IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,

Petitioner,

vs. **Case No. SC04-34**

JAMES V. CROSBY, Jr.
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Petitioner, Albert Holland, was the defendant in the trial court below and will be referred to herein as "Petitioner" or "Holland". Respondent, James V. Crosby, Secretary, Florida Department of Corrections, will be referred to herein as "the State." The following symbols will be used in this Response: IR denotes the record on appeal from the first trial and sentencing; T or R denotes the record on direct appeal from the re-trial in Holland v. State, 773 So.2d 1065, 1068 (Fla. 2000). Any supplements to these are SIR or STR, followed by the appropriate page number.

On August 16, 1990, the defendant, Albert Holland ("Holland"), was indicted for: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; Count III, sexual battery on Thelma Smith Johnson with a deadly weapon or physical force likely to cause serious personal injury; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon, all stemming from incidents that occurred on July 29, 1990 (R. Vol. 36, 3315-16, Vol. 96, 7000-01).

After jury trial, Holland was found guilty as charged on all

counts (R. Vol.44, 4698-4703). On August 12, 1991, the jury recommended a sentence of death, by a vote of 11 to 1 (R. Vol. 44, 4763). Holland was sentenced to death on August 19, 1991, for the first-degree murder of Officer Winters (R. Vol. 44, 4811-16); however, his convictions and sentences were reversed on appeal to the Florida Supreme Court. See Holland v. State, 636 So.2d 1289 (Fla. 1994). The Florida Supreme Court held that Holland's Fifth and Sixth Amendment rights were violated by the admission of testimony from a State psychiatrist who had interviewed Holland in jail without prior notice to defense counsel. Id. The State filed a Petition for Writ of Certiorari in the United States Supreme Court, challenging the reversal (Exhibits 1-2). On October 11, 1994, the United States Supreme Court denied the petition. Florida v. Holland, 513 U.S. 943 (1994) (Exhibit 3).

Holland was re-tried before a jury beginning September 24, 1996 and was found guilty as charged on: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon (R Vol. 101, 8031-38). On Count III, the jury found Holland guilty of the lesser-included offense of Attempt to Commit Sexual Battery upon a person twelve years of age or older (R Vol. 101, 8035-36). On November 15, 1996, the jury recommended

a sentence of death, by a vote of 8 to 4 (R. Vol. 101, 8084). Holland was sentenced to death on February 7, 1997, for the first-degree murder of Officer Winters (R. Vol. 102, 8169-95). He also received a consecutive life sentence for the armed robbery of Officer Winters, a consecutive 15 year sentence for the attempted sexual battery on Thelma Smith Johnson and a consecutive 30 year sentence for the attempted murder of Thelma Smith Johnson (R Vol. 102, 8203-15).

On direct appeal of the re-trial, this Court found the following facts:

> Holland attacked a woman he met on July 29, 1990. Holland ran off after a witness interrupted the attack. Police officers responding to a call about the attack found the woman semi-conscious with severe head wounds. Officer Winters and other officers began searching for the man believed to have been involved in the attack. A short time later, witnesses saw Officer Winters struggling with Holland. During the struggle, Holland grabbed Officer Winters' gun and shot him. Officer Winters died of gunshot wounds to the groin and lower stomach area.
>
> The jury convicted Holland of first-degree murder, armed robbery, attempted sexual battery, and attempted first-degree murder. The jury recommended by an eight-to-four vote that Holland be sentenced to death. The trial court found the following aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence to a person; (2) the capital felony was committed while the defendant was engaged in the commission of, or in an attempt to commit, or flight after

> committing or attempting to commit the crime of robbery or an attempt to commit the crime of sexual battery or both; and (3)(a) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, merged with (3)(b) the victim of the capital felony was a law enforcement officer engaged in the performance of his legal duties. The court did not find that any statutory mitigating circumstances were established, but did find the existence of two nonstatutory mitigating circumstances: (1) history of drug and alcohol abuse (little weight) and (2) history of mental illness (little weight). The trial court concluded that the aggravators outweighed the mitigators and sentenced Holland to death.

Holland v. State, 773 So.2d 1065, 1068 (Fla. 2000)(Exhibit 7).

On May 4, 2001, Holland filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 1, 2001. Holland v. Florida, 70 USLW 3235, 122 S.Ct. 83 (2001). Thereafter, on September 7, 2002, Holland filed a Motion to Vacate Judgment and Sentence pursuant to rule 3.851, Florida Rules of Criminal Procedure. An evidentiary hearing was held on April 10, 2003 and April 14, 2003 on Claims III and VIII of Holland's post-conviction motion. The other claims were summarily denied. Claim III alleged that guilt-phase counsel, Mr. James Lewis, was per se ineffective, under Nixon v. Singeltary, 758 So.2d 618 (Fla. 2000), by conceding Holland's guilt to the charge of Attempted First Degree Murder of Thelma Johnson, without Holland's authorization. Claim VIII alleged that penalty phase counsel, Mr. Evan Baron, was ineffective by

failing to properly investigate mitigation evidence "concerning Holland's birth, childhood and early adult life." Three witnesses testified at the evidentiary hearing: Mr. Evan Baron (penalty phase counsel), Mr. Randy MacCoy (investigator for trial counsel), and Mr. James Lewis (guilt phase counsel). Following the evidentiary hearing, the trial court denied relief and an appeal was filed. That appeal is currently pending before this Court. See Holland v. State, case no. SC03-1033.

STATEMENT OF THE FACTS

Thelma Johnson testified that on July 29, 1990, she was walking to her house and met Holland, who asked if she wanted to smoke crack cocaine (T Vol. 56 3295-3343). They walked together to a wooded area and he smoked half a cocain rock by himself. After Holland smoked a second hit of crack, "he went off." Holland pushed her to the ground, pinned her arms down, and hit her with a bottle on the side of her head. She begged him not to kill her. Holland continued to hit her with the bottle, breaking it, and told her, "Shut up before I kill you." While beating her, he continued to tell her to be quite before he blew her brains out or cut her throat. He tore her blouse open and then unzipped his pants. He put his penis in her mouth and told her to suck it. When she pushed it out and asked him how she was supposed to suck it with him beating on her, he beat her until she lost consciousness. He beat her with at least two

bottles and a rock. She had a fractured skull, a severed ear, a fractured finger, and cuts all over her face that required extensive plastic surgery. (T Vol. 56 3302-07).

Eyewitness Audrey Canion testified that she was sweeping debris out her trailer door when she heard a woman screaming, "Help me, help me. This guy out here's going to kill me." She saw Holland holding a woman, struggling with her, then grabbing a bottle and hitting her on the left side of the cheek. Ms. Canion went inside to call the police, then came back outside and saw Holland beat the woman some more. He told the woman to "[g]rab this, bitch," but Ms. Canion did not know what he meant. After Ms. Canion's husband told Holland to stop before he killed the woman, Holland threw an object into the woods, wiped his hands on the victim's shirt or shorts, then got up and left "like, you know it was nothing." (T Vol. 56 3345-55).

