IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-34

ALBERT HOLLAND

Petitioner

vs.

JAMES V. CROSBY, JR., as
Secretary of the Florida
Department of Corrections

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner ALBERT HOLLAND ("Holland") was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The Respondent STATE OF FLORIDA ("the State") was the plaintiff.

The record of Holland's second jury trial, including the trial transcript and other documents, is cited by the volume number, preceding the symbol "R" or "SR", followed page numbers and encased in parentheses. E.g.: "(82-R-5959)." The referenced page numbers are included in the Appendix attached hereto.

JURISDICTION

This is an action under Fla.R.App.P. Rule 9.l00(a) and Art. I, § 13, Fla. Const. This Court has jurisdiction. Fla.R.App.P. 9.030(a)(3); Art. V, § 3(b)(9), Fla. Const.

Holland raises constitutional issues concerning the appellate process upon his conviction and sentence of death. Jurisdiction lies in this Court, Smith v. State, 400 So.2d 956, 960 (Fla. 1981), as the fundamental constitutional errors complained of arose in a capital case wherein this Court heard and decided the direct appeal. Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969). Habeas corpus is the proper remedy. *See, e.g.,* Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d656 (Fla. 1987).

This Court also has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought. Holland raises claims of fundamental constitutional error. *See* Dallas v.Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of habeas corpus jurisdiction and authority to correct constitutional error is warranted in this action.

INTRODUCTION

Significant errors in Holland's capital murder trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. A review of the issues appellate counsel neglected demonstrate deficient performance and that those deficiencies prejudiced Holland. As "extant legal principles . . . provided a clear basis for . . . compelling appellate argument," Fitzpatrick v.Wainwright, 490 So.2d 938, 940 (Fla. 1986), neglecting to raise these fundamental issues falls "far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and cumulatively, Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984), the omitted appellate issues demonstrate that “confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165.

STATEMENT OF THE CASE

Holland was charged by Indictment August 16, 1990, in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, in 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), (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 pled not guilty and, at a first trial, was found guilty and sentenced to death for first degree murder, life for sexual battery, forty years for attempted first degree murder, and seventeen years for armed robbery. (No. 78,660-R-4784-4816).

This Court reversed the original judgment and sentence in Holland v. State, 636 So. 2d 1289 (Fla. 1994) (Holland's Fifth and Sixth Amendment rights were violated by the presentation of testimony of a psychiatrist who had interviewed him in jail without prior notice to defense counsel). 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 the March 24, 1994

remand. Delegal suspended his practice and, in August 1996 (*i.e.,* the month before Holland's second trial), was found dead of a drug overdose. (37-R-1407).

Holland's retrial began September 24,1996. He 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 the judgment and sentence on October 5, 2000. Holland v. State, 773 So. 2d 1065 (Fla. 2000).

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 the judgment and sentence via Fla.R.Crim.P. 3.850. The trial court denied the rule 3.850 motion and Holland appealed, the Initial Brief on which is filed simultaneously herewith pursuant to Fla.R.Crim.P. 3.851(d)(3).[1]

This Petition for Writ of Habeas Corpus follows.

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[1] At trial, Holland was represented by James Stewart Lewis, Jr., Esquire, and Evan H. Baron. On direct appeal, he was represented by Richard B. Green, Assistant Public Defender for the Fifteenth Judicial Circuit.

STATEMENT OF FACTS

Prior to trial, the State sought to preclude Holland from introducing any evidence obtained from police internal affairs investigations concerning Officer Winters' use of excessive force. (38-R-1568-1570). The trial court granted the State's motion *in limine* over Holland's objection. (38-R-1569-1570).

Also prior to trial, Holland moved to discharge trial counsel, asserting their incompetence, which the trial court refused without inquiry. (36-R-1383). Holland's trial counsel later moved to withdraw (37-R-1403) and the trial court began a Nelson inquiry. (37-R-1405, et seq.). Holland requested substitute counsel. (37-R-1411). The trial court again denied Holland's motion to discharge counsel. (37-R-1438).

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 using 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). Holland was normal until he smoked the second rock (56-R-3332, 3337) and suddenly became violent (56-R-3302-3303), putting his penis in her mouth and beating her when she pushed it away. (56-R-3303-3304).

