IN THE SUPREME COURT OF THE STATE OF FLORIDA

NO. _____

ERNEST LEE ROMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM DENIAL OF POST-CONVICTION RELIEF, MOTION FOR STAY OF EXECUTION, AND MOTION FOR STAY OF EXECUTION PENDING PETITION FOR WRIT OF CERTIORARI

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This is an appeal of the trial court's denial of post-conviction relief. Most of Mr. Roman's claims were summarily denied. A limited evidentiary hearing was conducted regarding three claims. This brief addresses only one part of one of the claims for relief, a claim that was summarily denied -- the State's failure to reveal material exculpatory evidence regarding Mr. Roman's drunkenness at the time of the offense. See Claim V, page 106, of the record on appeal from denial of post-conviction relief (hereinafter "P.C.R."). Mr. Roman will file a brief tomorrow morning addressing the other claims for relief, but counsel is unable at this point effectively to brief those other issues, due to time constraints, money contraints, and responsibilities to other clients.

Mr. Roman hereby re-raises every claim raised below, and incorporates into this brief all matters heard in the proceedings heretofore conducted. He will file an amended brief addressing those other matters by noon, March 30, 1988.

ARGUMENT I

THE STATE'S FAILURE TO REVEAL EXCULPATORY INFORMATION, PRESENTATION OF FALSE TESTIMONY, AND FALSE ARGUMENT, VIOLATED MR. ROMAN'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Three medical experts and some lay persons testified at trial/sentencing that if Mr. Roman was drunk at the time of the offense, many legal defenses and/or much mitigation became available to him. Because of Mr. Roman's life-long lay history of severe mental illness and chronic alcoholism, the experts opined that if he was drunk, he was insane. Naturally, drunkenness became the issue at trial.[1]

While Mr. Roman's appearance and behavior before and after the offense would be critical circumstantial evidence of his degree of intoxication at the time of the

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[1] The issue in this case is going to be the issue of what was the mental state of the defendant at the time . . . . That will be the issue in this case.

Opening statement by State (R. 462). Mr. Roman has substantial claims regarding his thirty-year history of suffering from schizophrenia and alcoholism, which will be explicated in his amended brief. This history, however, explains why it is that when he is drunk, he is legally incompetent, and so a synopsis of that history is appended to this brief as Appendix A. Appendix A was introduced as Exhibit 7 during the limited evidentiary hearing, and it was received as evidence.

offense, whoever saw Mr. Roman closest to the time of the offense would provide the most relevant evidence. There was conflicting evidence regarding his degree of drunkenness long before and long after the offense, and some conflicting evidence regarding drunkenness near the time of the offense.

However, the evidence that was most critical and relevant was the evidence from the one person who saw Mr. Roman, according to the State, nearest the time of the offense -- Arthur Reese. He was, according to the State, "one of the crucial witnesses in this case," Opening statement (R. 451), and he testified for the State that between 1:00 and 2:00 a.m., on March 14, Mr. Roman was not drunk. He testified for the State that Mr. Roman was sane. However, unknown to defense counsel, the jury, and this Court on appeal, Arthur Reese told the police right after the crime that Mr. Roman was in a stammering, stomping, drunken stupor at the time of the crime:

GALVIN: When you finally left Millie's trailer and went around to the camper where you sleep there's a, was Ernest there?

REESE: No sir.

GALVIN: Do you have any idea where he was?

REESE: No sir.

GALVIN: Do you have any idea how long it was before he came in and you were aware of him being there?

REESE: Well, when he opened the door he woke me up, cause he, he was drunk.

GALVIN: You had already gone to sleep?

REESE: Yes sir.

GALVIN: Sound asleep?

REESE: Well no, I don't sleep that sound. He had been in there ten minutes and then he left again.

GALVIN: Did you rouse yourself enough to take notice of what he was doing, or what he might be doing?

REESE: Well he was just kind of more or less in a drunk stupor, you know, I raised up to see who it was and all and said a few words and said I'll be back, walked back out the door.

GALVIN: Other than I'll be back what if you can recall, were the other few words?

REESE: Said I got to go see some friends. As a matter of fact that's what he did say.

GALVIN: But you roused yourself enough to look at him and recognize his being Ernie?

REESE: Yes sir.

GALVIN: When he left, how long was it before he came back?

REESE: Ten, fifteen minutes, something like that.

GALVIN: Had you gone back to sleep?

REESE: Yes sir.

GALVIN: And you roused up again?

REESE: Yes sir.

GALVIN: Did you look at him and recognize him as Ernest?

REESE: Yes sir.

GALVIN: Did you speak to him?

REESE: Yes sir.

GALVIN: What did you say to him?

REESE: I talked to him, he said, well we got to get up early and go out and he's got a little old stand where he sells stuff on, they got a license resale, and he talked quite a bit about that, and that's about it. Well he was kind of drunk but you know, you can figure how a person is when their drunk.

(P.C.R., 149-50). This statement was provided to Sgt. Ed Galvin, Sgt. Jerry Thompson, and Sheriff Jamice Adams, around 5:30 p.m. on March 14, 1981. Mr. Reese gave the same officers another statement the next day:

Galvin: I have a couple of questions I want to ask you.

Reese: Yes, sir.

Galvin: And the first being were you absolutely and purely truthful yesterday?

Reese: Yes, sir, I sure was.

. . . .

Thompson: And from that trailer, you went..

Reese: To the (inaudible) trailer in the front.

Thompson: Where you sleep.

Reese: Yes, sir.

Thompson: And you went directly to bed (inaudible)?

Reese: Yes, sir.....It was about 1:30 from (inaudible)..

Thompson: About 1:30.

Reese: Yes, sir.

Thompson: How long did you sleep?

Reese: I wasn't asleep really, I was there, I guess, 15 minutes, something like... 10, 15 minutes.

Thompson: Before Ernest came in?

Reese: Yes, sir.

Thompson: And he walked in the little trailer, did he go to bed?

Reese: No, sir, ah, he stammered, well you know...he's not fuly developed upstairs and he stammered and stomped around for awhile and.. I figured he had a wine jug outside, he was drinking. He went back out and he was gone for another 10 minutes, and come back in and 'bout (inaudible) and he left and.. he was in and out in other words.

Thompson: You say he was in and out. The last time he left, what time was that?

Reese: I presume about two, somewhere around then.

Thompson: Did you see him again, that night?

Reese: I think that I heard him come in, I'm pretty much asleep at the time. Which I..I don't know exactly what time it was, I'd say around 2:30, somewhere around then.

(P.C.R. 155-56).

Galvin: I have no further questions. Sheriff?

Adams: The night before in the trailer, ... were there any pills taken?

Reese: No, sir.

Adams: Dope smoked?

Reese: Not to the best of my knowledge.

Adams: Any dope smoked?

Reese: No, sir.

Adams: Liquor drank?

Reese: There may have been liquor drank, but it wasn't to my knowledge.. if there was.

Adams: Wine drank?

Reese: Well, Ernie was drinking wine.

(P.C.R. 161).

The State admits that these two statements from this crucial witness were not provided to defense counsel. The State also admitted in the Court below that this failure "would appear to constitute a violation under

state criminal rules governing discovery . . . ." See Response to Motion to Vacate Judgment and Sentence (P.C.R. 514). Because the State contended that there was no due process violation, however, the lower court denied this claim without allowing evidence.[2] Mr. Roman demonstrates hereinafter that Florida discovery rules and due process of law were violated, and that confidence in the reliability of the conviction and death sentence is undermined as a result of this violation, in contravention of the sixth, eighth, and fourteenth amendments.

A. AS THE STATE CONCEDES, ARTHUR REESE WAS A CRUCIAL WITNESS

Some State's witnesses at trial testified that Mr. Roman was not drunk before midnight on March 13th, and that he was not drunk after three a.m. of March 14. The defense proof contradicted this, in that Mr. Roman's sister stated that Mr. Roman was drunk before midnight,

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[2]If this "discovery violation" had been discovered during trial and had the trial judge then refused, as this judge did, to "inquire into the circumstances of the discovery violation and its possible prejudice to the defendant," reversal would have been automatic. Smith v. State, 500 So. 2d 125, 126 (Fla. 1987)(failure to conduct a Richardson hearing is per se reversible).

that he had been drinking for days, and that she had to throw him out of the trailer because he was falling over things. Another defense witness, a friend, Wanda Pritchard, testified that Mr. Roman was drunk earlier on March 13th.[3] The only between-time witness -- the only witness for the offense time -- testified at trial that

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[3]The prosecutor characterized the credibility confrontation between the state and defense witnesses in closing argument:

> You have heard 7 witnesses testify -- 8 witnesses -- testify throughout the time period in question, from just prior to the crimes to just after the crimes, that the defendant was not intoxicated. Who have you heard say the defendant was? The defendant's sister, Mildred Beaudoin, the same one who called up on the telephone and told her sister, Betty Smith, "Ernie has killed a baby, I reckon". But she denies that, when he had her on cross examination. You heard her say that Ernest Roman, the defendant, was drunk that night. You have heard Mrs. Pritchard take the stand, the defendant's friend, friend of the family, and testify that the day before Ernest Roman was drunk and was falling down. You have heard the defendant, himself, on that tape make what I would call and characterize to you as a self serving declaration, to the effect that he was drunk at the time. Those are the only people who have said that to you. I submit to you that you can apply the same rule to that testimony that you can to what we are talking about in reference to an expert. If you find that that testimony from the defendant's sister, and from the family

(footnote continued on next page)

Mr. Roman was absolutely not drunk. Arthur Reese, on direct examination by the State, testified:

> A. I went straight to the trailer and went to bed.
>
> Q. Was Ernest Roman in the trailer at that time?
>
> A. No, sir.
>
> Q. Was he in Mildred Beaudoin's trailer at that time?
>
> A. No, sir.
>
> Q. Did he have occasion to come back inside your travel trailer that you shared with him?
>
> A. Yes, sir, he went to his bed, I guess he was there four or five minutes, and then he left.
>
> Q. Went back outside?
>
> A. Yes, sir.
>
> Q. And was he gone for quite awhile?
>
> A. Probably forty-five minutes to an hour, he was back in, and then he left again, and I didn't see him any more.