Eyewitness Westley Hill testified that he was playing cards with others when a man walked through the area wearing a shirt, shorts, and sneakers. The same man walked by again a little while later wearing no shirt and having "quite a bit" of blood on his chest. James Edwards, who was there playing cards, told Holland that he was a policeman and asked Holland what happened. Holland responded that "some guy tried to rob him" down at "The Hole," which is the area where Johnson was assaulted. Holland had an object wrapped in a shirt. (T Vol. 57 3389-93, 3406-09).

Eyewitness Abraham Bell testified that he was leaving his bait and tackle shop when he saw a police car coming toward him. He heard the officer say over the public address system, "Hey you, get over here." A man whom he later identified as Holland stopped, turned around and walked over to the officer's car, which had stopped 40 to 50 feet from Mr. Bell. The officer got out of his car and told Holland to put his hands on the car, which Holland did. The officer went to use the microphone on his shoulder, but it appeared to be broken, so he reached down to use the radio on his belt. Meanwhile, he held his nightstick on Holland's back. When he reached for the radio on his belt, Holland turned and swung at the officer's head, but Officer Winters ducked, and they started "tussling." During the tussle, Officer Winters got Holland in a headlock and put Holland on the ground. Holland tried to get up, but Officer Winters told him to stay down and hit him in the back two or three times with his nightstick. Holland rose anyway, and he and the officer faced each other in a headlock while they struggled. Holland tried repeatedly to grab Officer Winter's gun, but "he couldn't get enough grip on it." Meanwhile, Officer Winters tried to keep Holland away from the gun. Holland kept "trying to get his weapon," but he could not extract it because it had a "latch" on it. While Holland tried to pull it out, Officer Winters had his hand over Holland's "trying to push down on it." Finally,

Holland managed to shift the officer's belt so that the holster was closer to the front of him, and he managed to free the gun from the holster. Officer Winters tried to radio for help and tried to open the car door to let his dog out, but Holland shot him twice and then ran. (T Vol. 65 4318-35).

Eyewitness Betty Bouie testified that she was a backseat passenger in a car traveling east on Hammondville Road when she saw Holland and Officer Winters struggling beside a police car. Holland had Officer Winters in a headlock and "took the gun out of [the officer's] holster." Holland shot the officer and ran west on Hammondville Road. (T Vol. 58 3516-18). Nikki Horne testified that she was riding west on Hammondville Road with her mother and father when she saw a police officer and a man struggling face to face. Then "the man took the policeman's gun from the side and the gun went off three times." (T Vol. 59 3684-86). Her father, Parrish Horne, also testified that, as he was driving by, he saw Holland in a headlock with a police officer. He then saw Holland reach around the officer and take the gun from the officer's holster. He shot the officer in the side. (T Vol. 59 3700-05).

The defense presented testimony from Dr. Love, a psychologist, who met with Holland, Holland's father, and Holland's attorney for two hours each and who reviewed a box of materials and wrote a report over an 18-hour period in 1991,

testified that Holland was insane at the time he assaulted Thelma Johnson and shot Officer Winters. He believed that Holland's schizophrenia, which St. Elizabeth's Hospital in Washington D.C. had diagnosed, combined with his alcohol and drug use the day of the offenses, prevented him from knowing right from wrong. (T Vol. 67 4427-52). On cross-examination, however, Dr. Love could not relate the standard for sanity in Florida and did not know that the test for insanity was different in Washington, D.C., at the time of Holland's hospitalizations. (T Vol. 67 4456). Although he was board certified in neuropsychology, Dr. Love had obtained his Ph.D. in Educational Psychology and had testified in only one or two other criminal cases in the 1970s. (T Vol. 67 4459-61). Moreover, he did not perform any psychological or neuropsychological testing and had not reviewed any of the materials in this case since 1991. He admitted he had almost no recollection of what he had read. (T Vol. 67 4468-69, 4481, 4484, 4510). Finally, Dr. Love admitted that he did not question Holland about how much alcohol and crack he had consumed the day of the offenses, and he did not know the half-life of crack, i.e., how long its effects last after ingestion. (T Vol. 67 4457-58, 4490-91).

Dr. Patterson was a psychiatrist at St. Elizabeth's when Holland was referred to the hospital for a competency evaluation

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

Three months after his commitment, while being escorted to see his father in the general hospital, Holland escaped. He was arrested three days later for committing another robbery, found not guilty by reason of insanity, and re-committed to the hospital. In 1984, Holland refused to continue medication, and his treatment team determined that he was competent to waive medication. In 1986, Holland petitioned the court for release,

but the hospital recommended against it, and the court denied him release. Two days later, while being escorted out on the grounds with a group of patients, Holland escaped again. Although Dr. Patterson testified that he never considered that Holland was malingering a mental illness, he admitted that an MMPI in 1985 indicated evidence of malingering. He also admitted that the treatment team believed Holland was feigning a lack of memory regarding the robberies. (T Vol. 69 4658-4749).

Holland's father testified that his son was a normal child until he started using drugs in high school (T Vol. 70 4768-81). According to Holland's father, Holland suffered a severe head injury, from a beating in federal prison, and thereafter, his behavior changed completely. He was nervous, jumpy, edgy, withdrawn, and depressed. Holland testified that "went crazy" and started beating Thelma Johnson with whatever was around him. (T Vol. 74 5054-56). He did not remember the incident with Officer Winters and believed that the police were framing him. The police beat him after they arrested him, so he told them what he thought they wanted to hear. (T Vol. 74 5061-68).

In rebuttal, the State called Nathan Jones, an ordained minister, who testified that he had just arrived at a church in Pompano Beach around 5:10 p.m. on July 29, 1990, when Holland called to him from down the street. Holland asked him if he

could help him get something to eat because he was hungry. Mr. Jones went inside the church to speak to his brother, the pastor, and Holland followed him in. While he spoke to his brother, Holland accompanied the congregation in song on the piano. Mr. Jones gave Holland $5.00 and escorted him out of the church. Holland did not appear intoxicated or under the influence of drugs and did not smell of alcohol. After Holland held Mr. Jones' hand in prayer, he left around 5:30 p.m. (T Vol. 77 5366-75).

REASONS FOR DENYING THE PETITION

ISSUE I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S GRANTING OF A MOTION IN LIMINE REGARDING INTERNAL AFFAIRS RECORDS ALLEGEDLY SHOWING THE VICTIM'S PRIOR USE OF EXCESSIVE FORCE (Restated).

