviewing extensive medical records. (67-R-4430-4431). He reviewed records from when Holland was severely beaten in federal prison. (67-R-4433-4434). The beating and CAT scans showed a shift in the brain. (67-R-4434-4435).

Dr. Love testified that the right frontal horn of Holland's brain was displaced. (67-R-447l). He stated that Holland had begun to develop serious drug problems when he was 16 or 17 years old (67-R-4437), included the abuse of alcohol, marijuana, heroin, PCP, LSD, cocaine, Dilaudid® and Percodan®. (67-R-4439, 4448).

Dr. Love interviewed Holland and reviewed his inpatient records from St. Elizabeth's mental hospital (67-R-4440-4441), one of the most prestigious mental hospitals in the United States. (67-R-4441). Holland had been sent to St. Elizabeth's after being found insane in the District of Columbia. (67-R-4442-4443).

Holland was diagnosed as suffering from schizophrenia, a biochemically-based disease characterized by a breakdown in the ability to perceive reality. (67-R-4445-4446). Holland was given several anti-psychotic drugs at St. Elizabeth's, including Haldol® and Thorazine.® (67-R-4512). His behavior consistent with schizophrenia began after the severe beating in federal prison. (67-R-4446). Alcohol and drug abuse exacerbates the problems of schizophrenics. (67-R-4447). Dr. Love testified that Holland was legally insane at the time of the crime. (67-R-4449-4452).

The defense called the Chief Medical Examiner of Palm Beach County, Dr. John Marracini (67-R-4530-4531), a graduate of Harvard Medical School and board certified practitioner of anatomic, clinical and forensic pathology (67-R-4531) who was declared an expert in forensic pathology. (67-R-4534). He reviewed the autopsy report, physical evidence and witness statements (67-R-4535-4536) and noted the victim's wounds were irregular as the projectiles had passed through the officer's clothes and equipment. (67-R-4539-4540). Residue on the victim's hands is consistent with their having been on or near a firearm as it discharged. (67-R-4546).

Dr. Marracini testified the physical evidence was consistent with the victim's holding a person in a face-to-face headlock with both combatants' hands on the gun as it fired. (67-R-4555). He also said it was possible both individuals had their

fingers inside the trigger guard at the same time. (67-R-4559). He said the evidence was consistent with shots fired very rapidly (67-R-4566-4567) with the second shot caused by the struggle rather than by an intentional act by the shooter. (67-R-4570).

Dr. Raymond Patterson, an expert in forensic psychiatry for 15 years, Forensic Director for the State of Maryland, Acting Commissioner of Mental Health for the District of Columbia and Surveyor for the Joint Commission on Accreditation (69-R-4659-4662), stated St. Elizabeth's Hospital is one of the most respected mental hospitals in the country. (69-R-4670-4671). Holland was first admitted there on July 1, 1981, when he was referred by a court for evaluation of his mental competency and sanity. (69-R-4672). Holland underwent multi-disciplinary evaluation by hospital staff, who concluded he was insane. (69-R-4673-4674). The court found him legally insane and committed him to St. Elizabeth's. (69-R-4675). Holland was diagnosed as suffering from chronic undifferentiated schizophrenia, as well as substance abuse. (69-R-4677). Schizophrenia is a major mental disorder that compromises the ability to recognize reality. (69-R-4678). Schizophrenics are far more likely than others to become violent when on drugs or alcohol. (69-R-4682).

Holland was given 1,000 mg. of Thorazine® per day, later reduced to 750 mg. (69-R-4585-4586). Thorazine® is a major tranquilizer which acts as an anti-

psychotic drug. (69-R-4686-4688). Holland, who complained of electricity running through his body, had benefitted from treatment with Thorazine® and requested it. (69-R-4687-4688). It is rare to ask for Thorazine® in order to abuse it. (69-R-4688).

Dr Patterson testified Holland had been found not guilty by reason of insanity on yet another charge in December 1982. (69-R-4691). Holland was consistently diagnosed as suffering from schizophrenia, based on reevaluations every three months. (69-R-4693). On June 10, 1986, Holland's involuntary commitment was continued by the court. (69-R-4699-4700). Holland was continually scrutinized for malingering, the possibility of which was consistently rejected. (69-R-4703-4704).

Schizophrenia can wax and wane (69-R-4742-3) and patients may function well in a hospital yet decompensate from the pressures of an uncontrolled environment. (69-R-4744). Stressors exacerbate the illness (69-R-4745) and fear may trigger it. (69-R-4745-4746). As cocaine increases levels of the neurotransmitter dopamine, it tends to magnify schizophrenia. (69-R-4746-4747). The defense introduced two judgments from the District of Columbia finding Holland not guilty by reason of insanity on January 8, 1992 and December 14, 1992. (70-R-4767-4768).

Holland's father, Albert Holland Sr., testified that his son was bitten by a dog at age 7 and had a fear of dogs his entire life. (70-R-4781). Holland's problems

began when he became involved with an older woman who introduced him to heroin. (70-R-477l-4772). In 1979 he went to federal prison where, in October 1979, he was severely beaten and remained in a coma. (70-R-4773-4775). He had been attacked by seven inmates, two of whom beat him with a metal mop ringer and was in three different hospitals recovering from the attack. (70-R-4774-4776). Released in 1980, Holland was extremely depressed and spoke of suicide. "He just went bizarre, he went like haywire." (70-R-4776-4777). Holland was eventually re-committed to St. Elizabeth's, where he remained until his escape from the hospital in 1986. Holland, on his own, saw psychiatrist Frances Welsing. (70-R-4777, 4779).

The defense called Thelma Johnson, who admitted giving a statement after the incident in which she stated that there had been no sex involved. (71-R-4814-4817).

Sandra Bass worked at a restaurant on July 29, 1990. (73-R-4917-4919). Holland "didn't look right" and "was on something." Bass saw Holland and Jose Padilla smoking crack that day. (73-R-4915-4920, 4935). Padilla testified he met Holland on that date, when they smoked crack together at 2 p.m. (73-R-4950-4958).

Defense witness Vernon Johnson stated that on July 29, 1990, he saw Jose Padilla and Holland, and smoked crack with them. (73-R-4963-4965). Johnson thought Holland and Padilla were smoking when Johnson arrived. (73-R-4969).

Holland took the stand and testified. (74-R-5021). He testified that he began using drugs and alcohol at age 17. (74-R-5022). He began with marijuana and beer (74-R-5023-5024), but became involved with an older woman who introduced him to injecting drugs, including heroin, Dilaudid® and Percodan®. (74-R-5024).

Holland eventually went to federal prison, where he was nearly beaten to death. (74-R-5027). He was in a coma for three weeks. (74-R-5027-5028). Released from prison, he eventually got back into drugs, particularly PCP. (74-R-5028-5029). He became increasingly depressed over his beating, could not trust anyone, and stayed to himself. (74-R-5029). Holland was sent to St. Elizabeth's twice and stayed there four years. (74-R-5030-2). He was given Thorazine®, which helped him. (74-R-5032-5033). Holland eventually felt doctors were trying to keep him there for no reason and escaped in 1986. (74-R-5033-5037).

Holland sought-out a private psychiatrist for what Holland had back then described as "burning in my head" and "drilling in my mind." (74-R-5038). He saw the psychiatrist from 2 to 4 times, but stopped when he ran out of money. (74-R-5038-5039). Holland saw the psychiatrist in 1987. (74-R-5040). In 1988 and 1989, he began using drugs and alcohol again, especially cocaine. (74-R-504l-5042). He left Washington D.C. in 1990 and ended up in Pompano Beach. (74-R-5045-5046).

Holland met two men who let him sleep behind their house. He awoke the next day and began drinking beer and wine, and smoking crack. (74-R-5046-5047). He smoked twenty or thirty dollars worth of crack (74-R-5050) and went into the woods with Thelma Johnson who agreed to have sex in return for crack. They both smoked crack and Johnson took her clothes off which bothered Holland as he only wanted oral sex for fear of AIDS. She asked for more drugs and he "went off and became very violent." Holland admitted beating Johnson, but denied trying to force her to have sex. He denied putting his penis in her mouth. (74-R-5053-5059).

Holland testified on cross-examination that he had possessed no intent to kill Thelma Johnson. (75-R-5182-5183).