(footnote continued from previous page)

> friend, Mrs. Pritchard, <u>if you find that that is contradicted by the weight of the evidence in the other direction, as it certainly is here, with all the rest of the witnesses, then you can also totally disregard what they have said</u>.

(R. 1425-26).

Q. Didn't see him again the rest of that night?

A. No, sir.

Q. Could you tell me, please, on those occasions when you saw him coming back into the trailer, did he at that time appear to be drunk to you?

A. No, sir. I asked him where he had been and he said "I was outside", just like I'm saying to you, and he immediately left.

(R. 609-611).

Q. Throughout that time period, did you have occasion to observe him and see his actions and have conversations with him?

A. Well, I observed Ernest Roman, and I have had many conversations with him, and I observed him for, well through the 13th, and I hadn't noticed anything that was insane about him. He was sane. And, he knew right from wrong, and he knew better than to kill anybody.

Q. Would that answer apply also as to March 14, 1981?

A. Yes, sir.

Q. That he was sane, knew right from wrong, and knew that it would be wrong to kill?

A. Yes, sir.

(R. 611-12).

What defense counsel, the jury and the judge, did not know was that, because of a discovery violation, Mr. Reese could not be impeached by his March 14 and March 15 statements, in which he said "throughout that time

period" Mr. Roman "was drunk," that "he was just more or less in a drunken stupor," that "he's not fully developed upstairs and he stammered and stomped around for awhile," and that "he figured he had a wine jug outside, he was drinking." These statements are directly contrary to Mr. Reese's trial testimony, and there is a reasonable probability that their provision and use would have made a difference at either guilt/innocence or sentencing.

B. IMPEACHMENT BY USE OF A PRIOR DEPOSITION WAS NOT SUFFICIENT TO EXPOSE THE LIES MR. REESE WAS TELLING, AND THE PROSECUTOR'S REHABILITATION OF MR. REESE'S DEPOSITION INCONSISTENT STATEMENT WOULD HAVE BEEN FUTILE WITHOUT THE DISCOVERY VIOLATION

Mr. Reese had been deposed by counsel before trial. During that deposition, Mr. Reese testified about what happened before the offense time:

> A. They were having a few drinks, and whatever, and as the evening progressed, Ernest got a little bit drunk or high or whatever you want to call it, and he flipped over backwards, he was sitting on a kitchen chair, and he kind of flipped over backwards, but he got up, and retrieved his chair and sat down and <u>his sister said 'you are pretty high, you had better go on home and go to bed and sleep it off'</u>.

Deposition of Arthur Reese, September 17, 1981, page 4. Mr. Reese gave <u>no</u> information in the deposition regarding drunkenness at the time of the <u>crime</u>:

A. Well, I would say about One-thirty, quarter to Two, the mother and her boy friend left and I followed them out the door. I go to the trailer where I'm living and Ernest wasn't there. A little while later, he come in, and he acted kind of strange, not too much, because Ernie was kind of strange anyhow, but he was there a few minutes, maybe five minutes, something like that and he left and then he come back in again and a few minutes later he left and I went to sleep, evidently, never seen him any more that evening.

Id., p. 6.

Trial counsel had this deposition available, and attempted to impeach Mr. Reese with it upon cross-examination:

Q. That is the statement you made?

A. Right.

Q. All right. Now, would you refer to line 13 through 21.

Question What happened when the baby's mother and this other guy came, what went on, what did you all do, talk about?

Answer They was having a few drinks and whatever as the evening progressed Ernest got a little bit drunk or high or whatever you want to call it, and he flipped over backwards. He was sitting on a kitchen chair and he kind of flipped over backwards but he got up and retrieved his chair and sat down and his sister said "you are pretty high, you had better go on home and go to bed and sleep it off"..

A. ...well, I was referring to...

Q. ...did you make that statement?

A. I made that statement, but...

Q. ...Mr. Brown can go into that, I just want you to tell me if you made the statement.

A. Yes.

(R. 626-20).

On redirect examination, however, the State effectively rehabilitated Mr. Reese:

Q. Arthur, Mr. Harrison has just shown you that deposition, and he was pointing out, I think he called line 13 through 21, and he asked you a question and you started to try to tell him something, and he cut you off and wouldn't let you say it?

A. Right.

Q. Go ahead and tell us.

A. I was quoting what Mildred Beaudoin was saying.

Q. So when he read that part to you, those are not your thoughts, those were Mildred's...

A. ...yes...

Q. ...as related to you...

A. ...yes, sir.

Q. And is that what Mr. Harrison wouldn't let you say?

A. Yes, sir.

Q. Now, where it is talking about flipping over backwards in a chair, would you tell us a little bit about that? You saw that happen, I believe.

A. Well, Ernest was tipping back, you know how most country gentlemen do, and he lost his balance and fell over backward. Well, he immediately got up and picked the chair up and sat it up and sat down again.

Q. Now, in the course of this time, you were watching him?

A. Yes, sir.

Q. Would you tell me, did he fall out of that chair because he was drunk or because he tipped back too far?

MR. HARRISON: I object, that calls for a conclusion, your Honor.

THE COURT: Objection sustained.

Q. What made him tip over in the chair?

A. He lost his balance...

MR. HARRISON: ...same objection, your Honor...

THE COURT: Objection sustained.

Q. Was he drunk at the time he tipped over in the chair?

A. No, sir.

(R. 631-33).

The trial testimony thus was unequivocal: Mr. Roman was not drunk, according to Mr. Reese, when he fell in the chair. He was just being an awkward "country

gentleman," and it was just the biased Roman sister, not Reese, who was saying Mr. Roman was drunk, according to the State's redirect examination. Now that the egregious discovery violation has been revealed, however, the State credits the impeachment of Reese, rather than its own rehabilitation. As the State argued below:

> While there do appear to be some discrepancies between Reese's trial testimony and his statements made on March 14 and 15, 1981 concerning Roman's intoxication, the defense was well aware of the existence of such a prior inconsistent statement. United States v. Davis, supra. Reese's credibility was impeached at trial through the use of his deposition taken on September 17, 1981 wherein Reese had opined that "Ernest got a little drunk or high or whatever you call it," relating how Roman had apparently fallen out of his chair (R 627-630, 1457). See, Sec. 90.801(2)(a), Fla. Stat. Under such circumstances, it is highly unlikely that impeachment of this witness with additional inconsistent statements would have resulted in a different outcome at trial. United States v. Bagley, supra.

(P.C.R. 513). The State's argument of lack of prejudice due to effective cross-examination is specious:

a. There was no impeachment regarding 1:45 a.m., because at deposition (the only "prior inconsistent statement" known of by defense counsel) and at trial Mr. Reese did not say Mr. Roman was drunk at that offense time. With regard to that crucial time, "Reese's credibility was [not and could not have been] impeached"

through the use of his deposition, and defense counsel was not "aware of the existence of such a prior inconsistent statement," because the deposition did not reveal the 1:45 a.m. drunk stupor statement.

b. The State completely ignores the fact that at trial the State got Mr. Reese to say on redirect that it was someone else, not he, that believed Mr. Roman was drunk, a rehabilitation that would have been readily destroyed had the defense been provided the March 14 and March 15 statements.

c. Mr. Reese's "crucial" testimony was the only offense time testimony. Reese testified categorically that Mr. Roman was not drunk at 1:45 a.m. If the jury decided Mr. Reese was a liar, that fact would have had many other independent ramifications. For example, he had been a suspect, and if he would lie at trial about Mr. Roman's drunkenness, he would lie to police (who testified they had eliminated him as a suspect) and to the jurors about other matters.

C. THIS "DISCOVERY VIOLATION" REGARDING THIS "CRUCIAL" WITNESS HAD FAR REACHING TRIAL AND SENTENCING IMPLICATIONS, AND A NEW TRIAL IS NECESSARY

This trial judge summarily denied an evidentiary hearing on this state-confessed discovery violation.

This would be reversible error -- a new trial would be ordered -- if this were a direct appeal. The same result must occur here. It would be anomalous to rule that the longer the State withholds information, and the more complete the State's advantage is, the more the State is to be rewarded. Reversal is required.