Holland claims that appellate counsel was ineffective for failing to challenge, on direct appeal, the trial court's granting of a motion in limine precluding Holland from using evidence of police internal affairs records which allegedly show Officer Winters' reputation for using excessive force. See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) ("'Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel.'"); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995). This Court will

find that the issue is without merit as appellate counsel was not deficient nor were his actions prejudicial.

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington . . . standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002)(citations omitted). Habeas relief based on ineffectiveness of appellate counsel is "limited to those situations where the petitioner establishes, first, that appellate counsel's performance was deficient because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Armstrong v. State, 2003 WL 22454933 (Fla. Oct. 30, 2003), citing Rutherford, 774 So.2d at 643. Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08, citations omitted. Further, appellate counsel is not ineffective for failing to raise nonmeritorious claims on appeal. Id. at 907-08 (citations omitted). "If a

legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, 2003. See also Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). With these principles in mind, it is clear that Holland has not meet his burden. All relief must be denied.

Here, the State filed a motion in limine prior to trial asking the court to "preclude defense counsel from mentioning during the course of the trial that the victim, Scott Winters, was previously the subject of an internal affairs investigation, where Officer Winters was cleared of any wrongdoing." (R 7801). The State noted that the investigation was not criminal, did not result in a conviction and was not relevant to Officer Winters' truthful character (R 7801). At the hearing on the motion, the defense argued that many of the internal affairs documents involved the use of excessive force by Officer Winters and were relevant because a potential defense in the case was that the murder was the result of excessive force used by the Officer (T Vol. 38 1568-69). The trial court granted the motion, reasoning that prior instances of excessive use of force were not probative of the officer's actions in this case (T Vol. 38 1569). The defense responded that the internal affairs

documents were probative of the methods and procedures the officer was using as he was attempting to apprehend Holland (T Vol. 38 1569-70). The court ruled that the methods and procedures the officer was using were provable by the testimony of what occurred in this case, not by any methods or procedures he might have used in the past (T Vol. 38 1570).

Holland claims that appellate counsel was ineffective for failing to challenge the trial court's ruling on direct appeal. This claim is without merit. As a general rule, evidence of a **victim's** character is inadmissible. See C. Ehrhardt, Florida Evidence, section 404.6 (2003 Ed.). However, "[i]f a defendant alleges a defense that rests upon the conduct of the victim, the defendant may offer evidence of the victim's character as circumstantial evidence to prove that conduct." Id. For example, "[w]hen a criminal defendant alleges self-defense, evidence of the victim's character trait of violence may be admissible for two purposes." Id. First, to show who was the aggressor and second to prove that the defendant was apprehensive of the victim and that the defensive measures taken by the defendant were reasonable. Holland does not specify for which purpose he would have introduced the internal affairs records in this case; however, it is clear that the records were

inadmissible for either purpose.[1] Consequently, appellate counsel was not deficient for failing to raise this issue on appeal.

Before evidence of a victim's violent character may be introduced to prove that the victim was the aggressor, there must be evidence of an overt act on the part of the victim at the time of the incident warranting the defendant to act in self-defense. Id. See also Berrios v. State, 781 So.2d 455, 458 (Fla. 4th DCA 2001)(holding it was not error to prohibit the defendant from introducing evidence of the victim's character on the issue of self-defense when the defendant failed to demonstrate an overt act by the victim at the time of the incident indicating a need for the defendant to act in self-defense); Sanford v. State, 785 So.2d 654, 655 (Fla. 3d DCA 2001)(same). Further, section 90.405, Florida Statutes (2003), limits the method of proving a victim's violent character, in order to show he was the aggressor, to testimony by witnesses who are aware of the victim's reputation for the character trait. See C. Ehrhardt, Florida Evidence, section 404.6 (2003 Ed.). See also Hoffman v. State, 708 So.2d 962, 966 (Fla. 5th DCA 1998)(specific prior acts are not reputation evidence). "Evidence of prior specific acts of the victim, e.g., a fight the previous week, is not admissible to prove that the victim

[1] Holland's attorney argued "self-defense" to the jury in opening and closing statements (T Vol.

was the aggressor since the victim's character is not an essential element of self-defense." See C. Ehrhardt, Florida Evidence, section 404.6 (2003 Ed.).

Here, the internal affairs records would not have been admissible to prove that Officer Winters was the aggressor because there was absolutely no evidence of an overt act on his part warranting Holland to act in self-defense. There were several eyewitnesses to the shooting in this case and one who witnessed the encounter between Officer Winters and Holland from its inception. Abraham Bell testified that he was leaving his bait and tackle shop when he saw a police car coming toward him (T Vol. 65 4317-20). He heard the officer say over the public address system, "Hey you, get over here." (T Vol. 65 4320-21). A man whom he later identified as Holland stopped, turned around and walked over to the officer's car, which had stopped 40 to 50 feet from Mr. Bell. (T Vol. 65 4321). The officer got out of his car and told Holland to put his hands on the car (T Vol. 65 4323). Holland walked back to the car and put his hands on the hood (T Vol. 65 4323). The officer attempted to use the microphone on his shoulder, but it appeared to be broken, so he reached down to use the radio on his belt. (T Vol. 65 4324). Meanwhile, he held his nightstick on Holland's back. (T Vol. 65 4324). When he reached for the radio on his belt, Holland turned and swung at the officer's head, but Officer Winters

ducked, and they started “tussling.” (T Vol. 65 4324). During the tussle, Officer Winters got Holland in a headlock and put Holland on the ground. (T Vol. 65 4324-25). Holland tried to get up, but Officer Winters told him to stay down and hit him in the back two or three times with his nightstick. (T Vol. 65 4325-26). Holland rose anyway, and he and the officer faced each other in a headlock while they struggled. (T Vol. 65 4326-27). Holland tried repeatedly to grab Officer Winter’s gun, but “he couldn’t get enough grip on it.” (T Vol. 65 4327-29). Meanwhile, Officer Winters tried to keep Holland away from the gun. (T Vol. 65 4328). Holland kept “trying to get his weapon,” but he could not extract it because it had a “latch” on it. (T Vol. 65 4328-29). While Holland tried to pull it out, Officer Winters resisted, trying “to push down on [the gun].” Finally, Holland managed to shift the officer’s belt so that the holster was closer to the front of him, and he managed to free the gun from the holster. (T Vol. 65 4329-31). Officer Winters tried to radio for help and tried to open the car door to let his dog out, but Holland shot him twice and then ran. (T Vol. 65 4331-35).

Betty Bouie testified that she was riding in her car when she saw a tall man have a police officer in a headlock, take the officer’s gun out of his holster and shoot the man (T Vol.58, 3516-18). The Horne family was also riding in their car when

they saw the struggle. Mr. Horne saw the man reach around, take the officer's gun and shoot him (T Vol. 59, 3700-13). His daughter, Nikki Horne, also saw the man take the gun from the officer's side and then she heard three shots (T Vol. 59, 3684-95).