Officer Pepper Shaw testified Officer Winters came on the radio stating he had a possible suspect and later reporting he had been shot. (57-R-3438). Civilian eyewitnesses testified that when Officer Winters beat Holland with his nightstick, the two struggled over Winters' firearm and it discharged (58-R-3492-3498; 3516-3536; 3538-3552; 59-R-3660-3678; 3684-3695; 3700-3713; 65-R-4320-4355) and that both men's hands were on the gun (65-R-4347) when it discharged. (65-R-4355).

Physical evidence connected Holland to Officer Winters' cruiser. (62-R-3935, 3944-3945; 63-R-4035; 4043-4045). Projectiles and casings recovered from the scene and Winters' body were consistent with being fired from Winters' handgun. (63-R-4168-4169). The State firearms expert ruled-out contact wounds or the gun's being purposely shoved under Winter's bullet-proof vest and testified that the gun could discharge if another person hit the hand of the person holding it. (64-R-4199-4203). 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 Officer Winters' 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).

Board certified neuropsychologist Dr. William Love (67-R-4426-4429) examined Holland in 1991 after reviewing medical records, noting Holland's head injury. (67-R-4430-4434). CAT scans showed a shift in Holland's brain. The right frontal horn of his brain was displaced. (67-R-4434-4435, 447l). His drug abuse began at 16. He was diagnosed with schizophrenia, a biochemically-based disease characterized by a breakdown in the ability to perceive reality. (67-R-4437-4448). Dr. Love noted substance abuse exacerbates schizophrenia (67-R-4447) and that Holland was legally insane at the time of the crime. (67-R-4449-4452).

Chief Medical Examiner of Palm Beach County, Dr. John Marracini, testified that Officer Winters' wounds were irregular as the projectiles had passed through his clothes and equipment. (67-R-4530-4540). Residue on Officer Winters' 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, Forensic Director for the State of Maryland, Commissioner of Mental Health for the District of Columbia and Surveyor for the Joint Commission on Accreditation (69-R-4659-4662), stated Holland was first admitted to St. Elizabeth's Hospital in 1981 when a court sought evaluation of his mental competency and sanity. (69-R-4672). Holland was diagnosed as suffering from chronic undifferentiated schizophrenia and substance abuse. The court found him legally insane and committed him. (69-R-4673-4677). Holland, who complained of electricity running through his body, benefitted from treatment with large doses of Thorazine®, an anti-psychotic drug. (69-R-4585-4688). Though Thorazine® is rarely abused, Holland requested it. (69-R-4688). Dr. Patterson stated Holland had been found not guilty by reason of insanity on another charge in December 1982 (69-R-4691) and was consistently diagnosed as suffering from schizophrenia, based on reevaluations every three months. (69-R-4693). He

was continually scrutinized for malingering, the possibility of which was consistently rejected. (69-R-4703-4704). The defense introduced two judgments from the District of Columbia finding Holland not guilty by reason of insanity. (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).

Thelma Johnson then admitted giving a statement after the incident claiming there had been no sex involved. (71-R-4814-4817).

Sandra Bass saw Holland and Jose Padilla smoking crack that day. (73-R-4915-4935). Padilla testified he smoked crack that day with Holland. (73-R-4950-

4958). Vernon Johnson stated that on July 29, 1990, he saw Jose Padilla and Holland, and smoked crack with them. (73-R-4963-4965). Holland and Padilla were smoking crack when Johnson arrived. (73-R-4969).

Holland took the stand and stated he began using drugs and alcohol at age 17 (74-R-5021-5022) and 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 got back into drugs. (74-R-5028-5029). He became increasingly depressed over his beating, could not trust anyone and stayed to himself. (74-R-5029). He was sent to St. Elizabeth's twice for a total of four years. (74-R-5030-2). He was given Thorazine®, which helped him (74-R-5032-5033), though he eventually escaped in 1986. (74-R-5033-5037).

Holland sought-out a private psychiatrist for what Holland described as "burning in my head" and "drilling in my mind." (74-R-5038). He stopped seeing the psychiatrist in 1987, when he ran out of money. (74-R-5038-5040). Holland saw the psychiatrist in 1987. 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 and went 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," becoming violent. Holland admitted beating Johnson, but denied trying to force sex. He denied putting his penis in her mouth. (74-R-5050-5059). 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 was beaten and kicked, 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 stated 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 she treated Holland privately (3-SR-56-67) and that he admitted having escaped from St. Elizabeth's Hospital, which he described 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).