Reese's statements were discoverable. Rule 3.220(a)(ii), Florida Rules of Criminal Procedure. The State concedes this. In Florida, the result is foregone:

> Brown and Troy next argue that the trial court failed to conduct an inquiry into the state's alleged discovery violation in accordance with Richardson v. State, 246 So.2d 771 (Fla.1971). Inmate Smith gave a statement to prison inspector Sands shortly after the murder. Smith later refused to testify at a defense deposition. The state obtained a taped statement from Smith approximately one week before trial, but did not inform the defense of the tape's existence until either Monday, the day of trial, or the preceding Friday. We held in Cooper v. State, 336 So.2d 1133, 1137-38 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), that
>
> > [a]s the trial date nears a prosecutor has the duty under Rule 3.220(f) to "promptly disclose" previously unidentified witnesses and material. A delay of days might be sufficiently prompt where several months remain before trial, but where a complex trial involving a human's life was scheduled to begin in one week, immediate disclosure is dictated by the Rule.
>
> The defense sought to exclude Smith's trial testimony based on (1) Smith's refusal to testify at the deposition; and (2) the

state's discovery violation. The court denied the request, stating that it felt compelled to allow Smith's testimony since the defense had not filed a motion to compel the deposition testimony. Without conducting a Richardson hearing into the discovery violation, the reason for the delay, or any resulting prejudice to the defense, the court postponed the testimony until the defense had an opportunity to hear the tape.

> Richardson states that although the trial court has discretion in determining whether the state's noncompliance with the discovery rules resulted in harm or prejudice to the defendant, such discretion could be exercised only after the court made an adequate inquiry into all of the surrounding circumstances. At a minimum the scope of this inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial. Cumbie v. State, 345 So.2d 1061, 1062 (Fla.1977); Richardson, 246 So.2d at 775; Raffone v. State, 483 So.2d 761, 763 (Fla. 4th DCA), dismissed, 491 So.2d 281 (Fla. 1986); Whitfield [v. State], 479 So.2d at [208] 215; Gant v. State, 477 So.2d 17, 19 (Fla. 3d DCA 1985); Donahue v. State, 464 So.2d 609, 611 (Fla. 4th DCA 1985).

State v. Hall, 509 So.2d 1093, 1096 (Fla. 1987). It is clear that the court did not comply with Richardson. We have repeatedly held that a trial court's failure to conduct a Richardson inquiry is per se reversible. E.g., Hall; Smith v. State, 500 So.2d 125 (Fla. 1986); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982); Cooper v. State, 377 So.2d 1153 (Fla.1979); Wilcox v. State, 367 So.2d 1020 (Fla.1979); Cumbie.

Appellants' remaining arguments are meritless. Pursuant to Richardson and its

> progeny, we vacate Brown's and Troy's convictions and sentences, and remand for a new trial.

Brown v. State, 519 So. 2d 211, 213 (Fla. 1987).

This Court does not like for the State to do this kind of thing. Smith v. State, 500 So. 2d 125 (Fla. 1986). Reversal is necessary.

D. THE NON-DISCLOSURE WAS PREJUDICIAL

No evidentiary hearing was allowed regarding whether the non-disclosure of what the State called this "crucial" witness's prior inconsistent statements was prejudicial. Thus, Mr. Roman has not been afforded the opportunity to have the trial lawyers, the expert trial witnesses, and the lay-person trial witnesses provide their opinion about how the hidden evidence provides a reasonable probability that the result in the case would have been different. State of mind was "the issue in this case." State's opening statement (R. 462). Expert testimony was that Mr. Roman was not competent if drunk, and virtually all witnesses agreed that Mr. Roman's degree of intoxication was pivotal:

> Q. Now, I believe, is it not still your opinion, that if Mr. Roman were sober when the crime occurred, he would have been sane?
>
> A. Yes.

Q. And if he were drunk when the crime occurred, he would be insane?

A. That is correct.

(R. 1311)(Lekarczyk, defense expert).

A. It would to a significant degree be dependent on how drunk he might have been, the degree of drunkenness.

Q. Now, I believe that Mr. Brown read the questions from the jury instructions, one of which related to whether he knew what would result from his actions, and I believe you answer Mr. Brown that he would have known what would result from his actions.

Now, assuming my hypothetical, is that still your answer to that question?

A. I would not be able to answer the way it is phrased because I don't know the degree of his drunkenness.

(R. 1101-04)(Dr. Carrera, state expert).

Q. Ray, if you could, would you tell us, please, even when he was drinking, in your opinion, did he know the difference between right and wrong, between legal and illegal?

A. Depends how drunk he was. You know.

(R. 575-75)(state witness Raymond Beaudoin).

The "depends how drunk he was" question could have been answered -- he was in a stammering, stomping, drunken stupor, but the State hid it. Dr. Barnard alone is prepared to testify that had he been fully informed that Mr. Roman was drunk, it would have figured into his

present expert opinion that "Mr. Roman was not competent to waive his constitutional rights or give a reliable statement to law enforcement officers," and his opinion that "there is a reasonable probability that Ernest Roman could not have formed specific intent to commit the offenes charged." Supp. P.C.R. 10-11. Dr. Barnard was the State's expert at trial, as the following record excerpts disclose, and if the hidden evidence effects his opinion, surely due process of law has been violated.

The following recitation of the evidence and argument at trial vis-a-vis intoxication reveals how critical the drunken stumbling, stammering, stomping, stupor evidence was:

1. State's opening statement

> Arthur Reese, I will tell you right off the bat, is one of the crucial witnesses in this case.

(R. 451).

> The issue in this case is going to be the issue of what was the mental state of the defendant at the time . . . . That will be the issue in this case.

(R. 462).

2. State Witnesses at Guilt Innocence

a. Kellene Smith:

> Q. Now, at the time that the defendant came into Mildred Beaudoin's trailer, did he

stay for a long time?

A. No.

Q. Could you tell us how long did he stay before he left?

A. He was in there just for a few minutes.

Q. Now, at the time that you saw him in that trailer as you think back on it now, do you have an opinion, from your observations of him, do you feel that he was drunk at that time?

A. No.

Q. Was he staggering or falling down, or anything like that?

A. No.

(R. 492-93) (this was around midnight).

Q. From your observation of him in walking back from that abandoned trailer area, could you tell us, please, did he appear to be drunk to you?

A. No.

Q. Was he staggering, or falling down, or anything like that?

A. No.

. . . .

Q. What did he do?

A. He just walked right on by and went to his trailer.

Q. Did you have occasion to follow him towards the trailer?

A. Yes, I did.

Q. What kind of a trailer was it that the defendant, Ernest Roman, was living in?

A. It was a little mini compact.

Q. Like a travel trailer?

A. Travel trailer.

Q. And could you tell us, where was that located in terms of Mildred Beaudoin's house trailer?

A. On the end of it, on the east...

Q. Was that pretty close to the end of her trailer?

A. End of her trailer.

Q. Did you see the defendant go back to that little trailer?

A. Yes.

Q. Did you have occasion to go up to the door?

A. Yes.

Q. And what, if anything, did you see inside that little travel trailer?

A. I seen him, he was sitting there taking off his shoes, and I asked him again if he had seen or heard a baby, and he said "no".

Q. Did you see Arthur Reese?

A. Yes, he was laying on the other side of the bed, the right side.

Q. Did you speak to him, or was he asleep?

A. I had asked him if he had seen or herad a baby and he said "no".

(R. 498-500) (this is around 3:00 a.m. on the 11th).

Q. Now, if I could ask you, after you had followed the defendant, Ernest Roman, to that travel trailer and you saw him sitting on the bed taking off his shoes, and you asked him again if he had seen Tasha, your observations of him at that time, did he appear to be drunk to you?

A. No.

Q. Did he appear to be acting pretty much normally and to know what he was doing?

A. Yes.

Q. Didn't have any trouble taking off his shoes?

A. No.

(R. 502).

Q. Kellene, you previously testified that you saw the defendant inside the trailer, Mildred Beaudoin's trailer, and that he did not appear drunk then? Not stumbling or falling down, or anything. You observed him for a period of several minutes?

A. Yes.

Q. The next time you saw him, you saw him walking from the abandoned trailer area, headed toward his travel trailer, and I think you testified that he was not stumbling or falling down and was not drunk, in your opinion? And, I assume that you had occasion to observe him for several minutes in that course of time?

A. Uh-huh.

Q. Had you had previous occasion before that night to see and talk to the defendant, Ernest Roman?

A. Yes.

Q. On approximately how many occasions had you seen him and talked to him?

A. Twice.

Q. Were you familiar with him, you had had conversations with him?

A. Yes.

Q. Now, if I could reask you that question, based upon your observations of the defendant, Ernest Roman that early morning, of March 14th, do you feel that he knew where he was and what he was doing at that time?

A. Yes.

(R. 503-504).

[Cross-examination]

Q. I believe that you told Mr. Brown earlier that you didn't think that Mr. Roman was drunk when you saw him on March 13th and 14th, 1981, is that correct?

A. Yes.

Q. Do you remember that he was drinking wine?

A. I saw him pick the bottle up.

Q. You in fact saw him pick the wine bottle up in Mildred's trailer and walk out with it, didn't you?

A. Yes.

Q. But you didn't actually see him drink any of the wine?

A. No.

(R. 530).

b. Chip Mogg:

Q. At the time that you saw him on March 13, 1981, did he appear to be drunk to you?

A. I really didn't notice. I don't think so.

Q. You don't think so?

A. I couldn't tell.

Q. If he had been stumbling and falling over himself and tripping over chairs and stuff like that, do you think you would have noticed?

A. I might have, I am not sure.

Q. From your observation of the defendant, Ernest Roman, that night, did it appear to you that he knew basically who he was and where he was, or did you have enough time to even observe him?

A. I really didn't have that much time.

(R. 541-42) (discussing early evening, the 13th).