The undisputed eyewitness testimony establishes that Officer Winters did not commit an overt act warranting Holland to act in self-defense. Holland had brutally beaten Thelma Johnson and ran off after a witness interrupted the attack.[2] Police officers responding to a call about the attack found Ms. Johnson semi-conscious with severe head wounds. The officers, including Officer Winters, began searching for Ms. Johnson's assailant. When he spotted the man believed to have been involved in the attack, Officer Winters ordered him to stop and put his hands on the police car. The officer then tried to radio that he had apprehended the suspect. To prevent Holland from attacking him or escaping while he was doing that he had his night stick in Holland's back. Contrary to Holland's assertion Abraham Bell did not testify that the officer had his nightstick "stuck" in Holland's back (T Vol. 65 4324). Officer Winters' shoulder

[2] Holland was charged with sexual battery of Thelma Smith Johnson with a deadly weapon or physical force likely to cause serious personal injury and attempted first-degree murder of Thelma Smith Johnson with a deadly weapon. He was found guilty of the attempted first-degree murder and attempt to commit sexual battery upon a person twelve years of age or older.

microphone did not work and as he reached down to use his belt radio, Holland turned around and swung at his head. Thus, Holland was the aggressor, not Officer Winters. Because Officer Winters did not commit an overt act warranting Holland to act in self-defense, evidence of his violent character would not have been admissible to show that he was the aggressor. Additionally, violent character may not be proved by prior specific acts. The internal affairs documents constitute prior specific acts, not testimony by witnesses who are knowledgeable about the victim's reputation. Here, the trial court properly excluded prior specific acts.

Moreover, the internal affairs records would not have been admissible for the second purpose, i.e., to prove that Holland was apprehensive of Officer Winters and that the defensive measures taken by him were reasonable. Before character evidence may be introduced to prove such, it must first be shown that there was an overt act by the victim at the time of the event which warrants the defendant to act in self-defense and there must also be evidence that the defendant **knew** of the victim's acts of violence or aggression. Here, as already noted, there was no evidence of an overt act by Officer Winter's warranting Holland to act in self-defense. Further, there was absolutely no evidence that Holland was aware of these internal affairs records at the time he encountered officer Winters.

Holland's reliance upon Melvin v. State, 592 So.2d 356 (Fla. 4th DCA 1992), Banks v. State, 351 So.2d 1071 (Fla. 4th DCA 1977), and Smith v. State, 606 So.2d 641, 643 (Fla. 1st DCA 1992),is misplaced. In Banks, the defendant, who was charged with second-degree murder and aggravated assault, admitted shooting the victim and his mother, but claimed self defense, arguing that he shot the victim because ". . . he was pulling his gun to shoot me." In support of self-defense, the defendant sought to introduce testimony regarding the deceased's reputation for violence. The trial court ruled the testimony inadmissible absent a showing that the defendant had prior knowledge of the deceased's reputation. In reversing for a new trial, the Fourth District noted prior knowledge of the victim's reputation for violence is required only if the defendant is seeking to show that his/her actions were based on a reasonable belief as to imminent danger from the deceased. Prior knowledge is not required if the character evidence is being introduced to establish the deceased's conduct at the time of the crime, i.e., to show the deceased was the aggressor. Because Banks was seeking to prove **both** grounds, the trial court erred by refusing to admit the evidence.

Similarly, in Melvin the Fourth District held it was error to exclude evidence of the victim's reputation as a bully, in the defendant's trial for first-degree murder, because the

victim's reputation might have "shed some light on what occurred factually before the fatal shots were fired." Id. at 357. In other words, the evidence could have shown whether the victim was the aggressor. The Fourth District found the error was not harmless because there was considerable dispute as to whether the victim choked the defendant first and the determination of that issue could have been influenced by evidence of the victim's reputation. In Smith, the First District upheld the admission of reputation evidence of the victim's violent character to establish that the victim was the aggressor because the defendant had presented eyewitness testimony that the victim approached the defendant in a threatening manner, pushed against him and held a knife. The court noted that where there is the slightest evidence of an overt act by the victim which reasonably places a defendant in imminent danger, the reputation evidence should be admitted.

Banks, Melvin and Smith are distinguishable from this case because there was not a shred of evidence here showing that Officer Winters was the aggressor or used excessive force. His holding of a nightstick to Holland's back while he attempted to radio his fellow officers that he had apprehended a suspect did not warrant Holland throwing a bunch at his head and engaging in is struggle. Here, unlike the cases cited by Holland, there was not the slightest evidence of an overt act warranting Holland to

act in self-defense. Thus, the trial court properly granted the motion in limine and appellate counsel was not deficient for failing to raise the issue on appeal.

Because the trial court's evidentiary ruling was correct, Holland has failed to demonstrate ineffectiveness of appellate counsel. See Jones v. Moore, 794 So.2d 579, 583-84 (Fla. 2001)(noting that in evaluating evidentiary objections which are preserved, but not raised on direct appeal, this Court evaluates the prejudice or second prong of the Strickland test first. The specific objection made by trial counsel is reviewed for harmful error. If this Court concludes that the trial court's ruling was not erroneous, "then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue."); Cherry v. Moore, 829 So.2d 873 (Fla. 2002) (same); Valle v. Moore, 837 So.2d 905 (Fla. 2002).

Had appellate counsel raised the issue on direct appeal, he would not have been able to argue successfully that the trial court abused its discretion by granting the motion in limine. Appellate counsel cannot be considered deficient for failing to raise a meritless issue on appeal. Moreover, Holland has failed to establish the necessary prejudice under Strickland because he has failed to show a reasonable probability that the result of his appeal would have been different had appellate counsel raised the issue.

ISSUE II

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S FINDING, AFTER A NELSON INQUIRY, THAT DEFENSE COUNSEL WAS COMPETENT AND WOULD NOT BE DISCHARGED (Restated).

Holland next argues that appellate counsel was ineffective for failing to argue, on direct appeal, that the trial court erred in refusing to discharge defense counsel after a Nelson inquiry.[3] The facts surrounding this claim are as follows. On remand, Judge Charles Greene was assigned to preside over Holland's retrial, since Judge Futch had retired. At the very first hearing, Holland informed the court that he did not want his lawyers from the first trial, Peter Giacoma and Young Tindall, re-appointed to represent him. He wanted "some new faces": "Even if they try to do my in, give me another face, not the same two or one." (T Vol. 1 12-13).[4] Ultimately, Judge Greene decided not to re-appoint Giacoma and Tindall, but only because Judge Futch and Peter Giacoma had formed a partnership

[3] Holland acknowledges that appellate counsel raised the related issue of whether the trial court conducted a proper Faretta inquiry and properly denied Holland the opportunity to represent himself. This Court held that the trial court had not abused its discretion in denying Holland's request to represent himself. Holland v. State, 773 So.2d 1065, 1068 (Fla. 2000).