The next thing Holland remembered was waking up in the police station (74-R-5060), where he remembers being beaten and kicked and throwing up 2 or 3 times. (74-R-5063-5065). Holland testified the officers were saying that he had shot the officer twice and he repeated this to Officer Butler out of fear. (74-R-5068).

Holland testified that he sometimes feels like there is electricity flowing through his body, which causes him to react violently. (74-R-5133-5134). Loud noises also cause "burning in his mind," which is very painful and does not allow him to think clearly. (74-R-5134).

Dr. Frances Welsing testified that Holland saw her privately in therapy (3-SR-56-67). Holland admitted to Dr. Welsing that he had escaped from St. Elizabeth's Hospital. Holland described the hospital as very stressful. (3-SR-59). Dr. Welsing had no reason to quarrel with the diagnosis of schizophrenia from St. Elizabeth's (3-SR-69), and was also able to see clinical evidence of depression. Holland gave her his long history of drug abuse. (3-SR-64). Dr. Welsing stated that schizophrenia can wax and wane, and stress can affect this process. (3-SR-71).

Dr. Welsing testified that some patients do better in a hospital than in an outside setting. (3-SR-71-72). She saw no evidence of malingering (3-SR-76), and noted the fact that Holland found the hospital stressful makes it unlikely he was malingering since this would only prolong his stay there. (3-SR-78-79). Holland appeared to be in considerable distress, which was more consistent with mental illness than malingering. (3-SR-78-79). The defense then rested and renewed its motion for judgment of acquittal, which the trial court denied. (74-R-5351-5353).

In rebuttal, the State called Dr. Elizabeth Koprowski, a clinical psychologist, who felt Holland was sane for the two offenses. (78-R-5467-5470). Dr. Koprowski interned at St. Elizabeth's Hospital and stated that it is one of the most prestigious mental hospitals in the world. (78-R-5471). Dr. Koprowski found Holland to be

incompetent when she saw him in September 1990, which was only 6-7 weeks after the incidents. (78-R-5475-5477). Holland has a severe drug abuse problem. (78-R-5490-5491). People with schizophrenia often "self-medicate" with drugs and alcohol and this can cause violence. Dr. Koprowski said crack is a powerful drug and that when Holland smoked the second rock it disinhibited him. (78-R-5491-5492).

The State next called Dr. Harley Stock, a forensic psychologist who saw Holland in 1996 (79-R-5514-5523) and believed he evidenced anti-social personality and substance abuse, but that he was sane during both incidents. (79-R-5538-5544). Dr. Stock further testified that Holland's MRI showed a shrinking of the brain ventricles which is consistent with long-tem drug abuse. (79-R-5549-5550). He stated crack cocaine is a powerful drug (79-R-5571-5572), that he was aware of the evidence of Holland's crack use during the incident and that "the intoxication he experienced would be consistent with chronic crack cocaine use." (79-R-5573).

The State then called Dr. Daniel Martell, a forensic psychologist who saw Holland in 1996 (80-R-5634-5647) and felt he was sane during the incidents, yet malingering (80-R-5648-5649). Martell agreed that a person can malinger and have a mental illness (80-R-5706), that drugs and stress can exacerbate schizophrenia (80-R-5721), and that Holland was intoxicated during the incidents. (80-R-5732).

Both sides rested. (80-R-5737). Holland's renewed motion for judgment of acquittal was denied. (82-R-5823-5824). Holland was found guilty as charged of first degree murder of a law enforcement officer, robbery with a firearm and attempted first degree murder with a weapon, and was convicted of the lesser of attempted sexual battery with great force. (80-R-6363-6365).

During the penalty phase, the State adduced evidence that Holland had been convicted in 1979 of armed assault with intent to rob and introduced victim impact evidence concerning the current prosecution. (89-R-6497-6502).

In his defense, Holland's father, Albert Holland Sr., testified that Holland was born in New York City and grew up primarily in Washington D.C. (89-R-6506). Holland has a younger brother and four sisters. (89-R-6506). The family was very poor (89-R-6507-6508), and Holland was an average student who liked sports and music. (89-R-6509-6510). He taught himself to play the trumpet, guitar and harmonica. (89-R-6509-6510).

Holland went to a new school that was "notoriously drug infested." (89-R-6511). Up until that time, Holland had been very involved in sports, particularly tennis and basketball. (89-R-651l-6512). Holland then became dominated by drugs (89-R-65l2), missing school and living with an older woman. (89-R-6513).

Holland landed in federal prison (89-R-6514), where he was eventually found laying in a pool of blood, originally believed dead. (89-R-6514). Seven prisoners had beaten him with a metal mop wringer and had broken his jaw, the orbital bones around his eyes, and damaged his hearing. (89-R-6515). He was medically airlifted and remained in a coma. (89-R-6515). Holland was later sent to a federal hospital in Missouri (89-R-6515), and was eventually released from federal custody, returning to live in Washington, D.C. (89-R-6515).

Holland was very depressed after his release. (89-R-6515-6516). He spoke of suicide and jumping off the top of a building. (89-R-6516). He evidenced a high irritability and sensitivity he had not shown before. (89-R-6517). Holland would become very angry if he heard a dog barking. (89-R-6517). He eventually was admitted into St. Elizabeth's mental hospital after being found not guilty by reason of insanity. (89-R-6518). He was "very, very sensitive about noise." (89-R-6523).

Roger Durban, an attorney from Washington D.C. who first began representing Holland in 1981 (90-R-6556), had always had questions about Holland's competency and felt he had psychiatric problems from the beginning of the case. (90-R-6557). Holland was quickly sent to a facility for pretrial detainees with psychological problems. (90-R-6559).

Holland was disheveled, incoherent, and unable to interact "in any way, shape or meaningful form, at all." (90-R-6560). Holland would sit rocking in a chair with his hands folded. He would rarely speak. He would just drool. (90-R-6561). On the rare occasions when he did speak, Holland made no sense. (90-R-656l). Durban pursued an insanity defense for Holland and the prosecutor ultimately stipulated that Holland should be found not guilty by reason of insanity. (90-R-6564-6567).

Dr. Robert Madsen testified Holland could not conform his conduct to the requirements of the law and was insane under District of Columbia law. (80-R-6568-6569). Holland was placed in St. Elizabeth's mental hospital and was given Thorazine®, which seemed to improve his condition. (89-R-6569-6570). Holland eventually escaped from St. Elizabeth's, however, and Durban represented him on new charges. (90-R-6571). Holland was again found not guilty by reason of insanity based on the testimony of Dr. Robert Polley and the government's stipulation on December 14, 1982. (90-R-6572-6574).

Dr. Richard Radner also evaluated Holland and opined he was insane. (90-R-6573). Holland was again committed to St. Elizabeth's. (90-R-6574).

Mr. Durban had been a criminal defense attorney for 16 years and had seen malingerers, though he never suspect Holland of it. (90-R-6575). Durban "never

doubted for a second the propriety" of Holland's two previous adjudications of not guilty by reason of insanity. (90-R-6576).

The defense next called Dr. Robert Polley, Interim Forensic Administrator for the District of Columbia, as an expert in the science of forensic psychology. (90-R-6612-6616). Dr. Polley had worked as a forensic psychologist for the District of Columbia nearly 25 years. (90-R-6614). From 1973 to 1983, he was a clinical administrator at St. Elizabeth's and, from 1983 to 1990, was director of the pretrial branch of the in-patient program. (90-R-66l4). Dr. Polley first met Holland on May 9, 1982, when Holland was admitted to the pretrial ward at St. Elizabeth's on his second case. (90-R-66l7-6618).

Holland had been previously found not guilty by reason of insanity and diagnosed as suffering from schizophrenia and organic amnestic syndrome. (90-R-6619). Holland's case was reviewed every three months while he was in St. Elizabeth's and his diagnosis of schizophrenia never changed. (90-R-6620-6622).

Holland was on several different wards and was seen by several different psychologists and psychiatrists, yet none rejected his schizophrenia diagnosis. (90-R-6622-3). Holland was again found not guilty by reason of insanity (90-R-6625-6626), and committed. (90-R-6628-6629).

In 1986, Holland was again determined to be in need of commitment. (90-R-6631). Schizophrenia is a major mental illness and there is no doubt that Holland was suffering from it. (90-R-6637-6638). The staff reported evidence of Holland's hallucinations. (90-R-6655).