Q. Weren't people drinking there?

A. Yes. People had been drinking.

Q. Kellene was drinking there?

A. I believe so.

Q. And you and Kellene had been drinking at your mother's house, isn't that right?

A. Yes, we had had a drink.

Q. Were other people there drinking?

A. I really didn't notice that much. There were some other people there.

(R. 546).

c. Raymond Beaudoin:

Q. Ray, if I could ask you, at that point and time, did you have occasion to take a look at the defendant to see how he was walking and so on and so forth?

A. Not long, because I was showering and getting ready for work, and all that, so not long. I didn't pay no attention.

Q. From the observation that you had of the defendant, previous to that, when he was at the trailer earlier, you testified to, and from what you did see of him when he came back in the trailer, as you were getting ready to leave for work, could you tell me, please, did he appear drunk to you?

A. No, sir, not drunk, no, sir.

(R. 557-58) (around midnight).

Q. From observations that you did have of them that nigh, could you tell me, in your opinion, was Kellene Smith drunk?

A. No, sir, she wasn't drunk. She had been drinking, but I wouldn't say she was drunk.

Q. What about Chip Mogg?

A. He was feeling a little better.

Q. Would you classify him as having been actually drunk?

A. Yes, I would have to say that he was feeling good.

Q. But Kellene Smith and the defendant

Ernest Roman in your opinion, were not drunk?

A. No, not drunk, no.

(R. 561).

Q. Throughout that time period, from the first part of January of 1981, until the defendant was arrested, back on March 14th 1981 for these crimes, based upon your observation of him, do you have an opinion as a layman as to whether he knew who he was, where he was, and what he was doing?

A. First, I would like to ask you what a "layman", what do you mean by that?

A. As opposed to being a psychiatrist. Being a regular person...

A. ...yes, sir, he was sane. Run that across me again.

Q. The simple question would be, in your opinion, was he sane?

A. Yes, sir.

Q. And, specifically, with reference to March 13th and March 14th, the dates in question here, would your opinion be the same as to those two dates that the defendant was, in fact, sane?

A. Yes, sir.

(R. 563).

[Cross-examination]

Q. From about 6 o'clock that night, isn't it true that your uncle was getting intoxicated?

A. Yes, sir, he had been drinking prior to before that, but I never seen him, you know. He made a few comments ...

(R. 564).

[Proffer]

Q. Ray, I think sometimes we talk about drunks and say some people are "mean drunks", some people are "quiet drunks", some go to sleep, some are "crazy drunks".

Without thinking about any medical stuff, do you have an opinion as to, would you call your uncle any particular kind of drunk?

A. No, there is no particular kind, no...I don't understand what you mean by that, no, no particular kind of drunk. There is no particular kind of drunk, a drunk is a drunk in my rules, that's it.

Q. So you wouldn't describe him in any particular different way when he gets drunk?

A. Yeah, I guess I could say he would do some strange things when he was drinking. He done many strange things when he was drinking, yes.

Q. Can you elaborate on that a little bit, give us some examples?

A. I would rather not, you know, it's things I would have to sit and think of for awhile. He would just make weird faces, do actions, crazy actions, crazy things sometimes when he was drinking.

Q. Can you think of a crazy action?

A. He's done all kinds, I don't know, name one - stealing flower pots, I don't know, you know, he's done little odd and any crazy things, nothing serious that I can recollect. Just little things. I can't remember anything right off hand, but I know he acted much different.

Q. Have you seen other people drunk

other than your uncle?

A. Sure. What do you mean, have I seen, --yeah, I've seen other people drunk.

Q. But you can't classify drunks in any particular way, such as I suggested?

A. If you run through the suggestions, maybe I could.

Q. Well, some of the ones I've heard is "mean drunks", you know, they like to fight; "quite drunks", they just sort of withdraw from conversation; "stumbling over drunks", they just blow their mind ...

A. ...yeah, that's him, I would classify him that. Kind of stumbling, yeah, kind of weavy, stumbling...

(R. 572-73).

Q. May it please the Court. Ray, Mr. Harrison on cross examination was asking you about prior drinking that your uncle might have done. The issue here is the night of the 13th and the morning of the 14th of March of 1981, and to go back and clarify things, as of that night of March 13th and the morning of March 14, 1981, would you tell us again, in your opinion, was the defendant drunk?

A. No, sir.

Q. All right. Now, Mr. Harrison asked you about drinking. Would you tell me, please, did your uncle, the defendant, drink even every day?

A. No, sir, not every day. Not to my knowledge, every day. He drank quite often, but...

Q. ...now, let me ask you this. You have had occasion to see your uncle after he had been drinking, haven't you?

A. Yes, sir.

Q. Would you tell me, please, Ray, is he your uncle, and you do have familiarity with me, would you tell me, please even after he had been drinking, would you tell me, and tell the ladies and gentlemen, does he know the difference between right and wrong?

MR. HARRISON: I think he needs to narrow it to time and place, your Honor.

THE COURT: I think the question is proper.

Q. Ray, if you could, would you tell us, please, even when he was drinking, in your opinion, did he know the difference between right and wrong, between legal and illegal?

A. Depends how drunk he was. You know.

(R. 575-75).

Q. Ray, I think just before the recess, I was starting to ask you a question. If I could go ahead and ask you that question now, speaking specifically about the night of March 13th and March 14th, early morning hours of March 14th, 1981, when you indicated that in your opinion you felt that your uncle, the defendant, was sane, did you include in that that he knew the difference between right and wrong?

A. Yes. I can say up 'til midnight.

Q. That is the last time you saw him?

A. Yes.

Q. Ray, you are basing that answer on your belief that your uncle, Ernest, was not very drunk on the 13th and the 14th of March...

A. ...that is correct.

Q. If he had been very drunk, your answer might have been...

MR. BROWN: ...Objection, calls for specultaion, [sic] your Honor.

MR. HARRISON: I think it is proper.

MR. BROWN: Calls for speculation. "If he had been drunk", the evidence shows that he was not.

AT THE BENCH: Mr. Brown, Mr. Harrison

MR. BROWN: It is speculation, your Honor. Asking "if he had been drunk"

MR. HARRISON: I think it is a proper question your Honor.

THE COURT: I think you need to rephrase it.

END OF BENCH CONFERENCE

Q. Ray, you have been your uncle when he has been drunk haven't you?

A. Yes, sir.

Q. If he had been as drunk on the 13th and 14th, as he was then, would your answer to Mr. Brown's question have been the same?

A. Yes, sir, right from wrong.

Q. No matter how drunk he was?

A. Well, no, I guess, it is possible.

(R. 582-83).

d. Dwayne Wolff:

Q. Did you have occasion, later, that morning, to see the defendant, Ernest Roman?

A. Yes, I did.

Q. And could you tell us, please, approximately how long after you looked inside the trailer and saw Arthur Reese, did you see the defendant?

A. Roughly forty-five minutes.

Q. And could you tell us, at the time that you saw him, from what direction did he appear to be walking?

A. From the woods to the trailer, toward the hard road.

Q. When you say "from the woods", could you tell me where is that in relationship to the abandoned trailer on top of the hill?

A. Right behind the abandoned trailer.

Q. Could you tell us in what direction was he walking?

A. He was walking toward the hard road.

Q. Is that back towards Mildred Beaudoin's?

A. Right.

Q. Now at the time that you saw the defendant, did you have occasion to speak to him?

A. Yes, I did.

Q. Approximately how far from you was the defendant at that time?

A. Approximately three, four foot.

Q. And what, if anything, did you ask the defendant then?

A. I asked him if he had seen the baby. He said "no".

Q. Now, at that time that you spoke to him, and at the time you had seen him walking, let me ask you first, did you detect any odor of alcohol about him?

A. No, I didn't.

Q. And if I could ask you about his walking, was he stumbling or tripping or anything like that?

A. No, sir.

Q. DWayne, if I asked you, from your observations and your conversations with the defendant at that time when he was walking from the area of the abandoned trailer back toward Mildred Beaudion's, do you feel that he was drunk?

A. I don't believe so.

. . . .

Q. Dwayne, I think just before the bench conference, I was in the process of asking you a question. I had not completed it, so let me go back and start from the beginning. Based upon your observations of the defendant, Ernest Roan, that early morning of March 14th, and also based upon your previous first hand experience with him, do you have an opinion as to whether he is sane, was sane at that time, and knew the difference between right and wrong?

A. I would say yes.

Q. And what is that opinion?

A. That he is sane and does know the difference between right and wrong.

(R. 589, 589A, 592) (discussing 3:00-4:00 a.m., the 14th.

e. Arthur Reese:

A. Oh, around 11:00, 11:20, probably 12 o'clock, 12:20.

Q. Twelve o'clock or a little bit after?

A. Yes.

Q. At the time that Ernest Roman came back inside the trailer, did you have occasion to look at him and observe him at that time?

A. Yes, sir.

Q. Now, based upon your observations, do you feel that he was drunk?

A. No, I do not.

Q. Throughout that evening, did you have anything to drink at all?

A. No, sir.

Q. Did you see Ernest Roman after he came back in that trailer drink anything at all?

A. No, sir.

Q. Could you tell us, did Kellene and Chip have occasion to leave Mildred Beaudoin's trailer?

A. You mean after they come?

Q. Yes.

A. No.

Q. How long did they ultimately stay that night?

A. Until about 1:00 or 1:30, and they left, and I left immediately behind them.

Q. Now, after they left and you left, where did you go?

A. I went straight to the trailer and went to bed.

Q. Was Ernest Roman in the trailer at that time?

A. No, sir.

Q. Was he in Mildred Beaudoin's trailer at that time?

A. No, sir.

Q. Did he have occasion to come back inside your travel trailer that you shared with him?

A. Yes, sir, he went to his bed, I guess he was there four or five minutes, and then he left.

Q. Went back outside?

A. Yes, sir.

Q. And was he gone for quite awhile?

A. Probably forty-five minutes to an hour, he was back in, and then he left again, and I didn't see him any more.

Q. Didn't see him again the rest of that night?

A. No, sir.

Q. Could you tell me, please, on those occasions when you saw him coming back into the trailer, did he at that time appear to be

drunk to you?