[4] At his first trial, Holland began complaining about Peter Giacoma a month after his appointment. (IR 2 12-13). Then, on the first day of trial, Holland sought to have Giacoma and Tindall replaced with other attorneys. (IR 12 889-90).

sometime after Holland's first trial. (T Vol. 1 16-17). Instead, on August 24, 1994, he appointed Ken Delegal, who agreed to represent Holland. (R96 7038; T Vol. 2 29-38). Five months later, upon Delegal's motion, the trial court appointed Evan Baron to represent Holland at the penalty phase. (R97 7276). Shortly thereafter, Holland's attorneys filed a Notice of Intent to Rely on a Defense of Insanity. (R97 7307-08, 7324-25).

In June 1995, the trial court replaced Ken Delegal with James Lewis as Holland's lead attorney, because Delegal was having personal and legal problems. (T Vol. 21 657-66). Shortly thereafter, on August 8, 1995, Holland wrote a letter to Judge Greene stating that he had concerns about Mr. Lewis and the judge which he wanted to address in court (R 7593-94). In September, 1995, a hearing was held so that Holland could voice his complaints about Mr. Lewis (T Vol. 24 712-64). Before Holland spoke, Mr. Lewis informed the court that Holland had refused to meet with him, twice, at the jail and had refused to speak to him that day (T Vol. 24 712-64). Holland then began a tirade about his disappointment in Delegal, his dissatisfaction with Lewis, and his fear of bias by Judge Greene.

When questioned by the court about Lewis' representation, Holland complained that: it took Lewis three weeks to tell him that Delegal had been arrested; Lewis left during their visit

with Holland's father and didn't come back in one-half hour like he had said; when he did come back he convinced Holland's father to return to Washington, D.C. because of a hurricane which Holland's father found suspicious; that the jail was taping all of Holland's spoken words in his cell and during his visits; that Lewis and other lawyers "knew" about his case before Delegal was arrested; that Lewis was going to "sell" Holland to the State to save his friend (Delegal); that Lewis might frame him with drugs from Delegal; and that Lewis was refusing to provide him with depositions and tapes. Holland also wanted to know if Lewis was gay because he thought Lewis' "shaking around the courtroom" might affect the jury. Holland wanted Judge Greene to appoint a different attorney and then to recuse himself.

The State Attorney was asked whether he was aware of any taping of Holland's cell or his visits(T Vol. 24 733). He responded that he was not (T Vol. 24 733). Additionally, the court informed Holland that any tapes could not be used against him (T Vol. 24 734). Lewis responded that he was aware of Holland's case because he shared office space with Delegal, as anyone would be who was reading about it in the newspapers, but denied that he was "familiar" with the case before taking over Holland's representation (T Vol. 24 735). Lewis further informed Holland that, to his knowledge, Delegal was facing only

City of Ft. Lauderdale charges for disorderly conduct and vandalism, which had nothing to do with the State Attorney's Office (T Vol. 24 739-40). Lewis further responded that he is not gay (T Vol. 24 747). The trial court denied Holland's motion to discharge counsel noting that Lewis met the qualifications for representation, had previously represented many individuals, was capable, competent, effective and that Holland was lucky to have him (T Vol. 24 753-54). Lewis re-iterated that he was uniquely qualified to take over the case because he has a relationship with the investigator, Mr. Milton and was aware of Holland's case because he shared office space with Delegal (T Vol. 24 754). Lewis also explained that he did confer with Holland's father before bringing him to the jail and did show him the evidence in the case (T Vol. 24 761). Further, he left the visit because he felt it was appropriate to give Holland and his father some time alone (T Vol. 24 761). Also, it was Holland's father who wished to return home rather than get caught in a hurricane (T Vol. 24 762). The Court noted that it would entertain further motions to bring Holland's father to Florida to help prepare his son's defense (T Vol. 24 762). It also requested that Lewis get Holland a copy of the witness list and the corresponding depositions (T Vol. 24 763).[5]

[5] Holland's complaints about Giacoma and Tindall in the first trial were similar in nature. Among the reasons for seeking their discharge were that they refused to provide him

Six months passed without incident before Holland again refused to cooperate with counsel and a defense expert. At a March 22, 1996 hearing, Lewis informed the trial court that Holland was refusing to meet with him at the jail (T Vol. 31 1174). When questioned about his conduct, Holland began another tirade about Judge Greene's bias, defense counsel's incompetence, and the State's overreaching. (T Vol. 31 1174-1205). Holland alleged that Lewis was incompetent for the following reasons: (1) Lewis had to live and work with the State Attorney so he was not going to try to help Holland; (2) Lewis had not brought him the depositions and transcripts from the first trial; (3) Lewis was not communicating with him regarding potential defense witnesses and defense strategy; (4) Lewis was ignoring his requests to see potential witnesses' rap sheets,

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with depositions, they refused to come see him at the jail, they refused to bring him some tennis shoes, they ignored his inquiries and input, they denied him a speedy trial by an impartial jury, they were pursuing an insanity defense against his wishes, they refused to file a motion to recuse the trial judge, they were working with the prosecution to convict him and sentence him to death, and they were denying him the effective assistance of counsel. (IR12 882-98, 901-04). Holland also moved to recuse Judge Futch because the judge had formerly been a police officer, he had sought to retain Holland's case even after retiring from the bench, he had authorized the mental health experts to videotape their examinations without Holland's knowledge, and he seemed overly concerned about the cost of the trial. (IR12 884-85). After patiently listening to Holland's complaints and defense counsels' comments (IR12 898-900), the trial court denied Holland's motions to discharge counsel and to recuse the trial judge, and determined that Holland was not competent to represent himself. (IR12 904).

crime scene photos, etc.; and (4) Lewis was concealing evidence and colluding with the State Attorney (T Vol. 24 1174-91).

Lewis responded that he had taken depositions, audio and videotapes to Holland. He's tried to share all the evidence provided by the State with Holland and his father (T Vol. 31 1191). There was not enough time for Holland's father to read the entire transcript of the first trial so Lewis took him the important parts (T Vol. 31 1191). Lewis did refuse to provide copies of the autopsy photos because he didn't think it was proper, but he did allow Holland and his father to view the photos (T Vol. 31 1191-92). He has taken every photograph to the jail for Holland and his father to view but didn't think it was reasonable to have to make copies for them to keep (T Vol. 31 1192). Lewis noted that he cannot take 30 boxes of material over every time, so he takes what is important (T Vol. 31 1192). He has provided copies of depositions and witness statements at his own expense to Holland when he felt they were important (T Vol. 31 1192). Lewis is still reading the first trial transcript, that's one reason he hasn't copied it yet for Holland and he doesn't know whether the jail would let Holland have that many boxes over there (T Vol. 31 1192-93). Regarding Holland's defense, Lewis noted that he needed Dr. Buckstell's report before he could formalize the defense strategy and was uncomfortable saying anything more (T Vol. 31 1194).