Dr. Robert Madsen testified as an expert in clinical psychology. (90-R-6665-6677). He worked at St. Elizabeth's from 1978 to 1985. (90-R-666-668). Dr. Madsen met Holland in July 1981, when he was first admitted. (90-R-6678). Holland was confused, displayed inappropriate affect and complained of hallucinations. (90-R-6687-6688). He was given 1,000 mg. of Thorazine®, a high dosage. Over time, he improved with the medication. (90-R-6690-6693).

Holland's official diagnosis was "chronic undifferentiated schizophrenia." (90-R-6694). The opinion of every professional who saw him was that Holland suffered from mental illness and that he was insane during both incidents. (90-R-6703-6704). He was found not guilty by reason of insanity: a disposition the government did not then oppose. (90-R-6707).

Dr. Madsen testified drugs and alcohol exacerbate mental illness (90-R-6722-6723) and that Holland was a severe drug and alcohol abuser. (90-R-6724-6725). He used marijuana, heroin, speedballs (heroin and methamphetamine), PCP, and up

to two fifths of liquor a day. (90-R-6724-6725). Dr. Madsen ssid some persons with mental disorders "self-medicate" with drugs or alcohol to relieve their symptoms (90-R-6724) and that Holland may have been using drugs "as a way of calming down the chaos . . . within." (90-R-6725). The defense then rested. (91-R-675l).

The State then recalled Dr. Martell, who stated that he felt Holland was not under the influence of extreme mental or emotional disturbance during the offense. (9l-R-6751-6752). He also felt Holland's capacity to appreciate the criminality of his conduct or to conform it to the requirements of the law was not substantially impaired (9l-R-6753-6754), though Dr. Martell admitted he had made no effort to speak to anyone who had treated Holland or to anyone in his family. (91-R-676l).

The State next recalled Dr. Koprowski (92-R-6789), who said she felt Holland was not under the influence of extreme mental or emotional disturbance (92-R-6790) and that she felt his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was not substantially impaired (92-R-6791), though Dr. Koprowski admitted Holland suffered from mental illness. (92-R-6792). The State then rested its rebuttal case. (92-R-6798).

In its closing argument, the State claimed Officer Winters had said in his radio transmissions, "I've been shot. ***He's got my gun.*** Running west." (82-R-5870)

(emphasis added). In fact, Officer Winters had said: "He's west bound. I've been shot." (R 190). Winters never said his gun was taken.

The State then shifted the burden to Holland to prove he was insane after the defense had produced evidence of insanity, arguing: "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***." (82-R-5889) (emphasis added).

The State further argued: "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? . . . And where is this big lie? What is the lie? I still haven't heard it." (83-R-5996). The State further argued: "You haven't heard anything other than Pompano or anyone else being fair in the presentation of this case." (83-R-6016).

The State then argued: "It's almost like the psychopathy test that Doctor Martell gave and he listed the checklist and thirty-four out of the forty on his list the defendant fit. He answered thirty-four out of the forty that were consistent with someone being a sociopath; lying, using aliases, committing crimes, not wanting to take responsibility. . ." (82-R-5886). (*See also* 5917; 83-R-6009).

The State went on to argue that Holland was like a little kid who throws a rock through a window and runs and hides and lies about it:

> [STATE]: It's like if you see 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 b[r]eak that window. He lies.
>
> In this case you have Albert Holland running, hiding and lying.

(82-R-5872).

The State repeatedly called Holland a liar: "He did not want to be detected. It's suspicious. Ran, hid, lied" (82-R-5890), and again: "You have to look at how he reacts in the community and whether he knows right from wrong, how he looked, ran, hid and lied" (82-R-5919), and: "He ran and he hid and he lied." (83-R-6010).

The prosecution went on to comment: "He forced his penis in Thelma Johnson's mouth and then he beat her mercilessly. He beat her savagely. He beat

her brutally. . . .You saw the pictures of Thelma Johnson - Unbelievable." (82-R-5880). "He beats her seriously, savagely. . . ." (82-R-5920).

The State next bolstered State Witness Abraham Bell--a convicted felon (65-R-4332) who claimed he had witnessed the events through four lanes of traffic (65-R-4336)--by arguing that his testimony was "almost like a videotape." (82-R-5874). The State again later commented: "You almost have like a videotape, because Abraham Bell is watching the entirety of the situation." (82-R-5891).

The prosecution also characterized the relationship between schizophrenia and insanity as follows: "All the doctors agree, even schitzophrenics (sic) know the difference between right and wrong." (82-R-5922). (*See also* 83-R-6001) ("they know the difference between right and wrong").

The State commented on Holland's post-arrest silence: "But remember on the tape, Detective Butler said, well, was it a fight? . . . He didn't say anything about the beating of Thelma . . ." (82-R-5898).

The State next accused Holland's defense counsel of denigrating the witnesses: "And it's really interesting that Mr. Lewis denigrates all the witnesses who came in here." (82-R-5994).

Meanwhile, the State disparaged Holland's defense: "Self defense? You're going to hear an instruction on self defense. Self defense is like, I don't remember, I didn't do it, intoxication, accident, and insanity." (83-R-6016). (*See also* 82-R-5871) (calling the defense "ridiculous").

The State expressed its opinion about Holland's guilt. Concerning Holland's testimony as to his version of events, the State argued: "Well I submit to you that is ridiculous." (82-R-5871). The State then argued: "I suggest to you, and I submit to you, that Albert Holland has a selective, convenient memory." (82-R-5882).

As for sexual battery, the State argued: "I submit to you she didn't take anything off. I submit to you she went back there to smoke crack cocaine. . . . He was trying to get sex all day and he took it." (83-R-5999).

On the insanity defense, the State opined: "I submit to you the defendant proves that he wasn't schitzophrenic (sic), they know the difference between right and wrong." (83-R-6001). "Did he know what he was doing? Did he know the consequences? Did he know it was wrong? And I submit to you, he did." (83-R-6011).

The State then went on to tell the jury that Holland had been formally charged with the offense of robbery in the indictment only because a robbery had actually occurred and because Holland was guilty of it:

> "The reason the robbery is in the indictment is because the robbery occurred; he took the gun away by force, violence, and assault."

(83-R-5998) (emphasis supplied).

Defense counsel omitted to object to any of the foregoing comments.

During the defense portion of closing argument, Holland's defense counsel, unilaterally and without Holland's consent, conceded Holland's guilt of attempted premeditated first degree murder. Though Holland had testified that he had possessed no intent to kill Thelma Johnson when he hit Johnson with various objects (75-R-5182-5183), defense counsel conceded Holland's guilt to attempted premeditated first degree murder. "Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes." (82-R-5959-5960).

Holland was found guilty as charged in Count I (first-degree murder), Count II (robbery), and Count IV (attempted first-degree murder), and was convicted of the lesser included offense of attempted sexual battery on Count III. (101-R-8031-8).

II. **Penalty Phase Testimony**

During the penalty phase, the prosecution introduced evidence that Holland had been previously convicted of assault with the intent to rob while armed. The State also introduced victim impact evidence. (89-R-6497-6502).

No testimony concerning Holland's birth, childhood, upbringing, school years, or any number of other possible mitigating matters was presented through any witness other than Holland's father, Albert Holland, Sr. (89-R-6506, *et seq.*).

In "preparation" for the testimony of the sole fact witness concerning Holland's beginnings, Counsel spoke to Holland's father for 5 minutes prior to his testimony. (89-R-6502). Other than Holland's former attorney, Roger Durban (90-R-6556-6557), Holland's father was the only non-expert defense witness presented during the penalty phase.

Dr. Robert Polley, Forensic Administrator for the District of Columbia, was called as a defense expert in forensic psychology. (90-R-6612, et seq.). Dr. Robert Madsen testified as a defense expert in clinical psychology. (90-R-6665, et seq.).

When the defense rested, the State recalled Dr. Daniel Martell (91-R-6751, *et seq.*) who opined Holland was not under the influence of extreme mental or emotional disturbance during the offense (91-R-6751-6752) and that his capacity to

appreciate the criminality of his conduct or to conform it to the requirements of law was not substantially impaired. (91-R-6753-6754). Dr. Martell admitted he made no efforts to speak to anyone who had treated Holland or with his family. (91-R-6761).