Schizophrenia can wax and wane, and stress can affect this process. (3-SR-71). Dr. Welsing saw no evidence of malingering (3-SR-76) and noted the fact that Holland found the hospital so stressful makes it unlikely he was malingering as it would only prolong his stay. (3-SR-78-79). Holland was in considerable distress, which is more consistent with mental illness than malingering. (3-SR-78-79).

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, who had interned at St. Elizabeth's (78-R-5471), had found Holland *incompetent* when she saw him in September 1990, *i.e.,* 6-7 weeks after the incident. (78-R-5475-5477). She noted people with schizophrenia often "self-medicate" with drugs and alcohol which can cause violence. She said that crack is a powerful drug. When Holland smoked the second rock, she said, it "disinhibited" him. (78-R-5490-5492).

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 his brain ventricles which is consistent with long-term drug abuse. (79-R-5549-5550).

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).

Holland was found guilty as charged of first degree murder of a law enforcement officer, guilty of robbery with a firearm, and guilty of attempted first degree murder with a weapon. He was convicted of the lesser included offense of attempted sexual battery with great force. (80-R-6363-6365).

At the conclusion of a penalty phase proceeding, 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).

Though Holland was originally sentenced to 17 years for armed robbery (Case No. 78,660 R-4784-4816), the trial court, on remand, increased Holland's sentence for the armed robbery to a sentence of Life Imprisonment, offering no explanation for the increase other than that (as in the first sentencing) "the defendant was convicted of an unscorable capital felony." (94-R-6917-6918).

GROUNDS FOR RELIEF

GROUND I

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE TRIAL COURT'S ORDER EXCLUDING ANY REFERENCE TO INTERNAL AFFAIRS RECORDS SHOWING OFFICER WINTERS' REPUTATION FOR USING EXCESSIVE FORCE

Prior to trial, the State, by motion *in limine*, sought to preclude Holland from making any reference to extensive evidence obtained from police internal affairs records concerning Officer Winters' excessive use of force. (38-R-1568-1570). The defense objected, noting Holland's potential defense that the struggle resulted from Officer Winters' excessive use of force, which "makes relevant prior incidents of conduct of the officer and I certainly object to us not referring to those reports or the knowledge of whatever sanction or counseling that he was subjected to as a result of his conduct in those internal affairs findings." (38-R-1569). But the court disagreed:

> COURT: The existence of any internal affairs investigations, even if they touch upon the excessive use of force, previously, by Officer Winters, is not probative of any conduct of Officer Winters in this particular instance.

> The issue of what occurred is something that the Court will address as is presented, based upon what actually transpired, not upon prior unrelated internal affairs investigations touching upon the victim in this incident.

(38-R-1569). The defense countered that numerous internal affairs investigations containing evidence of Officer Winters' prior race-based misconduct, poor judgment and use of excessive force, "would be critical and highly probative to a jury wanting to know what methods and procedures he was using as he was attempting to apprehend Mr. Holland." (38-R-1569-1570). The trial court, however, concluded:

> THE COURT: Methods and procedures that he was using if, in fact, he was trying to apprehend Mr. Holland, are provable by the testimony of what occurred and method and procedure he may have used at some time in the past, or may have been subject to investigate or complaint of internal affairs investigation in the past has nothing to do with this incident is not probative.
>
> That's the Court's ruling, State's motion is granted.

(38-R-1570). Holland's appointed appellate counsel neither raised nor discussed the trial court's exclusion of such evidence on direct appeal.

The law, however, is clear–and was clear both at the time of Holland's trial and direct appeal–that evidence of a murder victim's reputation as a bully is admissible to shed light on what occurred factually before the fatal shots were fired. Melvin v. State, 592 So. 2d 356 (Fla. 4th DCA 1992). This is true even where there is no evidence the defendant knew of the victim's reputation. Id; Banks v. State, 351 So.2d 1071 (Fla. 4th DCA), *cert. denied*, 354 So.2d 986 (1977) (refusal to admit evidence of a victim's reputation for violence is reversible error where the accused's defense is that he shot deceased because "he was pulling his gun to shoot me.").

> [I]f there is the slightest evidence of an overt act by the victim which may be reasonably regarded as placing the defendant in imminent danger, all doubts as to the admission of self-defense evidence must be resolved in favor of the accused.

Smith v. State, 606 So.2d 641, 643 (Fla. 1st DCA 1992) (and cases cited therein).