The trial court noted that it had heard similar complaints from Holland regarding his first trial attorneys, Giacoma and Tindall and Mr. Delegal (T Vol. 31 1194). Holland interrupted the court demanding to know where the gunshot wounds were on Officer Winters and why Lewis kept ignoring that the eyewitnesses could not have seen Thelma Johnson because there were too many trees (T Vol. 31 1194-97). Holland then asked to represent himself (T Vol. 31 1197). The court concluded that Lewis was competent and loyal, noting that Holland had complained about all his prior counsel (T Vol. 31 1199).

Three months later, at an emergency hearing held on June 28, 1996, the State informed the trial court that Holland was refusing to cooperate with its expert witness. Defense counsel noted that Holland was not communicating with them (T Vol. 34 1253). Holland began another tirade about the doctor, the State, the judge, and defense counsel. Regarding defense counsel, Holland complained that he had yet to receive copies of the depositions and had received only volumes 1-36 of the first trial (T Vol. 34 1260-61). Lewis responded that he would look into exactly what Holland had received and would send over depositions (T Vol. 34 1261-62).

Six weeks later, at a hearing held on August 2, 1996, Holland again requested the appointment of new attorneys, alleging that his counsel were ineffective (T Vol. 36 1383).

The trial court denied the motion (T Vol. 36 1383). Holland acknowledged receiving about 167 depositions on July 10, 1996, but had another list of depositions he wanted (T Vol. 36 1387-88). He complained he was missing pages 7-27 of the witness list and wanted the ballistics report (T Vol. 36 1388). The trial court denied the request for new attorneys. Holland asked if he would be given time to study the materials if he represented himself. (T36 1383-90). In response to Holland's question, the trial court conducted another Faretta inquiry. Holland explained that he had been reading cases and studying the law since he had been given law library privileges. When asked what he knew about the rules of criminal procedure, Holland indicated that he knew he could question jurors and object when the State is "out of line," but shook his head when asked how he would know when it was time to object. He indicated that he would know when a question was inappropriate based on what he learned from "Matlock," the television show. The court thereafter found Holland "not able to adequately [and] appropriately represent himself . . . [n]or to comply with the Court's order, nor with applicable rules of evidence, rules of criminal procedure, as well as case law." (T Vol. 36 1392-97).

Three weeks later (now four weeks before trial), defense counsel moved to withdraw at Holland's request. (R 99 7761-62). At the August 26, 1996 hearing on the motion, defense counsel

indicated that Holland was not cooperating with the State's mental health witnesses or with the scheduled MRI, and refused to talk to them about the trial and defense strategy until he had an opportunity to speak to the court. (T vol. 37 1403-04). In considering the motion to withdraw, the trial court made the following comments: Holland had already been convicted and sentenced to death once; he challenged his attorneys' competency at the first trial; Lewis and Baron were "well seasoned experienced criminal defense lawyers" who had previously litigated capital cases; Holland previously relied on a defense of insanity and was pursuing one again; the court was aware of factors in Holland's childhood that impacted his ability to represent himself; Holland had suffered a head injury and had been hospitalized therefor; and Holland was so disruptive at his first trial that he had been removed from the courtroom for the majority of the trial and had thus evidenced his inability to follow the court's orders and maintain proper decorum. (T Vol. 37 1405-10).

Before the court could conduct a Nelson/Faretta inquiry, however, Holland interrupted, alleging that his attorneys were incompetent and asking the court to discharge them and appoint new ones (T Vol. 37 1411). When asked how they were incompetent, Holland began another tirade complaining that his attorneys: had not filed another motion to recuse the trial

judge; had not given him the 83 depositions he requested; had not called the school in NY that was helping prepare mitigation; had not given him audio, videotapes and photos; had not gone to crime scene; had ignored exculpatory evidence given to them; and were crooked because they were associated with Delegal (T Vol. 37 1419-68). Penalty phase counsel Mr. Baron responded that he had read the record, the doctors' reports, had spoken with the doctors in Washington D.C., had spoken with Holland's father twice (rest of family uncooperative), and called the school in NY but the two students who were working with Holland's father were no longer there (T Vol. 37 1478-82). Baron explained that the things he has not been able to get done regarding penalty phase have been because Holland has refused to co-operate (T Vol. 37 1404). He noted that Holland refused to see Dr. Stock.

Jim Lewis explained that he read the first trial transcript, the depositions, spoke to Delegal, Giacoma and Delegal's investigator, spoke with the experts, had met with Holland when he would agree, had met with Holland's father, and had provided all requested depositions except those where deposition hasn't been taken(T Vol. 1489-93). The trial court denied the motion to withdraw finding defense counsel competent. It also noted its previous findings that Holland was not competent to represent himself, and specifically noted Holland's disruptive

behavior during the first trial.[6] (T Vol. 37 1497-1504).

Holland's tirades continued through jury selection. Holland requested new counsel, or alternatively to represent himself, at a hearing a week before the trial (T40 1634-39), prior to jury selection (T40 1675-78), and during jury selection (T40 2477-79, 2564-82; T52 3094-3103; T53 3114-29; T55 3181-83). His requests were denied.[7]

Holland argues that the trial court erred by not discharging

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

[7] Holland does not rely upon these other ruling for this argument. He challenges only those rulings made at the August, 1996 hearing.

defense counsel pursuant to Nelson and that appellate counsel was ineffective for failing to raise the issue on appeal. Specifically, he argues, there was nothing in the record to refute Holland's testimony that counsel had done nothing on the case for at least six months, had done no new investigation, had lied to Holland and the Court (about where the victim had been shot, about visiting him in jail, about calling his father, about providing depositions), had misrepresented facts and had not pursued exculpatory evidence. Holland's factual assertions are inaccurate. It is not undisputed that counsel had done nothing on the case for six months. To the contrary both defense counsel outlined the work they had been doing to present and both stated that any problems they were encountering in accomplishing things were caused by Holland's lack of co-operation. Mr. Baron's forgetting whether he last spoke to Holland's father over the telephone or in person is of no consequence. He stated unequivocally that he had spoken to him twice and was receiving no co-operation from the rest of the family. Further, regarding the depositions, Holland admitted at a prior hearing that he had received 167 depositions and Lewis represented that Holland had copies of all the depositions that had been taken. The problem was that Holland was requesting depositions of people that had not been taken. Holland also agreed on several occasions that he had refused to see his

attorneys when they visited at jail. Simply put, there were no factual allegations that were unrefuted at the hearings. The trial court properly found counsel competent after the Nelson inquiries and refused to discharge them.