The State also recalled Dr. Elizabeth Koprowski (92-R-6789, et seq.) who opined Holland was not under the influence of extreme mental or emotional disturbance (92-R-6790) and that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was not substantially impaired. (92-R-6791). The State then rested. (92-R-6798).

The jury recommended death by a vote of eight to four. (92-R-6869-6870). The judge found three aggravating circumstances, no statutory mitigating factors, and two non-statutory mitigating circumstances. The trial court judge sentenced Holland to death. (94-R-6917-6967).

III. Testimony at Evidentiary Hearing

During the course of evidentiary hearing held April 10, 2003 and April 14, 2003 (T 44-175), Defendant called three witnesses: Evan Hale Baron, Esquire (appointed penalty phase counsel); Randolph MacCoy (the sole investigator hired by

Mr. Baron); and James Stuart Lewis, Jr., Esquire (appointed guilt phase counsel). The State called no witnesses. A review of the witnesses' testimony follows.[2]

Evan Hale Baron, Esquire, testified that he was responsible for the penalty phase of trial and "was not concerned with the guilt phase at all. My concern was just to try and determine and collect mitigating evidence, if there was, in fact, a penalty phase." (T 54). Though he obtained funds to hire Investigator Randolph MacCoy. (T 55), he did not recall ever asking MacCoy to interview any witness or serve a subpoena. Still, Baron agreed that, in order to gather mitigating evidence, "you'd want to talk to family members." (T 56, 57-58). Baron agreed Holland had mental health problems and that such a client might not be able to provide all the information needed for the investigation. (T 56-57, 63-64). Of the family members who testified at the first trial (before the second trial on remand), Baron spoke only to Holland's father. (T 59-60). Though Baron advised the Court that four (4) family members would testify in mitigation, he never sought to compel their attendance. (T 60). He never asked MacCoy to speak with the family members (T 60) but relied on Holland's father to bring them in (though they were all adults living apart) to testify

[2] The transcript of the evidentiary proceedings for review is contained in Volumes 12 and 13 of the present Record (T 44-175).

in mitigation, and essentially "delegated" to Holland's father the duty to get the family mitigation witnesses to court. (T 61, 91).[3] Baron never asked MacCoy to get them in to testify and did not know whether MacCoy ever spoke with them. (T 62).

Baron did not seek to introduce the former testimony of Holland's sister as he thought her testimony from the first trial was worthless. Baron never spoke with her to see what she had to offer in mitigation years after her testimony at the first trial (T 62), and did not recall speaking with anyone except Holland and his father. (T 63).

On cross-examination, Mr. Baron agreed he had met Holland's father twice. (T 68). He had expected four (4) family members to testify at the penalty phase proceedings and was "surprised" when they did not show up, though he had relied on Holland's father to see they came. (T 70). Also on cross, Baron testified that, though he had spoken with no other family member, "As I recall . . . the only person in the family that Albert seemed to have a continuing contact with, was his father." (T 82). When Baron learned the family members would not be in town to testify in mitigation, he did not request a continuance "based upon what Mr. Holland's father

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[3] Appellant's copy of Volume 12 of the Transcript, though containing all of its pages, jumps from page 90 to page 108, with pages 91 through 107 misplaced at the end of the same volume, i.e., following T 107. It should be noted that the pages are properly numbered in consecutive order and are merely out of sequence.

said," though the Court had stated it would give the defense an opportunity to bring them in to testify. (T 87-88). "I just felt, like, at that point, if they didn't want to testify, they were not going to be favorable witnesses." (T 88). No family member was present at the Spencer hearing. (T 83).

On redirect, Baron stated that although he had a duty to independently seek out witnesses that might have information potentially leading to mitigating evidence, and although the Court had authorized investigative costs, he did not recall MacCoy going out to do so. There were no subpoenas for the penalty phase. (T 89-93).

Investigator Randolph MacCoy testified that he was hired by Mr. Baron and Mr. Lewis as the defense investigator for Mr. Holland' case. (T 106). MacCoy stated unequivocally that neither Baron nor Lewis had ever asked him to investigate any part of Holland's history. (T 106-107). He was just asked to remain on call. (T 107). MacCoy agreed that when a client has mental health issues, an independent investigation becomes even more important, but testified that all he ever did in this case was meet once with Holland's father. (T 107-108).

Mr. MacCoy was never asked to obtain any of Holland's school records, was never asked to interview any of Holland's brothers and sisters to see whether they

had even talked with the father, Albert Holland, Sr., who had been delegated the responsibility of producing mitigation witnesses, and was never asked to contact or secure a witness. (T 108-110, 112). Though MacCoy was the only defense investigator in the case (T 110), Baron never asked him to obtain records or review Holland's file. (T 111).

On cross-examination, Mr. MacCoy testified that he had not been aware Mr. Baron was attempting to obtain the appearance of witnesses through Holland's father. (T 113). MacCoy did not know family members had desired to become involved until the morning of the April 10, 2003 evidentiary hearing, when the State showed MacCoy documents in preparation for the evidentiary hearing. (T 115).

On redirect, Mr. MacCoy agreed that he would normally have considered it his duty to reinvestigate a case which had been sent back for a retrial, but testified that Mr. Baron had never authorized him to do so (T 117-118), though this particular case's reinvestigation would have been of even greater importance in light of the fact that the client had mental health issues. (T 118-120).

James Stuart Lewis, Jr., Esquire, testified that he was responsible for the entire guilt phase of Holland's trial. (T 132-133). He said Holland was bizarre in many ways and increasingly so over time. (T 135). Asked if he had discussed with

Holland a strategy of conceding guilt as to the attempted first-degree murder charge, Lewis said that well before closing arguments, the two "weren't communicating really at all." Since early in the trial, Lewis testified, "any meaningful dialog between the two of us was pretty much at an end." (T 137).

Mr. Lewis testified that he never got Holland's consent to concede guilt of attempted first-degree murder. (T 138). Lewis felt that he had no choice but to give whatever closing argument that he (Lewis) thought was best. (T 139). As for conceding guilt, Lewis claimed "I said the only defense we offer as to the attempted murder of Thelma Johnson was insanity." (T 139). Lewis acknowledged Holland's testimony that he went crazy and was on drugs might comprise a defense or lesser included offense. (T 140). The following exchange then occurred:

> [MR. COLLINS] Can you explain to the Court, then, the strategy of conceding that he's guilty of attempted first-degree murder if insanity is actually the defense?

> [MR. LEWIS] I don't know if you'd consider it a strategy. You sometimes try to gain some credibility of the jury on the issues that

there seems to be absolutely no contention over by saying, okay, this is what happened, this is what's admitted, now let's go on and talk about the issues that there's really controversy over.

[MR. COLLINS] You are aware that Judge Greene actually used the attempted murder of Thelma Johnson as one of the aggravating factors in his sentencing order; correct?

[MR. LEWIS] Yes.

[MR. COLLINS] And that is the point that was conceded in your closing?

[MR. LEWIS] Conceded in that if there was no insanity defense, there was no other defense offered, yes.

[MR. COLLINS] Would you also agree that it would be incongruous when there's two counts, when there's the murder of the police officer as one of the counts and the attempted murder of Thelma Johnson, it might be incongruous to be insane on one count but able to form the intent and know what you're doing on the other count? Do you agree that that might be incongruous defenses?

[MR. LEWIS] Is it possible? It's possible but I wouldn't think that that would be likely. I think if you're insane for one, you're insane for the other given the closeness and time, but I guess an argument could be made that he was insane only for one of the incidents

[MR. COLLINS] You weren't trying to make that argument in your defense though, you'd agree; right?

[MR. LEWIS] No. It was our argument throughout that he was insane through all of the criminal episodes that night.

(T 141-143). Lewis agreed he could have, but did not, request the Court's assistance in obtaining Holland's waiver of his plea of not guilty. (T 143). Amid wrangling over the meaning of the concession (T 147-148, 150), Lewis said: "I didn't get Albert Holland's consent to say – to any statement that I made in closing argument, including the one you're referring to." (T 148). The following then ensued:

> [MR. LEWIS] But this, the statement that you're referring to, again was kind of an offhand statement. Basically it said okay, Mr. Holland has testified that he beat her.
>
> [MR. COLLINS] He made an admission to the charge at its highest level, is that a fair statement?
>
> [MR. LEWIS] It was an admission that he beat her. I don't think it was an admission that he was guilty of the offense because –

[MR. COLLINS] Did you read the words that you said in the closing argument?