A. No, sir. I asked him where he had been and he said "I was outside", just like I'm saying to you, and he immediately left.

(R. 609-611).

Q. Throughout that time period, did you have occasion to observe him and see his actions and have conversations with him?

A. Well, I observed Ernest Roman, and I have had many conversations with him, and I observed him for, well through the 13th, and I hadn't noticed anything that was insane about him. He was sane. And, he knew right from wrong, and he knew better than to kill anybody.

Q. Would that answer apply also as to March 14, 1981?

A. Yes, sir.

Q. That he was sane, knew right from wrong, and knew that it would be wrong to kill?

A. Yes, sir.

(R. 611-12).

Q. And once again, so it is clear, could you tell me, what is your opinion as to whether as of March 14, 1981, the defendant, Ernest Roman, knew the difference between right and wrong and was sane?

A. Yes, sir.

Q. And that opinion is?

A. It is my opinion.

Q. And would you state your opinion as to whether he was?

A. Well, yes, I had lived with him for, like I said, a period of three days, we will say, and had many conversations and I observated (pho) him and watched him and talked to him and he knew the difference between right and wrong, and he knew better than to kill somebody.

(R. 611-620).

CROSS-EXAMINATION

Q. Mr. Reese, do you recall coming into the Sumter County Courthouse on September 17, 1981, and being sworn to tell the truth and being asked some questions by Mr. Ron Fox of the Public Defender's Office?

A. I sure do.

Q. You remember that occasion, don't you?

A. Yes.

Q. I believe that is the only time that your deposition has been taken by our office. Referring now, if you would look to page 4, lines 10 and 12... line 10

Question Was Ernest drinking?

Answer Ernest drank quite a bit of wine periodically not all the time

Do you remember making that statement?

A. I sure do.

Q. That is the statement you made?

A. Right.

Q. All right. Now, would you refer to line 13 through 21.

Question What happened when the baby's

mother and this other guy came, what went on, what did you all do, talk about?

Answer They was having a few drinks and whatever as the evening progressed Ernest got a little bit drunk or high or whatever you want to call it, and he flipped over backwards. He was sitting on a kitchen chair and he kind of flipped over backwards but he got up and retrieved his chair and sat down and his sister said "you are pretty high, you had better go on home and go to bed and sleep it off"..

A. ...well, I was referring to...

Q. ...did you make that statement?

A. I made that statement, but...

Q. ...Mr. Brown can go into that, I just want you to tell me if you made the statement.

A. Yes.

(R. 626-20).

Q. I believe that you, after you went to bed, that you noticed Ernest coming into the trailer, one time or two times?

A. Two times.

Q. Two times? Did you ever observe what he did?

A. Yes, I did.

Q. I mean, did you observe what he did at that time when he came in?

A. Yes, he turned the light on, and I sat up on the bed.

Q. Is that all that you observed?

A. Well, he walked to his bed and was there for, I said, four or five minutes, turned and walked back out the door.

Q. You didn't observe him do anything else?

A. He didn't do anything.

Q. He didn't brush his teeth, or anything like that?

A. No, sir.

Q. There wasn't even a bathroom in the trailer, was it?

(R. 623).

[Redirect Examination]

Q. Arthur, Mr. Harrison has just shown you that deposition, and he was pointing out, I think he called line 13 through 21, and he asked you a question and you started to try to tell him something, and he cut you off and wouldn't let you say it?

A. Right.

Q. Go ahead and tell us.

A. I was quoting what Mildred Beaudoin was saying.

Q. So when he read that part to you, those are not your thoughts, those were Mildred's...

A. ...yes...

Q. ...as related to you...

A. ...yes, sir.

Q. And is that what Mr. Harrison

wouldn't let you say?

A. Yes, sir.

Q. Now, where it is talking about flipping over backwards in a chair, would you tell us a little bit about that? You saw that happen, I believe.

A. Well, Ernest was tipping back, you know how most country gentlemen do, and he lost his balance and fell over backward. Well, he immediately got up and picked the chair up and sat it up and sat down again.

Q. Now, in the course of this time, you were watching him?

A. Yes, sir.

Q. Would you tell me, did he fall out of that chair because he was drunk or because he tipped back too far?

MR. HARRISON: I object, that calls for a conclusion, your Honor.

THE COURT: Objection sustained.

Q. What made him tip over in the chair?

A. He lost his balance...

MR. HARRISON: ...same objection, your Honor...

THE COURT: Objection sustained.

Q. Was he drunk at the time he tipped over in the chair?

A. No, sir.

(R. 631-33).

g. Douglas Calvert:

Q. And could you tell us, please, at that time, were you fairly close to him?

A. Yes.

Q. And did you have a conversation?

A. Yes.

Q. Based upon your observation of him then, and your conversation with him then, taken into context of your having known him for about a year, would you tell us please, as of about 4 o'clock on March 13, 1981, would you say that the defendant was sane and knew the difference between right and wrong?

A. To my opinion, yes.

Q. If I could also ask you, did he appear to be drunk at that time?

A. He was drinking.

Q. And when you say "he was drinking", you make a distinction between "drinking" and being drunk, is that correct?

A. Well, he was drinking. Whether he was drunk, I don't know.

Q. Was he stumbling or falling down, or anything like that?

A. No.

Q. Was he able to carry on a conversation with you?

A. Oh, yes.

Q. And if you would ask him a question, did he respond?

A. Yes.

Q. Would it be a regular type of response that you would expect to get from

any one?

A. Yes.

Q. Did he appear to understand what you were saying to him?

A. Yes.

Q. Did he appear to know what he was doing and hwere he was and who he was?

A. Yes.

(R. 639) (4 o'clock p.m. on the 13th).

Q. Mr. Calvert, I believe you said you saw Ernie about 3 o'clock or 4 o'clock and that he had been drinking, is that correct?

A. Yes.

Q. You don't know whether or not he drank any more alcohol that night or not, do you?

A. No, I don't.

Q. You didn't see him after that?

A. No.

(R. 660).

Q. Now, if I could ask you, did you have occasion to see the defendant himself on March 14, 1981?

A. Yes, I did.

Q. Could you tell us at approximately what time you did see the defendant?

A. In the afternoon, I arrived at the scene around 12:30, and I saw him approximately 2:00, 2:30 in the afternoon.

Q. Could you tell us, please, at the time that you saw the defendant, approximately how close to him did you get?

A. I would say within twenty-five yards.

Q. Did you have occasion to observe his movements?

A. Yes, sir.

Q. Would you tell me, please, from your observation of the defendant on March 14, 1981, did he appear to be intoxicated or drunk to you?

A. No, sir.

(R. 811).

A. Mr. Roman had a table, picnic type table, folding table set up out there side of the road, had a couple of boxes on it with yard sale type items, used items.

Q. Could you tell us, please, had he had that there for some period of time, to your knowledge?

A. Yes, sir.

Q. And was the purpose of this to make sales of various items?

A. Yes, sir.

Q. Such that the defendant would, up to and including March 14th, 1981, be conducting business with members of the public?

A. Yes, sir.

Q. Where he would sell something and receive money in exchange?

A. Yes, sir.

Q. I think that you also testified that you had known the defendant for some period of years, is that correct?

A. Yes, sir.

Q. And Mr. Power asked you if you had ever had occasion to see him drunk?

A. Yes, sir.

Q. And, I think you said "yes", you had?

A. Yes, sir.

Q. By the same token, have you also had occasion to see him when he was not drunk?

A. Yes, sir.

Q. Now, based upon the association that you have had with the defendant over the past several years, do you have an opinion as to whether the defendant knew the difference between right and wrong and was sane?

A. Yes, sir.

Q. Would you tell us, please, what is your opinion? Based upon your long association with the defendant?

A. I believe on March 14th that he was sober.

Q. And with reference to sanity and knowing the difference between right and wrong?

A. I believe he knew the difference.

(R. 821).

h. Jerry Thompson:

Q. Now, if I could ask you, did you have occasion to see the defendant, Ernest Roman, on that date?

A. Yes, sir, I did.

Q. And in what location did you see him?

A. He was in the rear seat of a Sumter County patrol car.

Q. Would you tell us, please, did you have occasion to speak to the defendant at that time?

A. Yes, sir, I did.

Q. Did he get out of the car, or did you get in?

A. I got in the car. In the back seat with him.

Q. At the time that you got into the patrol car with the defendant, approximately how close to him would you have been?

A. It was a small Chevy Nova, intermediate size car. And, I was sitting almost next to him.

Q. Almost touching?

A. Yes, sir.

Q. Did you have occasion to have words or conversation with him at that time?

A. Yes, sir, I did.

Q. Could you tell us, please, did you detect any odor of alcohol whatsoever on the defendant?

A. No, sir.

Q. Was he drunk in any fashion

whatsoever?

A. No, sir.

Q. At the time that you spoke to him, did you have occasion to advise him of his constitutional rights?

A. I did, yes, sir.

(R. 824-25)(around 4:00 p.m., on the 14th).