Holland has not cited a single case in support of his assertion that the trial court erred by not discharging counsel in this case. He is not alleging that the trial court did not conduct adequate Nelson inquiries and it is clear that the trial court's Nelson inquiries were proper. The trial court properly concluded that counsel was competent. See Bell v. State, 699 So.2d 674 (Fla. 1997)(noting that no basis was demonstrated for requiring the trial court to appoint other counsel after Nelson inquiry); Gudinas v. State, 693 So.2d 953 (Fla. 1997) (noting that counsel was acting legally competent after Nelson). Appellate counsel cannot be deemed deficient for failing to raise a non-meritorious issue on appeal. Had appellate counsel raised the issue on direct appeal, he would not have been able to prove that the trial court abused its discretion by finding counsel competent. Moreover, Holland has failed to establish the necessary prejudice under Strickland because he has failed to show a reasonable probability that the result of his appeal would have been different had appellate counsel raised the issue.

ISSUE III

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S DENIAL OF A CAUSE CHALLENGE AND ADDITIONAL PEREMPTORIES (Restated).

Holland argues that appellate counsel was ineffective for failing to challenge, on direct appeal, the trial court's denial of a cause challenge to juror Keith Mulford, based on his racial prejudice. The State's first argument is that Holland's factual assertions are inaccurate. The record shows that Mr. Mulford was excused for cause and did not serve on Holland's jury (T Vol. 51 2934-35).

As Holland points out, the trial court asked the venire whether any of them would be affected by the fact that Holland is African-American, Officer Winters was Caucasian and Thelma Johnson is African-American (T Vol. 50 2746). Mr. Mulford raised his hand (T Vol. 50 2747). Outside the presence of the other prospective jurors, Mr. Mulford explained that he would have a problem with the sexual battery if it was a minor (T Vol. 50 2753). Mr. Mulford defined a minor as anyone up to age 18 (T Vol. 50 2754). He pointed out that he has an African-American granddaughter and he was not willing to put his "time or feelings on the line for a man that would violate that, whether he was Caucasian or black (T Vol. 50 2754). When the court then asked "[s]o race really is not the issue?" Mulford responded, "[n]ot 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."

(T Vol. 50 2754). Mulford explained he would not feel right sitting on a panel where sexual battery of a minor was part of the Indictment, but would not have a problem if the victim was over age 18 (T Vol. 50 2754-55).

Defense counsel followed up on Mr. Mulford's racial feelings, asking whether there was a particular experience that made him feel a little prejudiced (T Vol. 50 2756). Mr. Mulford explained that he was inducted into the army in 1952, the year it was desegregated and that he was one of two whites in a battalion, which caused him mental and physical hardship (T Vol. 50 2756). He was treated badly by some of the black soldiers (T Vol. 50 2756). When asked whether he still had those feelings, Mr. Mulford explained that he's "learned to live with it. I have to, I've a granddaughter that is black." (T Vol. 50 2757). It was his daughter who bore an African-American child and when asked whether that causes him embarrassment or a problem, he responded "I love her dearly." (T Vol. 50 2757).

The State Attorney then asked Mr. Mulford whether he was prejudiced now and he responded "no." (T Vol. 50 2757). He was also asked whether his past experience would have anything to do with this case and he responded "[n]ot as far as the other three indictments, just the one sexual battery." (T Vol. 50 2757). He would have no problem if the victim was over 18 (T Vol. 50 2758). After Mr. Mulford was excused, the court noted that he

was not for consideration at that point and no challenge was made (T Vol. 50 2759). Later, the defense challenged Mr. Mulford for cause, arguing that he had strong feelings of prejudice based on his military experience and had an African-American granddaughter (T Vol. 50 2902). The defense argued that his true feelings were in question, despite the fact that he said his views had changed. The State Attorney argued that there was no basis for a cause challenge and that the defense could further question Mr. Mulford if it wished (T Vol. 50 2903). The defense declined and the trial court initially denied the cause challenge stating that Mr. Mulford's military experience was 34 years ago and he no longer has any prejudice (T Vol. 50 2903). He indicated that his granddaughter is African-American and he loves her dearly.

Immediately thereafter, during the selection of the alternate jurors, a bailiff brought to the court's attention that Mr. Mulford had indicated he couldn't "do this." (T Vol. 51 2926). Mr. Mulford was brought back in for questioning and explained it would be a financial hardship for him to serve on the jury and he wouldn't be able to give his undivided attention (T Vol. 51 2926). He also gave as a reason that he has an African-American granddaughter and it could have been a violation of her (T Vol. 51 2930). When asked whether he still harbored some prejudice against African-Americans, Mr. Mulford

responded that he's "learned to live with it. I don't know whether it's completely gone or not. I can't say for sure." (T Vol. 51 2931). He then agreed for the first time that he views regarding African-Americans would affect the way he looked at the case (T Vol. 51 2932). The Court then agreed to grant the defense challenge for cause on Mr. Mulford and he was excused (T Vol. 51 2934).

Because Mr. Mulford **was excused for cause**, appellate counsel could not have argued that it was manifest error to initially **deny** the cause challenge. See Looney v. State, 803 So.2d 656, 665 (Fla. 2001)("[i]t is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent **manifest error**."); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999)(same); Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997). Any error would be rendered harmless by his subsequent excusal for cause. See Bolin v. State, 2004 WL 212451 (Fla. Feb. 5, 2004)(subsequent dismissal of juror due to illness rendered harmless any error in denial). Further, the argument would not have been preserved for appellate review because after defense counsel had exhausted all of his peremptory challenges and requested more, he never identified an objectionable juror who had to sit on the jury and it is clear that Mr. Mulford did not sit on the jury. See Conde v. State,

860 So.2d 930 (Fla. 2003)(where an appellant claims he was wrongfully forced to exhaust his peremptory challenges because the trial court erroneously denied a cause challenge, both error and prejudice must be established; in order to establish prejudice, an appellant "must identify a specific juror whom he otherwise would have struck peremptorily"); Mendoza, 700 So.2d at 674-75 (noting that in order for there to be reversible error based upon denial of a challenge for cause, appellant must have exhausted all peremptory challenges and identified an objectionable juror who had to be accepted and sat on the jury); Trotter v. State, 576 So.2d 691, 692-93 (Fla. 1990)("To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted."); Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla. 1989)(same); Griefer v. DiPietro, 625 So.2d 1226,1228 (Fla. 4th DCA 1993)(same).

Moreover, based upon Mr. Mulford's responses at the time the cause challenge was initially denied, the trial court did not commit manifest error by denying the cause challenge. Whether or not a juror should be stricken for cause is a question for the trial judge and this Court "must give deference to the judge's determination of a prospective juror's qualifications." Looney, at 665, citing Castro v. State, 644 So.2d 987, 989 (Fla. 1994). The decision is "based upon determinations of demeanor

and credibility that are peculiarly within a trial judge's province." Witt, 469 U.S. at 428. “A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors’ answers than does this Court in [its] review of the cold record.” Mendoza, at 675. See Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997)(“a trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency”); Wainwright, at 424-26 (“because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism . . . deference must be paid to the trial judge who sees and hears the juror”).