[MR. LEWIS] I did. I did.

[MR. COLLINS] Did you not say that Albert Holland said in his own words that he is guilty of the first degree attempted murder of Thelma Johnson by his own admission?

[MR. LEWIS] Yes, yes.

(T 150). Lewis went on to claim that the subject statement was not intended to tell jurors that if Holland was not insane, he was guilty of attempted first-degree murder. (T 152). Lewis agreed that, although he had told jurors that Holland had admitted in his own words that he was guilty of attempted first-degree murder, Holland had ***in fact not*** testified that he had attempted to kill Thelma Johnson. (T 152).

On cross-examination, the State read from the transcript of Holland's guilt phase testimony, pausing periodically to ask Lewis whether the portion read was how he remembered Holland testifying. (T 157, *et seq*.). The defense objected to this procedure and requested a standing objection. (T 158, 159, 163). The following exchange then took place between the State and Mr. Lewis:

> [THE STATE] And [the State's] next question: Well, when you beat somebody with bottles and rocks and other blunt objects and leave somebody in this condition, don't you think there is a chance she is going to die? And do you recall Mr. Holland's response to that?
>
> [MR. LEWIS] I didn't recall it specifically, until I see it here.
>
> [THE STATE] Do you recall that the Defendant's response was: Well, there is a chance, you know?
>
> [MR. LEWIS] Yeah, I see the transcript. And I am sure it's accurate.

MR. COLLINS: I ask you to read that whole sentence.

THE COURT: Go ahead, please do so.

THE WITNESS: Me?

THE COURT: Either you, Mr. Lewis, or Ms. Bailey.

MR. COLLINS: This is my objection, she gives an excerpt. It will speak for itself.

THE COURT: It's not really complete. Please read the whole thing.

[MR. LEWIS] Well, there is a chance, you know, like you said she had her ear messed up and her hand was bruised but by hitting her hand, ***that doesn't mean she was going to die. I mean, there was a lot***

of battery to her, but that doesn't mean she was going to die. She didn't die.

(T 160-161) (emphasis added).

On redirect, Mr. Lewis conceded: "to me that's a major decision, conceding guilt, and something certainly that I would consult with my client about." (T 167). But while Lewis agreed there are times it is in a client's best interest to concede guilt of a lesser degree of the offense charged, he could not name any advantage to conceding guilt to the highest degree of the offense charged. (T 167-168).

The State called no witnesses at the evidentiary hearing and introduced no evidence. The exhibits tendered by the State were excerpts from the trial transcript.

SUMMARY OF ARGUMENT

I. The trial court's denial of Claim III is not supported by competent substantial evidence as the trial transcript and testimony at the evidentiary hearing show that, without Holland's authorization, appointed defense counsel conceded Holland's guilt of attempted premeditated first-degree murder, requiring a presumption of prejudice, a holding that he was denied the effective assistance of defense counsel, and a decision vacating his conviction and according a new trial.

II. The trial court's denial of Claim VIII is not supported by competent substantial evidence as the trial transcript and evidence adduced at the evidentiary hearing show appointed counsel's failure to properly investigate the evidence in mitigation denied Holland the effective assistance of defense counsel guaranteed by the Sixth Amendment during the penalty phase of trial, entitling him to a new one.

III. The trial court erred in summarily denying Claims I, II, IV, V, VI and VII as they are facially sufficient and not conclusively refuted by the record. The trial court's adoption of the State's response as the court's rationale for summarily denying relief impermissibly delegated to the State the trial court's duty to fully consider and decide each of Holland's claims--and, as a result, the trial court completely overlooked the substance of Holland's Claims VI and VII.

ARGUMENT

I. THE TRIAL COURT’S DENIAL OF CLAIM III IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AS COUNSEL CONCEDED HOLLAND’S GUILT WITHOUT HIS AUTHORIZATION RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL

Claim III of Holland’s rule 3.850 motion alleges trial counsel conceded Holland’s guilt of attempted first-degree murder during closing arguments without his consent. Though Holland had testified at trial that he possessed no intent to kill Thelma Johnson when he hit her (75-R-5182-5183), the trial transcript shows defense counsel conceded Holland’s guilt of attempted first degree murder:

> “Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes.”

(82-R-5959-5960). Holland alleged he never consented to this admission of guilt.

The State claimed below that Holland admitted committing attempted first degree murder in his trial testimony, “implicitly” authorizing the concession of guilt (R 467-468), but could cite to no part of Holland’s testimony in which he admitted having such an intent. Though the State noted that “Holland admitted that he <went crazy’ and started beating Thelma Johnson,” that he “admitted that he ‘snapped’ and

beat Thelma with whatever was there and that he has become 'violent' before after (sic) mixing crack and alcohol" (R 467), it could point to nothing in Holland's testimony admitting he formed any intent to kill, much less a *premeditated* intent.[4]

In an attempt to create the illusion that Holland had admitted acts which comprised the offense of attempted premeditated first-degree murder, however, the State's response mixed-in Ms. Johnson's testimony with that of Holland (R 468).

The trial court's finding in its Order denying Claim III that "Mr. Lewis did no more than admit to the conduct to which Holland had testified" (R 1039-1040) is not supported by competent substantial evidence and is, in fact, directly refuted by the transcript of Holland's trial testimony, which was read onto the record at the evidentiary hearing. (T 160-161) ("that doesn't mean she was going to die. I mean, there was a lot of battery to her, but that doesn't mean she was going to die.").

The trial court's suggestion that Holland "agreed on cross-examination that when you beat someone with bottles and rocks and leave them in this condition, there is a change (sic) they are going to die" (R 1039) would not have conceded the essential element of intent, much less a *premeditated* intent.

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[4] Indeed, the State's argument points to at least two defenses to a crime involving premeditation, *i.e.*, voluntary intoxication and insanity.

The lone case cited by the trial court in its Order denying relief was Thompson v. State, 839 So. 2d 847 (Fla. 4h DCA 2003), wherein a defendant charged with lewd assault on a child sought postconviction relief alleging his counsel was ineffective for conceding guilt without his permission. After an evidentiary hearing, the trial court in that case concluded that counsel had not conceded Thompson's guilt since the attorney had argued that Thompson's conduct did not constitute a crime.

The crime to which Holland's counsel conceded guilt, in contrast, is attempted first-degree murder. Unlike a prosecution, as in Thompson, for lewd acts against a child, the *specific intent* to kill is an essential element the State must prove to convict of attempted first-degree murder. Gurganus v. State, 451 So. 2d 817 (Fla. 1984).

Thus, Thompson is distinguishable in that the lewd act in that case is not a specific intent crime. Killian v. State, 730 So.2d 360 (Fla. 2nd DCA 1999); Harris v. State, 418 So. 2d 416 (Fla. 1st DCA 1982) (lewd assault on a child is not a specific intent crime, obviating the need for a voluntary intoxication instruction). *See also* Grady v. State, 701 So. 2d 1181 (Fla. 5th DCA 1997) ("crimes against children fall 'within the category of crimes in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act . . . and proof of an intent is not indispensable to conviction.'").

Thompson is also, of course, distinguishable in that Holland's counsel, unlike Thompson's counsel, never argued to the jury that the accused's conduct did not constitute a crime, but instead conceded: "Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes." (82-R-5959-5960).

The State's contention that Holland's testimony was "implicit, if not explicit, consent to the concession" (R 468) not only rests on the erroneous notion that Holland admitted premeditating Ms. Johnson's death, but also runs afoul of the constitutional standards announced both by this Court and the United States Supreme Court concerning counsel's unauthorized concession of an accused's guilt at trial.

Counsel is said to be constitutionally ineffective when he or she concedes an accused's guilt without the accused's consent. Brookhart v. Janis, 384 U.S. 1 (1966) (though criminal attorneys may make tactical decisions, due process disallows counsel to admit facts amounting to a guilty plea without the client's consent and there is a presumption against such a waiver). The defendant in such a case need not show prejudice, as otherwise required to make a showing of ineffective assistance of counsel. United States v. Cronic, 466 U.S. 648 (1984).

In Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II"), for example, the accused pled not guilty to first-degree murder. Facing overwhelming evidence of guilt, defense counsel adopted a strategy designed to save him from the death penalty rather than to obtain acquittal, conceding the accused's guilt. 758 So. 2d 620.

This Court held Nixon's counsel's statements constituted a breakdown in the adversarial testing process, noting that, while he may have been acting in his client's best interest, he could not implement a strategy amounting to a guilty plea without the defendant's consent. The Court remanded for an evidentiary hearing to determine whether Nixon had consented to counsel's strategy. 758 So. 2d 624. The determinative factor in the decision to grant a new trial would be whether the defendant's consent to counsel's strategy was an "affirmative, explicit acceptance":

> Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough.

Nixon II, 758 So. 2d at 624.

The Sixth Amendment guarantees "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." Indeed, "of all the rights that an accused person has...the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Cronic, 466 U.S. at 654. In addition to guaranteeing effective counsel, Fourteenth Amendment Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The State has the burden of making this showing. Speiser v. Randall, 357 U.S. 513, 526 (1958).

By conceding Holland's guilt, Mr. Lewis failed to subject the State's case to meaningful adversarial testing, resulting in a trial that was fundamentally unfair.

Though an attorney may make tactical decisions on trial strategy, Faretta v. California, 422 U.S. 806, 820 (1975), the decision to plead not guilty is left completely to the defendant. "Even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. at 656-657 n.19.

In Nixon II, *supra*, defense counsel had conceded in closing the guilt of a defendant who, on rule 3.850 motion, alleged he never consented to such an

admission. The Court weighed whether a Strickland standard (insufficiency plus prejudice) or that of Cronic (presuming prejudice) should be applied. In holding that prejudice in such a case must be presumed, the Court stated:

> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.
>
> * * *
>
> Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough.
>
> We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

Nixon II, 758 So. 2d at 623, 624-625 (citations omitted).

Mr. Lewis' unilateral decision to concede Holland's guilt was outrageous. As Justice Ehrlich declared in Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985):

> The propriety of the death penalty is in every case an issue requiring the closest scrutiny. . . . However, the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

Wilson v. Wainwright, 474 So. 2d at 1164

The trial court in the present case did not have benefit of the decisions in Nixon v. State, 857 So. 2d 172 (Fla. 2003) ("Nixon III"), and Harvey v. State, 2003 WL 21511339 (Fla. 2003), which, along with the opinion in Nixon II, followed the rule of United States v. Cronic in finding counsel's unauthorized concession of guilt comprised ineffective assistance, without any required showing of prejudice.

In Nixon III, this Court reviewed the trial court's decision after the remand in Nixon II for an evidentiary hearing to determine whether the defendant had affirmatively and explicitly authorized defense counsel to concede his guilt during the guilt phase of jury trial. Nixon's trial counsel, the only witness on the topic, had testified at the evidentiary hearing that the defendant had simply stood mute when counsel sought to discuss the strategy of conceding guilt, and nothing in the record showed the defendant had given the "affirmative, explicit acceptance" of counsel's strategy to concede guilt required by Nixon II. The trial court sought to rationalize its decision to deny relief by addressing the "totality of the circumstances in making a determination of whether Nixon affirmatively and explicitly agreed to counsel's strategy of conceding guilt to the charged crime," Nixon III, 857 So. 2d at 176, rather than whether there had truly been an "affirmative, explicit acceptance by Nixon of counsel's strategy." Id., 758 So.2d at 624. The Court in Nixon III was thus confronted with a case in roughly the same posture as that at bar, where the trial court had strayed from the relevant inquiry of "affirmative, explicit acceptance" to matters which, in essence, seek to avoid Cronic's *per se* ineffectiveness standard by pretending the unauthorized concession had simply never happened. This Court held:

> 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, 857 So. 2d at 176 (emphasis in original).

In Harvey v. State, *supra*, a death-sentenced postconviction movant claimed trial counsel was ineffective for conceding the defendant's guilt without his consent when counsel argued: "Harold Lee Harvey is guilty of murder." In its appellate answer brief, the State argued (as it did below in the present case) that the denial of

relief was proper since trial counsel had not conceded guilt to the crime charged. Id., at 2. This Court noted (as it should in the case at bar) that "the trial court's factual findings are not supported by the record." Id., at 5. Quoting its earlier opinion in Nixon II, the Harvey Court noted: "We made it very clear in Nixon [II] that a defendant must give an 'affirmative, explicit acceptance' of counsel's strategy to concede guilt because conceding guilt is the functional equivalent of a guilty plea." Id., at 5. The Court held that where, as here, there is no "'affirmative, explicit acceptance' of counsel's strategy," the proper standard is not Strickland's two-prong test, but the *per se* ineffectiveness standard of Cronic. *See also* Hinton v. State, 854 So. 2d 254 (Fla. 5th DCA 2003) (trial counsel's unauthorized concession of guilt to some of several offenses would require a new trial); Smallwood v. State, 809 So.2d 56 (Fla. 5th DCA 2002) (where counsel unilaterally concedes defendant's guilt to some felonies and argues he is not guilty of others, counsel is presumed ineffective).

Though the trial court noted Holland's counsel said he conceded guilt since he thought it would gain credibility for an insanity defense (R 1039) there are additional problems with that rationale. It is not only incongruous with an insanity defense for counsel to argue Holland was mentally capable of premeditating Johnson's death, yet mentally *in*capable of forming a premeditated intent to kill Officer Winters

seconds later--but it also strains credulity to suggest Holland, if sane, premeditated the death of Ms. Johnson but not Officer Winters, who tried to stop him after a first premeditation. The trial court's finding that counsel “did no more than admit to the conduct to which Holland had testified” (R 1039-1040) is simply not supported by competent substantial evidence. The trial transcript and testimony at evidentiary hearing show Holland denied premeditating Johnson’s death--and his trial testimony to this effect was read into the record at the evidentiary hearing when postconviction counsel objected to the State attempt to take Holland’s trial testimony out of context in order to elicit testimony to the contrary from former trial counsel. (T 160-161).

As the record shows Holland never authorized counsel’s decision to concede his guilt, his conviction should be vacated and this cause remanded for a new trial. The uncontradicted testimony at evidentiary hearing shows counsel’s performance fell measurably below objective standards of reasonably effective assistance by attorneys handling death penalty cases.

Though arguably redundant (given the standard which presumes prejudice), counsel’s concession of guilt undermined the reliability of the outcome as there remains a reasonable probability jurors would have found Holland not guilty of premeditating Ms. Johnson’s death, of engaging in similar premeditation as to

Officer Winters, or of escaping from the scene of an enumerated felony when the struggle ensued. There is also a reasonable probability he would not have received death as the attempted first-degree murder verdict was used as an aggravating factor.

Counsel's unauthorized concession of Holland's guilt was a serious deficiency which fell measurably below objective standards of reasonably effective assistance by attorneys in capital cases. Attempted first-degree murder was the highest degree offense charged in that count. While an accused's concession of guilt to a *lesser* included offense may sometimes be a reasonable defense strategy, even then, the dividing line between sound strategy and ineffective assistance is whether the client consents to the strategy. Nixon II. The decisions in Cronic, Brookhart, Nixon II, Nixon III and Harvey require in such circumstances that prejudice be presumed.[5]

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[5] Even were Holland required to show prejudice, however, counsel's unilateral decision to concede his guilt of attempted first-degree murder undermined the reliability of the proceeding's outcome by admitting, in effect, that Holland was mentally capable of forming the requisite intent (premeditation) to kill Thelma Johnson, but somehow mentally *in*capable of forming the requisite intent (premeditation) to kill Officer Winters. Counsel's unauthorized concession of guilt was incongruous with, and tended to undermine, what defense counsel characterized as Holland's main defense of insanity in the killing of Officer Winters, for which he now stands sentenced to death. There were other defenses (voluntary intoxication, necessity, self-defense, etc.) which, if the insanity defense were to fail, left alternatives to a guilty plea. Defense counsel's guilt phase conduct also prejudiced the outcome at sentencing as the trial court ultimately used Holland's conviction of the attempted

As the State put on no witness at the evidentiary hearing and introduced no evidence whatsoever to overcome this presumption, the trial court's ruling is not supported by competent substantial evidence and it must be concluded that Holland was denied the effective assistance of defense counsel guaranteed by the Sixth Amendment during the guilt phase of trial, entitling him to a new one.