Had evidence of Officer Winters' habitual use of excessive force, poor judgment and racial confrontation been revealed to Holland's jury (as urged by the rules of evidence, extant case authority and Holland's defense), the evidence would

have supported a finding–in harmony with the defense theory and consistent with the physical evidence and live testimony–that Officer Winters' excessive use of force precipitated the struggle when he grabbed Holland and stuck his night stick in Holland's back, threw him to the ground and beat him 2 or 3 times in the back with his nightstick as Holland tried to rise, struggling over the gun, which was withdrawn from its holster during the struggle that resulted in Officer Winters' death.[2]

Appellate counsel's failure to raise this error on direct appeal was a serious deficiency measurably below objective standards of reasonably effective representation of a defendant in a capital case. But for appellate counsel's failure to challenge the trial court's exclusion of such evidence, there remains, at the very least, a reasonable probability of reversal as Holland had a right to introduce evidence of Officer Winters' reputation as a bully who habitually used excessive force.

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[2] State witness Abraham Bell, for example, testified Holland obeyed Officer Winters' order to stop and return to the cruiser where Winters told him to put his hands on the hood, an order with which Holland also complied. (65-R-4320-4324). Winters then stuck his night stick in Holland's back (65-R-4324) and a struggle ensued. Winters grabbed Holland, put him in a headlock and took him down to the ground. (65-R-4324). When Holland tried to stand, 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) which had come out of the holster and discharged twice. (65-R-4331). State witness Parish Horne testified Winters had Holland in a headlock when Holland struggled and Winters was ultimately shot with his own gun. (59-R-3703-3704). Mrs. Horne (also called by the State) testified that she could not tell whose hands were on the gun when it discharged. (59-R-3678).

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN REFUSING TO DISCHARGE TRIAL COUNSEL AS HOLLAND'S CLAIMS THAT TRIAL COUNSEL WERE NOT BEING TRUTHFUL TO HIM OR TO THE COURT WENT UNREFUTED

Though Holland's appellate counsel argued on direct appeal that the trial court had erred in denying Holland his right of *self*-representation, appointed appellate counsel wholly overlooked a related yet separate issue. Appellate counsel failed to raise or discuss the fact that, in the course of a Nelson[3] inquiry in which Holland sought to discharge trial counsel and obtain substitute counsel, Holland's assertions that his appointed trial attorneys were lying to him about the facts of the case, such as where the victim had been shot, and lying to the trial court about having visited him in jail, about having called Holland's father, about providing Holland with copies of depositions and investigating the case, went entirely unrefuted.

When Holland had first unequivocally stated, "I want you to know if you can appoint me some new attorneys, like I asked you on March 22nd. They are not effectively representing me[;] they're incompetent," the trial court simply stated: "Okay. That motion is going to be denied." (36-R-1383). When Holland

[3] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1974).

complained that appointed trial counsel had not provided him with copies of a number of depositions, the trial court commented:

> Mr. Holland, understand something, and I think we're really getting to the point where this just needs to be made, a statement needs to be made. You have been appointed two very fine capable counsel, they are representing you, Mr. Holland.

(36-R-1389).

After rejecting Holland's additional claim that trial counsel was under a conflict of interest (36-R-1389-1392), the trial court conducted a Faretta[4] hearing in which, though Holland suggested the appointment of standby counsel, the trial court concluded "Holland is not able to adequately appropriately represent himself." (36-R-1392-1396). As the trial court had ignored his first suggestion about standby counsel, Holland repeated his request which the court again ignored. (36-R-1397).

Holland's trial counsel then moved to withdraw (36-R-1403) and the trial court began a Nelson inquiry. (36-R-1405, et seq.). Holland requested the appointment of *substitute* counsel. (36-R-1411). When Holland's attorney, Evan Baron, claimed that, in the course of the 1 to 1 ½ years since his appointment (37-R-

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[4] Faretta v. California, 422 U.S. 806 (1975).

1407) he had only prepared for trial by reading Holland's old medical records, keeping abreast of new medical reports and speaking on two occasions with Holland's father--once by phone–without "any cooperation at all" (37-R-1479), Holland pointed-out that Baron did not have Holland's father's telephone number:

> THE DEFENDANT: I wanted to say the thing about him contacting my father. I don't think you have my father's new number.
>
> MR. BARON: I guess I don't. The last time I tried calling the number it was disconnected.
>
> THE DEFENDANT: Right. See when did you talk to him on the telephone?
>
> MR. BARON: Before I spoke to him in person the last time. I spoke to him in person when he was down here.
>
> THE DEFENDANT: In February.
>
> MR. BARON: Whenever that was.