Here, Mr. Mulford explained during his first questioning that the prejudice he felt in the military was still 34 years in the past, that he had gotten over it and denied having any prejudice. Appellate counsel cannot be deemed deficient for failing to raise a non-meritorious issue on appeal. Had appellate counsel raised the issue on direct appeal, he would not have been able to prove that the trial court committed manifest error by denying Holland’s cause challenge to Mr. Mulford. Moreover, Holland has failed to establish the necessary prejudice under Strickland because he has failed to show a reasonable probability that the result of his appeal

would have been different had appellate counsel raised the issue.

ISSUE IV

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INCREASING HOLLAND'S SENTENCE FOR ARMED ROBBERY FROM 17 YEARS TO LIFE IMPRISONMENT (Restated).

Relying upon North Carolina v. Pearce, 395 U.S. 711, 726 (1969) and Gilliam v. State, 582 So.2d 610 (Fla. 1991), Holland argues that appellate counsel was ineffective for failing to argue, on direct appeal, that Holland's due process rights were violated when the trial court increased his sentence for Count II, armed robbery, from 17 years at the original sentencing to life imprisonment (at re-trial sentencing).

The Fourteenth Amendment's Due Process Clause forbids a trial court from imposing a vindictive sentence upon re-sentencing. To insure compliance with the Fourteenth Amendment, the Supreme Court explained in Pearce:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

> In order to assure the absence of such a motivation, we have concluded that whenever 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 725-26 (footnote omitted). Under Pearce, a presumption of vindictiveness arises only when a judge imposes a more **severe** sentence upon re-sentencing. In Trotter v. State, 825 So.2d 362, 369 (Fla. 2002), this Court held that the dictates of Pearce were not violated where a trial court imposed a drug trafficking multiplier upon resentencing which it had declined to impose during defendant's original sentencing because the resulting sentence on remand was less than the original sentence imposed. The trial court had originally sentenced Trotter to 83.2 months incarceration. On resentencing, the trial court applied the multiplier, resulting in a sentence of 72 months' incarceration. This Court held that because the sentence imposed on remand was less than the original sentence imposed, the presumption of vindictiveness did not arise, and there was no due process violation.

Similarly, in James v. State, 845 So.2d 238, 240 (Fla. 1st DCA 2003), the First District noted that "[a]s a prerequisite to

demonstrating that a sentence is vindictive, a defendant must show that the new sentence is actually more severe." In that case, the new sentence, **viewed as an interrelated plan**, was held to be less severe than the initial sentence. The defendant had originally been sentenced to a 30 year HFO sentence on Count I and a concurrent fifteen year sentence on Count II. On remand, the defendant received a 58 month sentence on Count I and a concurrent 30 year HFO sentence on Count II.

The First District held that the new sentence did not offend due process, even though it increased the sentence on Count II, because although the defendant received a thirty-year HFO sentence, the concurrent sentence on Count I was reduced from fifteen years to fifty-eight months. Thus, this was not a case where the defendant's sentence was enhanced; instead, the trial court accomplished its original goal on re-sentencing, and defendant received a sanction no more severe than the original sentence.

Here, Holland cannot demonstrate that Pearce applies because he his new sentence, viewed in totality, is actually **less severe** than the original. Holland was originally sentenced to death on Count I, a consecutive 17 year sentence on Count II, a consecutive life sentence on Count III and a consecutive 40 year sentence on Count IV (IR 4784-4795). After re-trial, Holland received the same sentence for Count I– death, a consecutive

life sentence for Count II, a consecutive 15 year sentence for Count III and a consecutive 30 year sentence for Count IV. Thus, his overall sentence was not more severe than his original one and there is no due process violation.

Moreover, even if this Court were to apply Pearce, there was no due process violation. As the Second District noted in Van Loan v. State, 779 So.2d 497, 500 (Fla. 2d DCA 2000),

> These requirements do not apply in every instance where a more severe sentence is imposed on retrial. In Texas v. McCullough, 475 U.S. 134, 140, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986), the Supreme Court reexamined the Pearce rule and found that the presumption of vindictiveness as set forth in Pearce was inapplicable where "different sentencers assessed the varying sentences." McCullough, 475 U.S. at 140, 106 S.Ct. 976. See also Graham v. State, 681 So.2d 1178 (Fla. 2d DCA 1996) (finding that, because the second sentence was not imposed by the same judge who imposed the original sentence, the defendant has the burden of proving actual vindictiveness). The McCullough case also permits the trial court to consider all evidence relevant to sentencing, whether known or unknown at the time of the original sentencing procedure. 475 U.S. at 141-42, 106 S.Ct. 976. As suggested in Pearce, this information may come from a variety of sources. However, because proven, actual vindictiveness violates the Due Process Clause, it is important for trial judges to follow the instructions set forth in Pearce: that is, a new sentencer should insure that the record provides logical and nonvindictive reasons for the sentence to insure proper review on appeal.

Here, there was a different judge on re-trial due to the retirement of the original judge. Consequently, Holland would

have the burden of proving actual vindictiveness. He could not do that in this case because the record contains logical, non-vindictive reasons for increasing the sentence on Count II from 17 years to life imprisonment. The State filed a motion to aggravate Holland's sentence on Counts II, III and IV based upon the fact that his first-degree murder conviction for Officer Winters was not a scorable offense on his guidelines score sheet and therefore had not been taken into account on those score sheets ® 8161-8163). The trial court entered a written order explaining that it was departing from the guidelines on Counts II-IV based on the fact that the defendant had been convicted of an unscorable felony ® 8196-97). Thus, the trial court provided logical, non-vindictive reasons for the increased sentence on Count II and Holland could not establish a due process violation.

Appellate counsel cannot be deemed deficient for failing to raise a non-meritorious issue on appeal. Had appellate counsel raised the issue on direct appeal, he would not have been able to prove that the trial court committed fundamental error by increasing Holland's sentence for Count II from 17 years to life imprisonment. Moreover, Holland has failed to establish the necessary prejudice under Strickland because he has failed to show a reasonable probability that the result of his appeal would have been different had appellate counsel raised the

issue.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny all relief based on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished by United States mail to BRADLEY M. COLLINS, Esq., 600 South Andrews Avenue, Suite 500, Fort Lauderdale, FL 33301, this 13th day of April, 2004.

_____

DEBRA RESCIGNO

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this

brief is 12 point Courier New, a font that is not proportionally spaced.

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DEBRA RESCIGNO