Q. Could you tell me, please, based upon the prior times that you had seen him, and seeing and speaking with him on March 14th, do you have an opinion as to whether he knew the difference between right and wrong?

A. Yes, sir, I do.

Q. And what is your opinion?

A. I believe that he did, and does know right from wrong.

(R. 828).

Q. Sergeant Thompson, about what time of day was it when you saw Ernest Roman on the -- was it the 14th of March of 1981?

A. Yes, sir.

Q. What time of day was that?

A. It was after 4 P.M.

Q. And, did you see any signs of intoxication when you viewed him at that time?

A. No, sir.

(R. 829).

i. <u>Clarence Galvin</u>:

Q. Would you tell me, please, as a

fifteen year law enforcement officer, do you have an opinion as to whether at that time he was drunk or sober?

A. In my opinion, at that time, he was sober. [at 6:32 p.m. on the 14th]

Q. Did you detect any odor of alcohol about him whatsoever?

A. I did not.

(R. 834).

[CROSS-EXAMINATION]

Q. Didn't he appear to fall asleep several times during the interrogation, Sergeant?

A. Not necessarily to fall asleep, he slouched in the chair and looked into the floor, ahead of his feet.

(R. 887).

Q. And, Sergeant, from your observation of the defendant, Ernest Roman, that night, can you state that he was not hung over or suffering from the effects of alcohol?

A. In my opinion, he was not.

(R. 890).

j. Dr. Barnard:

[PROFFER]

Q. Could you tell me, please, based upon those examinations that you conducted and the other information that you had available to you at the time, did you reach a conclusion as to whether or not the defendant was legally sane as of November 20th 1973 examination? Do you have an opinion based upon that examination?

A. Yes, I did.

Q. And what was that opinion?

A. For the '73, it was my opinion, had he not been on alcohol at the time of the alleged crime, he would have been competent, legally sane, knowing right from wrong, been capable of adhering to the right.

(R. 1002).

Q. Could you tell me, please, in the course of your examination of the defendant, Ernest Lee Roman, and in terms of reaching the conclusions which you did ultimately reach as to the defendant's competency, and as to his legal sanity, at the time of these crimes, did you have occasion to look at or consider the confession statement which he gave to the Sheriff's Department shortly after his arrest?

A. Yes.

(R. 1017).

[Q] First, that according to the testimony which has been introduced in this trial that the defendant did not drink every day; second, on March 13, 1981, that he was seen sober, and in lay opinion testimony, sane at 3 o'clock in the afternoon; also seen sober and sane, according to lay testimony at 7 o'clock that night, also sober and sane, according to lay testimony, at approximately midnight, between the 13th and 14th of March; also that on the 14th of March, he was seen sober and sane according to lay testimony, at 3 o'clock in the morning of March 14th; also according to lay opinion testimony that he was seen sober and sane at 4 o'clock that morning; also that he was seen sober and sane at 9:45 that morning; again at 4:29 that afternoon, he was seen sober, sane and with no odor of alcohol or other evidence of intoxication whatsoever. And lastly, that he

was, in fact, observed from approximately 6:32 on that night, the 14th, until approximately 11 o'clock by Sheriff Department personnel, one of whom was very familiar with alcoholics and alcoholism. And that those persons also testified in Court that he did not show any signs of alcohol withdrawal or of a hangover. If you take all of those facts into consideration, and especially the method in which the defendant committed the crime, that the evidence of intentionality --if I ask you, Doctor, do you have an opinion, based upon all those various factors, taken in concert, as to whether at the time these three crimes, the kidnapping, rape and murder were committed, that the defendant, Ernest Lee Roman knew the nature of his acts? Do you have an opinion as to that?

A. Yes.

Q. And what would that opinion be?

A. That he knew.

(R. 1029).

The way I would go about saying how I reach my opinion on these matters had to do with relying a good bit on statements that the defendant made shortly after his arrest, because throughout the three times of examination that I made, he said that he did not remember any specific details. I would have to rely extensively on the basis of what he said in the statements to the individuals taking the statement from him after his arrest.

(R. 1031).

Q. And you don't know personally whether or not Mr. Roman was drunk during the early morning hours of March 14th, do you, sir?

A. Personally, meaning what?

Q. You weren't there to see him drunk, were you?

A. No.

Q. So, basically, you are going on the materials that you reviewed, isn't that correct?

A. Yes.

Q. And, isn't it true that some of those materials indicated that he was drunk?

MR. BROWN: Your Honor, if the Court please, there is no testimony before this Court whatsoever that the defendant was drunk.

MR. HARRISON: Your Honor, may I rephrase that --I do need to lay a better predicate. Your Honor, I would submit of course that the, in brief argument, to Mr. Brown, that the tape recording which the State of Florida introduced in this cause is certainly evidence that Mr. Roman was drunk.

MR. BROWN: Your Honor, if the Court please, the only evidence before this Court from quite a number of witnesses is that the defendant definitely was not drunk, and a self serving statement of the defendant in that confession in a tape recording, which is not live testimony from the stand, is not that type of evidence.

MR. HARRISON: Mr. Brown is going to the weight of the evidence.

THE COURT: Approach the bench.

(R. 1049).

Q. Doctor, let me change Mr. Brown's hypothetical just a little bit. Assume for the purposes of the rest of my questions that there is evidence in this case that Mr. Roman

was drinking, but not drunk at the time of the offense, and that there is also evidence that he was drunk at the time of the offense. now, I'm basing my hypothetical question on the basis that Mr. Roman was drunk, when the offense occurred.

MR. BROWN: Your Honor, I object to that. The way it is phrased, it is not a proper hypothetical. I think if he wants a fair answer and opinion from the Doctor, that he would have to tell him that evidence is solely the defendant's own self serving statement.

MR. HARRISON: Your Honor, we would ask that Mr. Brown not argue in front of the jury.

MR. BROWN: Well, we can come up to the bench, your Honor, but I think it is unfair to the Doctor to ask it that way, and improper.

THE COURT: Come up to the bench.

(R. 1053).

A. If I assume that he was drunk at the time, it certainly would have a lowering of his capacity to reason.

(R. 1054).

Q. And, assuming my hypothetical to be true, he was drunk when the offense occurred, isn't that right?

A. Assuming your hypothetical?

Q. Yes.

A. Yes.

Q. Neither you nor I would decide that, but assuming it for the moment, wouldn't it be fair to say that all three of those factors would be impinging on Mr.

Roman's behavior, isn't that correct? Be affecting his behavior at that time?

A. All three, meaning what?

Q. Well, for the moment, I will withdraw the organic brain syndrome, because I understand that you are not very sure whether he has that or not. But, assuming for the moment that he just suffered from the alcohol abuse and he was drunk, both of those factors would have affected his behavior at the time of the crime, isn't that correct?

A. Yes, sir.

Q. And you can't really tell the jury which of those factors caused what, can you? In other words, you can't say that one factor caused it or the other factor caused it. I think that probably you can say that they caused it acting in concert, isn't that correct?

A. I think that would be fair, yes.

(R. 1060-61).

[Redirect Examination]

Let me ask you, would the answers that you gave to Mr. Harrison have been different if Mr. Harrison had bothered to tell you that the only evidence of drunkenness of the defendant was his own self serving statement in the confession tape that was played?

MR. POWER: Your Honor, I would object upon the grounds that Mr. Brown has not stated the other hypothetical we suggested. He is, in fact, asking Dr. Barnard to weigh the evidence.

MR. BROWN: Mr. Harrison asked a hypothetical, or he said assume the evidence shows he was drunk. I am --he then went and asked him a whole bunch of questions based

upon that assumption. I think I am entitled to bring out the true facts about the hypothetical.

MR. HARRISON: Your Honor, objection, may we approach the bench.

(R. 1065).

Q. Doctor, would it make a difference to you with reference to the answers that you gave to Mr. Harrison, would it make a difference to you as an expert in forensic psychiatry to know what that evidence was that Mr. Harrison referred to of drunkenness? Would it make a difference to you and help you?

A. Yes, sir.

Q. <u>If that evidence that Mr. Harrison referred to of drunkenness was the statement of the defendant himself, and nothing else, would that make a difference in the wasy that you would respond to Mr. Harrison's question</u>?

A. Yes, sir.

(R. 1069).

Q. In fact, if going back to my hypothetical, if there were testimony from Kellene Smith, Chip Mogg, Dwayne Wolfe, Raymond Beaudoin, Arthur Reece, Douglas Calvert, Billy Farmer, Ed Galvin, Jerry Thompson, as witnesses in this cause, to the effect that they had seen the defendant and the defendant was not drunk, given all...

MR. POWER: ...Your Honor, I'm going to object again for the record that Mr. Brown's question is invading the province of the jury and asking Dr. Barnard to weigh the evidence.

THE COURT: All right. Take the jury out.

WHEREUPON, the jury was removed from the courtroom to the jury room.

(R. 1069-70).

k. Dr. Carrera:

Q. If I could ask you also to consider that, and if I could further ask you to consider as given in court in the course of this trial, the testimony of Kellene Smith, Chip Mogg, Dwayne Wolfe, Raymond Beaudoin, Arthur Reece, Douglas Calvert, Billy Farmer, Ed Galvin, and Jerry Thompson, to the effect that on March 13th and March 14th of 1981, that is the time period that we are dealing with here, that the defendant, Ernest Roman was not intoxicated and showed no signs of being drunk, if I could also ask you to assume that there was testimony from one witness to the effect that the defendant had been drinking some wine.