(37-R-1486). That hearing took place on August 1996. (Id.).

When Holland's first-chair counsel, James Lewis, claimed to have visited Holland to see whether Holland had the copies of depositions he had requested, but claimed that Holland had refused to discuss it, Holland responded:

> That's not true. You only went over a week ago. When did you come back over? No. Nobody told me when you came over. When did you come over and check that? You never did. You're just lying.
>
> It was over a week ago, you talked to me for about eight minutes....I don't know why he's standing here lying.

(37-R-1493-1494).

Holland stated unequivocally that his attorneys were incompetent (37-R-1383, 1419), that they had not gone to the crime scene, had failed to investigate (37-R-1429, 1432), and that "I've given them evidence, Your Honor, that would prove my innocence, but they won't do anything." (37-R-1450). (*See also* 40-R1636-1638).

Although Mr. Baron had, in effect, conceded doing nothing on the case in six (6) months other than re-reading some of Holland's medical records, and although Mr. Lewis at no point denied Holland's accusations that Lewis had made false

representations to the trial court about counsel's almost non-existent contacts with Holland and his access to crucial discovery materials, the trial court concluded:

> THE COURT: The Court finds that there is no reasonable basis for a finding of ineffective representations, both Mr. Baron and Mr. Lewis have been actively working on this case, appearing at numerous hearings, speaking with experts, speaking with Mr. Holland's father, speaking with Mr. Holland, doing that which they can do with the level of cooperation that Mr. Holland is willing to give at any specific time.

(37-R-1438). For its suggestion that Holland might not be cooperating with counsel, the trial court relied on the transcript of the previous trial. (37-R-1500, 1501).

There was, in short, nothing in the record of the Nelson inquiry to refute Holland's testimony that, for at least six (6) months, appointed trial counsel had simply dropped the ball. There was nothing to refute Holland's testimony that his attorneys had done absolutely nothing new to investigate the case and were being

untruthful to Holland as well as to the trial court which relied upon the truth of counsel's representations when passing on Holland's motion.

In Nelson v. State, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973), *approved of in* Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988), the Fourth District held that "where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge." 274 So.2d at 258.

The Nelson Court further held that "[i]f incompetency of counsel is assigned by the defendant as the reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." Id. at 258-59.

Finally, the Nelson Court stated: "If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense." Id. at 259.

At bar, Holland's testimony during the Nelson inquiry to the effect that his trial counsel were incompetent, that they had done absolutely nothing new to advance the investigation for more than six months despite Holland's production of

exculpatory evidence, and had misrepresented facts to Holland as well as to the court hearing and ultimately deciding the case under Nelson, remained unrefuted and, rather than supporting the trial court's decision at the conclusion of the Nelson inquiry, instead militated against it.

As the trial court's order following the Nelson inquiry is not supported by competent substantial evidence, Holland's appointed appellate counsel was ineffective in failing to raise and discuss this error on direct appeal. Appellate counsel's failure to raise or discuss this error on direct appeal constituted a serious deficiency falling measurably below objective standards of an attorney's reasonably effective representation of a defendant in a capital case.

But for ineffective appellate counsel's failure to challenge the trial court's ruling, there remains a reasonable probability the proceeding's outcome would have been different. There remains a reasonable probability the case would have been reversed and remanded for a new trial if raised on direct appeal as Holland had been denied competent counsel at trial under Nelson.

GROUND III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S DENIAL OF ADDITIONAL PEREMPTORY CHALLENGES AS HOLLAND'S CHALLENGE FOR CAUSE OF A RACIALLY BIASED JUROR WAS IMPROPERLY DENIED

Holland was denied the effective assistance of appellate counsel guaranteed by the Sixth Amendment when appointed appellate counsel failed to raise or discuss the trial court's erroneous refusal to remove a racially-biased juror for cause and denial of adequate peremptory challenges, producing harmful error as only one juror on the panel was African-American. A review of Holland's jury selection follows.