II. THE TRIAL COURT ERRED IN DENYING CLAIM VIII AS DEFENSE COUNSEL'S FAILURE TO PROPERLY INVESTIGATE EVIDENCE IN MITIGATION DENIED ALBERT HOLLAND THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT DURING THE PENALTY PHASE

Claim VIII of Holland's rule 3.850 motion alleges that Holland's penalty phase defense counsel, Evan Baron, failed to properly investigate the evidence in mitigation of a death sentence. (R 179-183). The motion points out that no testimony about Holland's birth, childhood, upbringing, school years or other mitigating matters was presented through any witness other than Holland's father, Albert Holland, Sr. This overwhelming lack of mitigating evidence, Holland's motion alleges, was the result of ineffective penalty phase defense counsel's wholesale failure to investigate the evidence in mitigation of the death penalty.

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first-degree murder of Johnson as an aggravating factor in imposing the death penalty.

In preparation for the testimony of this sole fact witness concerning Holland's birth, childhood and early adult life, counsel only spoke to Holland's father briefly. (89-R-6502). The State responded that Holland's motion did not allege what defense counsel would have discovered had he investigated the facts in mitigation. (R 484-485). But concerning a criminal defense attorney's failure to properly investigate the facts in mitigation of the imposition of the death penalty, this Court has defined the necessary showing of prejudice required under Strickland v. Washington[6] in such circumstances as follows:

> Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different ***or the deficiencies substantially impair confidence in the outcome of the proceedings.*** Strickland, 466 U.S. at 695, 104 S.Ct. 2052; Robinson, 707 So.2d at 695. The concern is that "the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687, 104 S.Ct. 2052.

Gaskin v. State, 737 So.2d 509, 516, n.14 (Fla. 1999) (emphasis added).

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[6] Strickland v. Washington, 466 U. S. 668 (1984). Under Strickland, counsel is determined to have been ineffective upon a showing that: (1) counsel's performance was deficient, and (2) counsel's performance prejudiced the defense by undermining the reliability of the trial's outcome. *Id.* 466 U.S. at 687.

In Deaton v. State, 635 So. 2d 4 (Fla. 1993), this Court affirmed a grant of a new penalty phase proceeding where the trial court had concluded that, because his attorney had failed to adequately investigate the facts in mitigation, the defendant's waiver of his right to put on mitigating evidence was not knowing and voluntary. More recently, this Court, in State v. Lewis, 838 So. 2d 1102 (Fla. 2002), stated:

> Generally, prejudice is established by a finding that, but for the ineffective assistance of counsel, a reasonable probability exists that the outcome of the proceeding would have been different, ***or that, as a result of the ineffective assistance the proceeding was rendered fundamentally unfair.***

> As the cases above illuminate, the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated--this is an integral part of a capital case. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.
>
> * * *
>
> In reviewing the current case, we find there is competent, substantial evidence to support the trial court's finding that counsel did not spend sufficient time to prepare for mitigation prior to Lewis's waiver. Kirsch never sought out Lewis's background information and never interviewed other members of Lewis's family; therefore,

> he was unable to advise Lewis as to potential mitigation which these witnesses and records could have offered.

State v. Lewis, 838 So. 2d at 1113-1114 (emphasis in original). *See also* Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.1989) (prejudice ensued when counsel failed to properly investigate for the penalty phase and hence did not present witnesses who would have testified merely that the defendant was "a devoted father, husband, and brother," despite the fact that this testimony could have permitted the prosecution to explore the defendant's numerous other felony convictions and that he had been dishonorably discharged from the military).

At bar, Holland has adequately alleged that "the deficiencies substantially impair confidence in the outcome of the proceedings," Gaskin v. State, *supra*, and/or that "as a result of the ineffective assistance the proceeding was rendered fundamentally unfair," Deaton v. State; State v. Lewis, *supra*. The trial court properly granted an evidentiary hearing in which to prove the allegations in support of this Claim and the evidence adduced at that hearing ultimately supports it.

Appointed penalty phase counsel had a duty to independently investigate Holland's family background and social history, yet spoke only in this regard to Holland's father. Mr. Baron impermissibly "delegated" his duty to investigate

Holland's family background and social history to Holland's father, and took the father's word concerning Holland's relationship with his many other family members who lived separate lives, the content of their expected testimony in penalty phase proceedings, and their readiness and availability to testify in Holland's behalf.

Baron went no further than Holland's father to "investigate" Holland's school and personal life. The sole defense investigator, Randolph MacCoy, made no family background or social history investigation. (T 106-111, 117-118). Confidence in the penalty phase outcome is substantially impaired by defense counsel's deficient investigation in which, beyond Holland's father, he spoke to no other potential witness in this regard and sought none of Holland's non-psychiatric records.

The United States Supreme Court has repeatedly reaffirmed the importance of thorough investigation by defense counsel into mitigating factors to be presented in the penalty phase of capital cases. Williams v. Taylor, 529 U.S. 362, 394-99 (2000); Strickland v. Washington, 466 U.S. 668, 690-91 (1984). Most recently in this regard, the United States Supreme Court's decision in Wiggins v. Smith, ___ U.S. ___, 123 S.Ct. 2527 (2003) provides a detailed explanation of how the standard established for evaluating the performance of counsel set out in the landmark decision in Strickland should be interpreted and applied.

The Wiggins Court emphasized that defense counsel's investigations "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. at 2537 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989). Referring to the ABA Guidelines, the Court noted that among those topics that should be considered for presentation are "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. In concluding counsel's investigation was unreasonably deficient, the Court relied on the ABA standards for capital defense, noting that such standards had long been deemed "guides to determining what is reasonable." Id. (quoting Strickland, 466 U.S. at 688).

Despite the fact that funds were available for retaining a professional to prepare a detailed social history, Wiggins' trial attorneys had not done so. Id. In collateral proceedings, Wiggins' trial counsel defended the lack of investigation or presentation of mitigating evidence, suggesting these decisions were a matter of strategy and that trial counsel "decided to focus their efforts on 'retry[ing] the factual case' and disputing Wiggins' direct responsibility for the murder." Id. But after

reflecting on the standards that should guide counsel's actions in investigating mitigation, the Supreme Court concluded Wiggins' defense team had not performed the level of investigation that would allow them to make a reasonably informed decision not to present such mitigation. Id.

Determining that the decision not to pursue mitigation was made based on a prematurely truncated investigation, the Court stated:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [Wiggins' trial counsel] limited the scope of their investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 2538 (citing Strickland, 466 U.S. at 691). The Wiggins Court rejected arguments that Wiggins' defense team made a strategic decision based on the limited investigation they had conducted not to introduce mitigation. Id. at 2538.

Ultimately, the Supreme Court determined trial counsel's investigation into Wiggins' background did not meet the professional norms prevailing at the time of

trial, noting that "[d]espite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Id. at 2537. Hence, Wiggins' "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." Id. at 2538.

The same is true in the present case. The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in Wiggins should have provided similar guidance to Albert Holland's counsel. In conducting the investigation into those individuals who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect . . . possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." Id. 11.4.1(D)(3)(B), at 95.

It was clear from the testimony adduced at the evidentiary hearing in this case that Holland’s penalty phase counsel improperly delegated the entire duty to investigate Holland’s family and social background to Holland’s father. Defense counsel wholly failed to investigate Holland's family and social history, and did not

even use their paid investigator for this purpose. Hence, it would be difficult to conclude that counsel's knowledge of the available facts in mitigation was sufficient to make an informed strategic choice on these matters.

Without having uncovered information about Holland's troubled background, any "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' " Wiggins, ___ U.S. at ___, 123 S.Ct. at 2541 (quoting Strickland, 466 U.S. at 690-91).

By relying on Holland's father, defense counsel conducted little or no investigation of Holland's family history or social background. Other than talking briefly to Holland's father, MacCoy conducted no investigation of any facts in mitigation. The Court should find the amount of time spent investigating Holland's family background and social history, as well as its content, fell measurably below objective standards of reasonably effective assistance by attorneys handling death penalty cases, and that these deficiencies substantially impair confidence in the outcome because, as a result of Baron's ineffective investigation of the facts in mitigation of the death penalty, the proceeding was rendered fundamentally unfair.