Q. Could you please tell us, based on the hypothetical could you bill us what is your opinion as to whether at the time, that is March 14, 1981, when the defendant, Ernest Roman, is charged with the kidnapping, rape and murder of Tasha Marie Smith, what is your opinion, as to whether or not he knew the nature and quality of his acts?

A. It is my opinion that he did know.

Q. If I could also ask you, do you have an opinion as to whether at that time, the defendant, Ernest Roman, knew right from wrong?

A. I do.

Q. And could you tell us, please, what is that opinion?

A. That he did know the difference between right and wrong.

Q. And if I could ask you, please,

also, with reference to that hypothetical and the facts that I have given you, do you have an opinion as to whether the defendant would have had the mental capacity to form premeditation, that is, the intent to kill?

A. It is my opinion he would have.

(R. 1080-83).

[Cross-Examination]

Q. Doctor, assuming for the purposes of this question that the evidence in this case shows that on March 14th in the early morning hours, between midnight and 3 A.M. when this crime is alleged to have been committed, that the defendant, Ernest Roman, had been drinking and was drunk. If that is true, wouldn't there have been at least three separate factors affecting his behavior, that is to say, alcohol abuse, the mild organic symdrome [sic] and the immediate intoxication?

A. Yes, the alcohol abuse ....

Q. Would not all three of those factors have affected his behavior?

A. Yes.

Q. Assuming that same hypothetical, is it possible that during that time, Mr. Roman might have lost some of his ability to understand or reason accurately?

. . . .

Q. Assuming my hypothetical, isn't it possible that he at least lost some of his ability to understand or reason accurately at the time that I specified?

A. It is possible, but I must qualify.

Q. Go right ahead and qualify. Give you all the time you want.

A. It would to a significant degree be dependent on how drunk he might have been, the degree of drunkenness.

Q. Now, I believe that Mr. Brown read the questions from the jury instructions, one of which related to whether he knew what would result from his actions, and I believe you answer Mr. Brown that he would have known what would result from his actions.

Now, assuming my hypothetical, is that still your answer to that question?

A. I would not be able to answer the way it is phrased because I don't know the degree of his drunkenness.

(R. 1101-04).

Q. And, Doctor, the bottom line, Mr. Harrison was asking you if alcohol could have affected the defendant, well, obviously, it would affect all of us, let me ask you this question. Do you feel, based upon all the information that you have, do you feel that based on all the information that you have, do you feel the defendant on March 14, 1981 between 12 o'clock and 3 o'clock when we allege that he committed those three crimes, do you feel at that time that he had lost his ability to understand or reason accurately?

A. No.

Q. And, also, based upon all the information that you have, including everything the defense said including the business about the incompetence, do you have an opinion as to whether the defendant did know the nature and quality of his actions?

A. I do.

Q. And your opinion is?

A. That he did know.

Q. If I could ask you also, do you have an opinion considering everything that you have heard, as to whether he knew the difference between right and wrong at the time?

A. I do.

Q. And that opinion is?

A. That he did know the difference.

(R. 1114-15).

3. Defense Proof

a. Mildred Beaudoin:

Q. Between, let's say, from 6 o'clock P.M. on the 13th until about 1 or 1:30 on - A.M. - on the 14th, did you have the occasion to see and observe your brother, Ernest Roman?

A. Yes, sir.

Q. How many hours during that period of time was he where you could see and observe him?

A. From, somewhere shortly after 9 o'clock to the time I put him out of my trailer at about 1 o'clock.

Q. Mildred, do you have an opinion, based upon your observations of your brother, Ernest Roman, as to whether or not, when you put him out of your trailer that night, he was or was not drunk?

A. He was very drunk.

Q. Do you know what he had been drinking?

A. He had been drinking wine for four days.

Q. When you say he "had been drinking wine for four days", could you estimate how much wine he had been drinking?

A. Several bottles.

Q. Several bottles a day, or several bottles over the four days?

A. Over the four days, he drank several bottles of wine.

Q. On the evening of the 13th, did he drink anything other than wine in your house?

A. Yes, sir.

Q. What did he drink?

A. Whatever was brought to my house by Kellene and Chip Mogg, he was drinking from their bottle.

Q. Had they come to your house and brought a liquor bottle of some kind?

A. Yes, sir.

Q. How do you know he was drunk?

A. He fell down drunk in the floor, off of a chair, and I had to help him up off the floor, and help him out the door, and I told him to go home and sleep it off.

Q. Was there any doubt at all in your mind that he was very drunk when you put him out of that trailer?

A. None whatsoever.

(R. 1136).

Q. Could you tell us please, why Raymond Beaudoin, your son, would say that that night, that Ernest Roman was not drunk?

A. He wasn't really there to pay attention, he was sleeping, got up, took a shower, and went to work.

(R. 1156-57).

Q. Mildred, are you certain that it was 1 o'clock in the morning when you put your brother out and 1:20 when Kellene, Chip and Arthur left?

A. Yes.

Q. Could you tell us, please, or explain for us why Kellene, Chip and Arthur Reece all put the time at least an hour before that?

A. Because they were drunk.

Q. Oh, they were drunk, and you were sober and that is why again, they were wrong despite the fact that they all testified to the same thing?

A. That they were drunk.

(R. 1157-58).

b. Dr. Lekarazyk:

Q. Now, if you take away that assumption that he was intoxicated, at the time, if you take away that assumption that you made that he was intoxicated, then would you agree with me that he did know the difference between right and wrong?

A. Yes, I would.

. . . .

(R. 1299).

Q. Okay. Fine, That is exactly what we were talking about before. To answer the basic question, did he know the difference between right and wrong, and your answer is

"yes, he did", but getting to the secondary thing, you say if he had had enough to drink, and there is some question as to how much that might be, his capacity might be diminished somewhat?

A. Yes.

(R. 1301-03).

[Assume] that seven different witnesses saw the defendant during the time period immediately surrounding the crime -- and I could list off the names to you, but the purposes of brievity, let me just say that seven different witnesses saw the defendant during the time period immediately surrounding the crime; <u>including at 12 o'clock and at 3 o'clock and at 4 o'clock</u>. That those seven people said that the defendant was not drunk, and did not show any signs of intoxication.

. . . .

Given that whole laundry list full of things, let me ask you, on this hypothetical, would you agree with me, that the defendant would know both the nature of his acts, first of all, the consequences of his acts?

A. Yes.

Q. And also the difference between right and wrong?

A. Yes, but I would like to add that I can accept that hypothetical as a hypothetical. However, there are two factors in there which could not in any possible way be true about Mr. Roman.

Q. Doctor, I am quoting the testimony that has come out here and it is in this record in court. So, accept the facts as they are.

(R. 1304-05).

Q. Now, I believe, is it not still your opinion, that if Mr. Roman were sober when the crime occurred, he would have been sane?

A. Yes.

Q. And if he were drunk when the crime occurred, he would be insane?

A. That is correct.

(R. 1311).

c. Wanda Pritchard:

Q. Would you tell the jury what you observed the defendant, Ernest Roman to do, without making any opinion at this time?

A. He walked out of the trailer and fell down about three times, and I was trying to help him up, and he told me he didn't need any help, to leave him alone.

Q. Do you have an opinion as to whether he was drunk at that time?

A. He was definitely drunk. He had been drunk for a few days before that.

Q. How do you know that?

A. Well, Millie and I had been trying to find out where he was getting his whiskey and stuff and we had been to his trailer trying to find it, and everything, and that is the reason my husband and I were arguing because we found out that day, on the 13th, that Mary had been bringing him something to drink.

Q. Your ex-husband, Marty, that is Marty Pritchard, right?

A. Yes.

Q. Is he a well known drunk in the Wildwood area? At that time?

A. Yes, he was.

Q. And he and Ernest had been drinking on that same day, the 13th?

A. Yes, sir. And two days before that.

Q. Did you actually observe Ernest Roman?

A. No, sir, I never saw him drink anything, because he had been hiding it, but you could smell it and you could tell he was drunk.

Q. Did you smell it on him when you helped him up?

A. I was trying to help him up, yes, sir, and he wouldn't let me help him up, and he was definitely drunk.

Q. And you could smell the odor of alcohol about him?

A. Yes, sir.

Q. Did he fall one time or more than one time?

A. No, sir, he fell three times. And the third time he fell, I tried to help him up, because he was trying to pull up on Millie's car.

(R. 1328-31).

d. Officer Horton:

Q. Isn't it a fact that you also Ernest Roman that morning, and that you saw him pick up a bottle of wine and leave out of Mildred's trailer?

A. Yes. [Around 7:15 to 7:30, March

14, R. 1552].

Q. Did you notice anything about Ernest Roman that morning different from what you had normally noticed in the past about his behavior?

A. No difference.

Q. Did it appear to you that he might be hung over or just coming off a drunk?

A. No. I wouldn't say coming off a drunk, no.

Q. Refer to page 8 of your deposition, sir.

. . . .

Q. The first question that I refer to, is on line 5,

> Okay, did you notice anything else about Ernest behavior that morning different from what you had normally noticed in the past about his behavior?

And your answer, line 8, was

> Nothing different, no, he was dressed, he had a coat on, his hair was combed, his appearance was probably like a fellow that had been on a drunk all night, you know spaced out, I mean, I would probably say he had been roaming around, drinking all night.

And, then the next question was

> Looked hung over?

And your answer was

> Right.

Do you admit that you made those statements on deposition, Mr. Howton?