During *voir dire*, the trial court asked prospective jurors whether they would be influenced by the fact that Holland was African-American and Officer Winters was Caucasian, or that Thelma Johnson was African-American. (50-R-2746). One prospective juror raised his hand: Keith Mulford. (50-R-2747). The trial court later summoned Mulford, who stated his belief that the alleged sexual battery victim, an African-American female, was a minor. (50-R-2753). When Mulford mentioned that he had an African-American granddaughter (50-R-2754), the trial court concluded:

> THE COURT: So race really is not the issue?
>
> MR. MULFORD: Not really. I can't -- I had a problem with that years ago, but ***I've learned to live with it. And it's just part of life.***
>
> But I would not feel right and comfortable by sitting on a panel knowing that this was part of the indictment.

(50-R-2754) (emphasis added).

Mr. Mulford stated that his upbringing and experience caused him to feel racial prejudice, particularly when the armed services, in which he had been enlisted for almost two years, were desegregated. He was one of two Caucasians out of two hundred servicemen in his battery. (50-R-2755-2756). Asked whether his feelings of racial prejudice "sometimes stick with [him] today," Mulford indicated that since contact with African-Americans had been forced upon him, he had to live with it:

> "***I've learned to live with it. I have to.*** I've a granddaughter that is Black."

(50-R-2757) (emphasis added).

The granddaughter was the daughter of Mulford's daughter. Asked whether this fact caused him pain or embarrassment, Mulford stated, without specifying whether he was referring to his Caucasian daughter or his Afro-American granddaughter: "I love her dearly." (50-R-2757). Mulford then stated that he was not currently racially prejudiced, though his history of racial prejudice would have an effect on the sexual battery count of the Indictment, though he would have "no problem" if the alleged sexual battery victim were over the age of eighteen. (50-R-2757-2758). When it had exhausted its peremptory challenges, the defense requested six more based on the racial disparity ("it is almost completely devoid of minority representation. . . there is only one black woman on the jury of twelve") (50-R-2894), of which the trial court granted only two. (50-R-2894).

When the defense had exhausted the two challenges, Holland's trial counsel requested additional peremptories:

> MR. LEWIS: I'm requesting of the Court for (sic) additional peremptories that I originally requested, on the grounds that we still haven't been able to reach minority jurors. And I note in the next group out here, there is a good number of African-Americans.

> If we can just reach them and in order to do that, I'm asking, requesting these four additional peremptories in which to do that.

(50-R-2901).

Though the State's only response was that "they could have had Mr. Osborne, he was African-American and they excused him," the trial court denied the defense request for additional peremptories. (50-R-2901-2902). The defense then renewed its challenge to Juror Keith Mulford for cause, pointing-out that Mulford's admitted history of racial prejudice, combined with the fact that an African-American granddaughter had been forced upon him, "calls into question what his true feelings might be." The defense also noted that the State still had seven remaining peremptory challenges. (50-R-2902). In denying the defense's request for additional challenges, the trial court characterized the circumstances as follows:

> THE COURT: If I recall correctly what this juror said in 1952, which was 34 years ago, the army had just desegregated. He was one of two Caucasian (sic) in an otherwise African-American platoon.

> He said that left him with some ill feelings. But the Court doing arithmetic over the last 34 years, ***indicated that he no longer in any way, shape or form has any prejudices at this time***. His feelings were three or four years ago (sic).
>
> In essence, he indicated that his granddaughter is African-American and he loves her dearly. The Court denies the challenge for cause.

(50-R-2903) (emphasis added).

One problem with the trial court's characterization of Mulford's testimony is that Mulford never "indicated that he no longer in any way, shape or form has any prejudices at this time." Id. Instead, Mulford merely agreed with the State's conclusory leading statement that he was not racially prejudiced and himself stated: "I've learned to live with it. ***I have to.***" (50-R-2757) (emphasis added).

Another problem with the trial court's characterization of Mulford's testimony is that Mulford never specified whether it was his black granddaughter or his white daughter that he loved so dearly–and regardless of who he was referring to, Mulford's perception that African-Americans were something he "had to . . . learn to

live with" in no way eliminated the likelihood Mulford would--as he had for 34 years--judge a black man based on the fact that he was black.

The defense renewed its request for additional peremptories, which the trial court denied and Mulford was seated on Holland's jury. (50-R-2905). The jury seated to decide Holland's guilt and whether he would be put to death was not a jury of his peers. Only one of the twelve jurors was African-American. (50-R-2893).