The shear lack of time and effort spent investigating Holland's family background and social history fell measurably below objective standards of reasonably effective assistance by attorneys handling death penalty cases. The foregoing "deficiencies substantially impair confidence in the outcome of the proceedings," Gaskin v. State, *supra*, and, "as a result of the ineffective assistance the proceeding was rendered fundamentally unfair," Deaton v. State; State v. Lewis, *supra*, requiring, at the very least, a new penalty phase proceeding. Wiggins, *supra*.

III. THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS I, II, IV, V, VI & VII AS THEY ARE FACIALLY SUFFICIENT AND NOT CONCLUSIVELY REFUTED BY THE RECORD

The trial court entered an order following a Huff Hearing, determining that no evidentiary hearing would be had as to Claims I, II, IV, V, VI and VII of Holland's rule 3.850 Motion. (R 1003). The trial court ultimately entered an order summarily denying Claims I, II, IV, V, VI and VII. (R 1037-1046).

In order to uphold a trial court's summary denial of claims raised in a 3.850 motion, the claims must be shown to be either facially invalid or conclusively refuted by the record. McLin v. State, 827 So.2d 948 (Fla. 2002). Rule 3.850(d) requires, in this regard: "In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order." *See also* Rule 3.851(f)(5)(D), Florida Rules of Criminal Procedure ("Within 30 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing *and all other claims* raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and *attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review*.") (emphasis added).

As no files or records are attached to the order summarily denying Claims I, II, IV, V, VI, and VII, and because the order cites to no portion of the record relied upon to deny relief, reversal is required. Roberts v. State, 678 So.2d 1232, 1236 (Fla. 1996).[7] The trial court's adoption of the State's Response is insufficient.

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[7] Thus, the Second District, in Flores v. State, 662 So.2d 1350 (Fla. 2nd DCA 1995), held a trial court's order denying postconviction relief from a first-degree murder conviction did not contain the required record attachment showing a proper jury instruction was given on premeditation and its summary denial of the defendant's

As each of the summarily denied claims and the stated grounds for their denial differ in this case, an individual review of each claim follows.

Claim I alleges Holland's trial counsel was ineffective for failing to object to the admission of a police officer's opinion testimony that Officer Winters' service weapon had been intentionally hidden in the place that it was found. The trial court summarily denied Claim I as either refuted by the record or procedurally barred "to the extent that any of the issues were not raised on direct appeal." (R 1044).

The trial court, however, attached no record portion justifying a summary denial and its alternative theory of denial (*i.e.,* that it is procedurally barred for not being raised on direct appeal) fails as a matter of law as counsel may be said to have been ineffective for failing to object to prejudicial matters at trial despite the unpreserved error's consideration on direct appeal, Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998) (where movant raises "counsel's failure to object . . . which the state argued was procedurally barred because those comments were raised as error in

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ineffectiveness claim for failure to request the instruction was consequently improper, though the order incorporating the State's response identified a page of the transcript in which the instruction was given and recited the instruction verbatim, where the court did not attach a copy of the relevant page of the transcript to its order. The court noted the State's response is not a record attachment contemplated by the rule requiring record attachments to support summary denials and that the growing practice of incorporating State responses into orders denying postconviction motions is no substitute for record attachments to support summary denials of relief.

Appellant's direct appeal . . . it is clear that any error involved in those comments was not preserved for appeal by counsel's failure to object; such failure may be sufficient to constitute the ineffective assistance of counsel pursuant to a rule 3.850 motion"), and because the ineffectiveness of defense counsel may not generally be raised as an issue on direct appeal, Corzo v. State, 806 So.2d 642 (Fla. 2nd DCA 2002) ("Because of the strict rules limiting claims for ineffective assistance of counsel on direct appeal, the appellate courts typically reject the issue as both premature and requiring evidence beyond the appellate record. Accordingly, unless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel, an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion.").

The trial court's "Catch-22" denies Holland access to the courts. If Holland is precluded from raising this issue on direct appeal as unpreserved by defense counsel, yet also precluded from proving he was denied the effective assistance of counsel by counsel's failure to properly preserve the issue (on the rationale that it was not raised on appeal), he would, in effect, be denied any remedy whatsoever to redress the improper and unfairly prejudicial admission of evidence that went to the heart of his

defense: intent. *See, e.g.,* Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992) (condemning denial of 3.850 claim on basis that matter should have been challenged on direct appeal while overlooking that claim was counsel's failure to object, thus barring direct review). The summary denial of Claim I should be reversed.

Claim II alleges counsel failed to object when, in closing, the State misstated evidence, argued matters not in evidence, shifted the burden, vouched for the credibility of State witnesses, expressed personal belief in Holland's guilt, ridiculed Holland and his defense, engaged in inflammatory argument, accused the defense of denigrating witnesses and commented on silence. The summary denial of Claim II simply adopted the State's Response and failed to attach record portions refuting the allegations. As a review of the trial transcript fails to show conclusively that Holland is entitled to no relief, summary denial should be reversed. Jackson v. State, *supra*.

Claim IV alleges the cumulative effect of defense counsel's failures to object to the presentation of opinion testimony that the victim's firearm had been intentionally hidden; failure to object to the State's unfairly prejudicial arguments; and counsel's unauthorized concession of Holland's guilt of premeditated attempted first degree murder, rendered Holland's trial fundamentally unfair under the

decisions in Urquhart v. State, 676 So. 2d 64 (Fla. 1996); State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Cherry v. State, 659 So. 2d 1069 (Fla. 1995); and Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).

The trial court's rationale for denying this claim follows: "The Court adopts and incorporates the State's reasoning as set forth in the State's response, and finds this claim to be legally insufficient." (R 1045). As the summary denial delegated to the State the ***court's*** duty to independently review this claim, reversal is required.

Claims V, VI and VII were lumped together by the trial court as alleging "that Holland's death sentence is unconstitutional as a judge determined the aggravating circumstances instead of a jury." (R 1045). The trial court, however, wholly failed to consider Holland's actual allegations. Though the court's summary accurately described Claim V, it is significant that Claim VI alleged "death is not a permissible punishment as the State failed to properly charge Holland with a death-eligible offense," and that Claim VII alleged that Holland should be sentenced to life as Florida's death penalty scheme is unconstitutional. The trial court never passed upon, or even mentioned, these Claims. It is imperative that these claims be decided in the first instance by the trial court. The summary denial of Claims V, VI and VII should therefore be reversed and remanded for further proceedings.

CONCLUSION

I. As competent substantial evidence fails to support the denial of relief in the face of defense counsel's unauthorized concession of Holland's guilt in Claim III, the judgment and sentence should be set aside and Holland accorded a new trial.

II. To the extent competent substantial evidence fails to support denial of relief despite counsel's failure to investigate evidence in mitigation in Claim VIII, the sentence should be vacated and Holland accorded a new penalty proceeding.

III. As the trial court failed to attach record portions showing conclusively that Holland is entitled to no relief in Claims I, II, IV, V, VI and VII, this Court should reverse summary denial of these claims and remand for further proceedings.

Respectfully submitted,

BRADLEY M. COLLINS, P.A.
Attorney for Appellant
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
Telephone: (954) 763-7331
Facsimile: (954) 764-5040

By:______________________________

Bradley M. Collins

Fla. Bar No. 369438

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Susan Bailey Office of the State Attorney, Seventeenth Judicial Circuit, 201 S.E. Sixth Street, Suite 675, Fort Lauderdale, FL 33301, (2) Assistant Attorney General Debra Rescigno, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, (3) the Honorable Charles M. Greene, 201 S.E. Sixth Street, Suite 675, Fort Lauderdale, FL 33301, and (4) Defendant, Albert Holland, #122651, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4410, by United States Mail, this _____ day of ____________, 2003.

CERTIFICATE OF FONT AND TYPE SIZE

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BRADLEY M. COLLINS, P.A.

Attorney for Appellant
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
Telephone: (954) 763-7331
Facsimile: (954) 764-5040

By:_____________________________

Bradley M. Collins
Fla. Bar No. 369438