A. Yes.

Q. You did make those statements, didn't you?

A. Yes.

Q. And I presume that to the best of your ability when you made those statements, you were telling the truth, isn't that right?

A. That's right.

(R. 1350-51).

4. State's Rebuttal

Q. Now, could you tell us please, did you have occasion to see the defendant, Ernest Roman, earlier that day, on the 14th?

A. Yes, I did.

Q. At the time that you saw him on the 14th, would you say that he was sober and that he knew right from wrong?

A. To the best of my knowledge, yeah, I imagine so.

Q. Did you also have occassion to see him the day before, which would be the 13th, on Friday?

A. Yes.

Q. And approximately what time of the day was it when you saw him on the 13th?

A. Three, four o'clock.

Q. At that time, in the afternoon, - that is afternoon as opposed to morning, isn't it?

A. Right.

Q. At that time in the afternoon when you saw the defendant, Ernest Roman, would you tell us, did he appear to you to be drunk, staggering, falling down, anything like that?

A. No, he didn't.

(R. 1372-73).

Two lay witnesses then testified that when defendant is drunk, he is sane. Farmer, R. 1388; Thompson, R. 1391.

5. Closing Argument/State.

I put in the thing about him drinking, despite the fact that only one of seven witnesses even said that Ernest Roman had had anything to drink that night, the rest of the six that had been presented at that point said "no, he did not even have anything to drink".

(R. 1420).

You have heard 7 witnesses testify -- 8 witnesses -- testify throughout the time period in question, from just prior to the crimes to just after the crimes, that the defendant was not intoxicated. Who have you heard say the defendant was? The defendant's sister, Mildred Beaudoin, the same one who called up on the telephone and told her sister, Betty Smith, "Ernie has killed a baby, I reckon". But she denies that, when he had her on cross examination. You heard her say that Ernest Roman, the defendant, was drunk that night. You have heard Mrs. Pritchard take the stand, the defendant's friend, friend of the family, and testify that the day before Ernest Roman was drunk and was falling down. You have heard the defendant, himself, on that tape make what I would call and characterize to you as a self serving declaration, to the effect that he

was drunk at the time. Those are the only people who have said that to you. I submit to you that you can apply the same rule to that testimony that you can to what we are talking about in reference to an expert. If you find that that testimony from the defendant's sister, and from the family friend, Mrs. Pritchard, if you find that that is contradicted by the weight of the evidence in the other direction, as it certainly is here, with all the rest of the witnesses, then you can also totally disregard what they have said.

(R. 1425-26).

We cannot let this be hidden behind a claim of alcohol. Because all the facts say he is not only factually guilty, he knew what he was doing. He was legally sane. Ladies and gentlemen, that must be your verdict in this case.

(R. 1441).

6. Defense Closing

I submit to you that one crucial factual determination that you must make in this case is whether Ernest Roman was drunk when this crime allegedly occurred. When the crime occurred. Was Ernest Roman drunk.

(R. 1453).

Q. Lastly, let me ask another question. Basically, using Mr. Power's hypothetical but changing only one factor. If you assume at the time that these crimes were committed, that the defendant was not intoxicated, then could you tell us what would your opinion be as to whether his ability to appreciate the criminality of his conduct or conform his conduct to what the law requires, would it then be substantially impaired, if he were not intoxicated?

A. No.

(R. 1566, 1567).

Four time periods are produced through all of this evidence: 1) the Reese time period, that was completely impeachable, and which has been discussed, 2) the party time period, 3) the before the party time period, and 4) the next day, post-offense time period. An analysis of the evidence pursuant to these rational divisions shows the prejudice from the Brady violation.

1. The party

Six people were there: Reese, Smith, Mogg, Ray, Mildred, and Ernest. Reese changed his story, but that went unrevealed. Smith was the victim's mother, left the victim in the car on a cold night for hours, and could not keep her story straight about when the baby was missing, and what she did about it. See Supplemental brief. Mogg did not notice if Ernie was drunk, and in fact he was a prime suspect. Ray said Ernie was getting drunk, but was not quite there (R. 564), and he only knew about "up 'till midnight." (R. 582-83). Mildred said Ernie was falling down drunk. These are all the people who were closest to the offense time, and the trial was a credibility contest. Resse's suppressed statements could have made a difference.

2. Before the Party

On the 13th at 4:00 p.m., Mr. Roman was drinking, according to Douglas Calvert. Wanda Pritchard testified that Ernie was falling down drunk that afternoon.

3. After the Offense

William Farmer, a police officer, saw Mr. Roman at 2:30 p.m. on the 14th, and testified he was not drunk. Jerry Thompson, a police officer, saw Mr. Roman at 4:30 p.m. on the 14th, and testified he was not drunk. Clarence Galvin, a police officer, saw Mr. Roman at 6:30 p.m. on the 14th, and testified he was not drunk. Mr. Wolfe, a person assisting in the search for the victim at 4:00 a.m., saw Mr. Roman briefly, and testified he was not drunk. Officer Horton, a police officer, however, testified that at 7:15 a.m. on the 14th Mr. Roman's "appearance was probably like a fellow that had been on a drunk all night, you know spaced out, I mean, I would probably say he had been roaming around, drinking all night" (R. 1350-51).

Confidence in the reliability of the guilt/innocence and sentencing issues in this case is undermined by the State's withholding of this crucial witness's statements about the critical issue tried.

E. MR. ROMAN'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND UNDER BRADY V. MARYLAND, WERE VIOLATED BY THE STATE'S WITHHOLDING OF FAVORABLE AND MATERIAL EVIDENCE

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967), Agurs v. United States, 427 U.S. 97, United States v. Bagley, 105 S. Ct. 3375 (1985). Thus the prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, 105 S. Ct. 3375 (1985). Brady claims are clearly cognizable in a motion for post-conviction relief in Florida. See, e.g. Arango v. State, 467 So. 2d 692 (Fla. 1985); Ashley v. State, 433 So. 2d 1263 (Fla. 1st DCA 1983); Press v. State, 207 So. 2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So. 2d 618 (Fla. 3d DCA 1965); Wade v. State, 193 So. 2d 454 (Fla. 4th DCA 1967).

Mr. Roman alleged that the State's action of withholding exculpatory evidence "violated the sixth, eighth and fourteenth amendments." An explanation of how each amendment's guarantees were denied Mr. Roman is appropriate. The cornerstone is the fourteenth

amendment: hiding evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory information violates the sixth amendment right to effective assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). The unreliability of fact determination rendered upon less than full cross-examination of critical witnesses violates as well the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margins of error.

All these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in this case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). "Of course, the right to cross-examine includes the opportunity to show

that a witness is biased, or that the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, No. 85-1347, slip op. at 10 (U.S. S. Ct. February 24, 1987).

As is obvious, there is "particular need for full cross-examination of the State's star [or 'crucial'] witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and when that star-witness happens to be a co-defendant (or suspect), it is especially troubling:

> Thus, "[o]ver the years . . . the Court has spoken with one voice declaring presumptively unreliable accomplice's confessions that incriminate defendants.

Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986). Thus, it is with a very careful eye that the State's handling of star-witness's statements should be scrutinized.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates any reasonable likelihood that the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence

relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence is one and the same. The method of assessing materiality is well-established. First, analysis begins with the Supreme Court's reminder in Agurs that the failure of the prosecution to provide the defense with specifically requested evidence "is seldom if ever excusable." United States v. Agurs, 427 U.S. at 106. Any doubts on the materiality issue accordingly must be resolved "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980); accord United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Anderson v. South Carolina, 542 F. Supp. 725, 732 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983); United States v. Feeney, 501 F. Supp. 1324, 1334 (D. Colo. 1980); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977). "[T]his rule is especially appropriate in a death penalty case." Chaney v. Brown, supra, 730 F.2d at 1344.

Second, materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate

all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

Third, materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir.

1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant or sentence him to death. Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981). For, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or a reasonable doubt as to his guilt, or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is for a jury, and not th[e] Court to determine guilt or innocence," Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981), materiality is established and reversal required once the reviewing court concludes that the suppressed evidence "might" or "could" have affected the outcome on the issue of guilt . . . [or] punishment," United States v. Agurs, supra, 427 U.S. at 105, 106, and that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [either phase of the capital] proceeding would have been different." Bagley, supra, 105 S. Ct. at 3383.

Impeachment of prosecution witnesses is often, and especially in this case, critical to the defense case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in capital criminal cases:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Bagley, 105 S. Ct. at 3300 (emphasis added).

Evidence which tends to impeach a critical state witness is clearly material under Brady. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwright, 785 F.2d (11th Cir. 1986). This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such sublet factors as the possible

interest of a defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). It matters not that the material evidence withheld by the state was relevant to the sentencing decision, rather than to guilt or innocence; in fact, the withheld evidence in Brady was relevant to sentencing.

There is no question of the materiality of this information to the sentencing decision. See generally Green v. Georgia, 442 U.S. 95 (1979); Chaney v. Brown, 730 F.2d 1334 (8th Cir. 1984). The suppression of the above mentioned materials at Mr. Roman's trial affected not just guilt/innocence, but also sentencing considerations. There is no question as to the admissibility of the evidence. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 106 S. Ct. 1669 (1986).

CONCLUSION

WHEREFORE, Mr. Roman respectfully requests that this Court stay his execution and grant relief.

Respectfully submitted,

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Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by (U.S. MAIL)(HAND DELIVERY) to Margene A. Roper, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 29th day of March, 1988.

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Attorney