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." Ross v. Oklahoma, 487 U.S. 81, 85 (1988). *See also* Morgan v. Illinois, 504 U.S. 719, 726 (1992). The defendant is entitled to a fair trial by a panel of impartial, indifferent jurors whose verdict is based upon the evidence developed at trial. Irvin v. Dowd, 366 U.S. 717, 722 (1961). The right to trial by an impartial jury is also guaranteed by article I, section 16, of the Florida Constitution and Florida Rule of Criminal Procedure 3.251. Richardson v. State, 666 So. 2d 223, 224 (Fla. 2nd DCA 1995); Wilding v. State, 427 So. 2d 1069 (Fla. 2nd DCA 1983).

A juror should be excused for cause if there is any reasonable doubt about the juror's ability to render an impartial verdict. Turner v. State, 645 So. 2d 444, 447 (Fla. 1994); Bryant v. State, 601 So. 2d 529, 532 (Fla. 1992); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).

"[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality." Hill v. State, 477 So.2d at 556 (quoting O'Connor v. State, 9 Fla. 215, 222 (1860)).

At bar, the trial court violated Holland's right to an impartial jury by denying his cause challenge to a juror who had admitted a long history of racial prejudice against African-Americans mitigated solely by the fact that, because his daughter had been impregnated by an African-American, he had been forced to live with it.

Appointed appellate counsel's failure to raise or discuss this error on direct appeal–particularly significant in light of the fact that there was solely one (1) African-American juror on the panel deciding his fate–constituted a serious deficiency measurably below objective standards of reasonably effective representation of a defendant in a capital case.

But for appointed appellate counsel's failure to raise or discuss on direct appeal the trial court's denial of Holland's challenge for cause to Juror Keith Mulford, and/or its refusal of Holland's request for additional peremptory challenges, there remains a reasonable probability that the case would have been reversed and remanded on direct criminal appeal as Holland had a constitutional right to an unbiased jury. A new trial is required

GROUND IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL FUNDAMENTAL ERROR INHERING IN THE TRIAL COURT'S UNEXPLAINED INCREASE IN HOLLAND'S ORIGINAL SENTENCE FOR ARMED ROBBERY FROM 17 YEARS TO LIFE IN PRISON AFTER HOLLAND EXERCISED HIS RIGHT TO APPEAL

At his original sentencing, Holland was sentenced to seventeen (17) years on the armed robbery charge in Count II of the Indictment. (No. 78,660-R-4784-4816).

On remand from this Court, following its decision in Holland v. State, 636 So. 2d 1289 (Fla. 1994) (which held that Holland's Fifth and Sixth Amendment rights were violated by the presentation of testimony of a psychiatrist who had interviewed Holland in the jail without prior notice to defense counsel), however, the trial court increased Holland's sentence from the original seventeen (17) years to a sentence of Life Imprisonment. In so doing, the trial court gave no explanation for this substantial increase other than the fact that (no different than in the first sentencing) "the defendant was convicted of an unscorable capital felony." (94-R-6917-6918).

The law is clear, however, and was clear at the time of Holland's direct appeal, that it is fundamental error to impose a more severe sentence upon reconviction for the same offense where no reasons for doing so appear in the record. The due process clause of the Fourteenth Amendment requires that

vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives upon reconviction, and that the defendant must be freed of the apprehension of retaliatory motivation on the part of the sentencing judge. North Carolina v. Pearce, 395 U.S. 711 (1969). In order to assure the absence of such motivation, the United States Supreme Court requires:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726. *See also* Wasman v. United States, 468 U.S. 559, 563 (1984) (a judge must state the reasons for enhancing sentence on record to permit appellate review).

Such was this Court's holding in Gilliam v. State, 582 So.2d 610 (Fla. 1991), where, following a defendant's first trial for capital murder and sexual battery, the trial court imposed the death penalty for murder and a *concurrent* life sentence for the sexual battery, yet after a retrial (following the defendant's success on appeal), the court again imposed death, but also sentenced the defendant to a *consecutive* life

sentence for sexual battery, giving no reasons for imposing the more severe sentence. This Court therefore held the consecutive sentence for sexual battery must be remanded for the imposition of a concurrent sentence. 582 So.2d 612-613.

Thus, Holland's appointed appellate counsel's omission to raise or discuss this fundamental sentencing error on direct appeal of his sentence fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal prosecution wherein the defendant faced a sentence of life in prison.

RELIEF SOUGHT

For the foregoing reasons and those set forth in the accompanying Initial Brief, Holland should be accorded a new trial with directions that the trial court not impose a sentence in Count II greater than that received at the initial sentencing.

Respectfully submitted,

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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

This petition is word-processed utilizing 14-point Times New Roman type.

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