IN THE SUPREME COURT OF THE STATE OF FLORIDA

NO. _____

ERNEST LEE ROMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

SUPPLEMENTAL BRIEF

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. In his abbreviated brief filed yesterday, Mr. Roman addressed 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."). In the instant brief, Mr. Roman addresses the other claims for relief.

## ARGUMENT II

### MR. ROMAN WAS INCOMPETENT TO STAND TRIAL, AND HIS ATTORNEYS INEFFECTIVELY ADDRESSED THIS ISSUE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The following people believe Mr. Roman was incompetent at the time of trial:

1. The Public Defender for the Fifth Judicial Circuit;

2. The Chief Investigator for the Public Defender for the Fifth Judicial Circuit;

3. Mr. Roman's primary case worker at North Florida Evaluation and Treatment Center, where Mr. Roman resided for fifteen months, after he was found incompetent to stand trial;

4. Dr. George Barnard, who found Mr. Roman incompetent fifteen months before trial, who found Mr. Roman competent four months before trial, and who did not evaluate him again at the time of trial;

5. Dr. Robert Fox, expert psychiatrist and neurologist, see Exhibit 1;

6. Dr. Cesar L. Benarroche, expert psychiatrist and neurologist, see P.C.R. 427.

Mr. Roman in fact was found incompetent by the Court July 21, 1981, and was committed to the North Florida Evaluation and Treatment Center.[1] On October 29, 1982,

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[1]He had been at NFETC since May 18, 1981, being evaluated. Between March 14, 1981 (the time of the offense) and May 18, 1981, the time of his commitment to NFETC for evaluation, Mr. Roman showed the following signs of incompetency:

> 1. When Mr. Roman was arrested, he looked like he was coming off a drunk, and told the officers he wanted to get the thing over with so he could go to the "Eustus", an alcoholic rehabilitation center.

(footnote continued on following page)

-- fifteen months later -- the Court found him to be competent, and he was returned to jail. Four months

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(footnote continued from preceding page)

2. He slept in the patrol car on the way to the police station, and vomited, slept, sat long periods without response, and shook all over during interrogation. He did not believe he had any rights to waive because he had been found incompetent in the past.

3. The day after his arrest, he tried to plead no contest to first-degree murder, so he could go to Eustus. His lawyer saw him that day, said he appeared half-drunk, and that Mr. Roman was completely uncommunicative and incompetent.

4. He told Hernando County Jail officials he was having headaches and hearing voices. He thought he was in a hospital. His blood sugar level was "30", which in most people would mean they were comatose.

5. Over the next two months Hernando County Jail records reveal he was disoriented, not talking, not eating, did not know where he was, he shook, had flat affect, could not remember who people were, and he was treated with psychotropic medication by the jailers.

6. Dr. Carrera found him to be probably incompetent on May 9, 1981, as did Dr. Barnard. Hernando County Jail physicians found he was psychotic, needed psychiatric treatment, and that he sould be placed in an institution <u>permanently</u>.

7. He was diagnosed on May 15, 1981 as being schizophrenic, chronic, undifferentiated type, with psychosis.

8. From May 18, 1981, until July 21, 1981, he was completely psychotic at NFETC, and was heavily medicated with psychotropic drugs.

later, trial counsel without having Mr. Roman evaluated by the previous competency commission (Dr. Barnard and Dr. Carrera), began the trial, after Mr. Roman sat mute while four lawyers and an investigator attempted to convince him to accept a guilty plea, and receive a life sentence. As will be shown in this Argument, Mr. Roman was incompetent to stand trial, his defense attorneys ineffectively addressed the issues,[2] and Mr. Roman's sixth, eighth, and fourteenth amendment rights were violated.

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[2]Two defense attorneys, under the supervision of Mr. Howard Babb (who sat at counsel table) tried this case. Mr. Harrison, lead counsel, testified that he believed Mr. Roman was competent. Mr. Powers, who entered the case four months before trial, and, unlike Babb and Harrison, "remembered", on the witness stand, but not during pre-hearing conversations, that a defense psychologist interviewed Mr. Roman one week before trial, and believed he was competent. Mr. Roman could not decide in post-conviction whether he had Mr. Roman looked at by the psychologist because he believed he was incompetent, or because, four years before the creation of CCR, he believed that "if it goes against you, the CCR people in doing their duty will certainly second guess you on it." P.C.R. 1324. He could not explain why a psychologist rather than the two previous psychiatrists, was used, and he agreed that a schizophrenic, competent today, could be incompetent tomorrow. Id., at 1323.

A. IT VIOLATES A DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS IF HE OR SHE IS TRIED WHILE INCOMPETENT, AND HIS OR HER SIXTH AMENDMENT RIGHTS IF COUNSEL UNREASONABLY ADDRESSES THE ISSUE

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210. The right of a criminal defendant not to tried when incompetent "is fundamental to an adversary system of justice." Drope v. Missouri, 420 U.S. 162, 172 (1975). Because a person must be competent in order to exercise all of the other rights available to him, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." Id. at 171.

The constitutional test for incompetency is articulated in Dusky v. United States, 362 U.S. 402 (1960):

> [T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."

Id. See also Drope v. Mississippi, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United

States, 350 U.S. 961 (1956). The Dusky test is applied by evaluating numerous subjective and objective criteria, many (but not all) of which have been incorporated into statutes and rules. See A.B.A. Mental Health Standard 7-4.1 and Commentary. Such nonexclusive criteria are contained in Florida Rules of Criminal Procedure 3.210 and 3.211. A fortiori, a person unable to face trial meaningfully is unable to plead guilty to the charges: if one cannot consult with counsel with a rational understanding, and if one has no rational and factual understanding of the proceedings, it is impossible to constitutionally waive the multiple constitutional rights inhereint in a criminal proceeding, i.e., right to jury trial, right to compel the attendance of witnesses, right to cross-examination, right to testify or remain silent, etc. See A.B.A. Mental Health Standard 7-5.1 and Commentary.

It would never be appropriate to accede to the demands of a client when the client has not had the benefit of adequate advice, founded on independent investigation. Advice requires investigation, and a client's decisions must be made after proper counsel. For example, a client's decision to reject a plea offer

cannot be deemed intelligent, knowing, and rational, unless and until that client has been properly advised.[3]

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[3]Mr. Powers, who was not lead counsel, decided that Mr. Roman was competent because, during trial, Mr. Roman's sister, Dixie Ruzzo, told Mr. Powers the family had told Mr. Roman "don't cop a plea, they'll send you back to the state hospital. . . ." P.C.R. 1323. Powers testified then that since Mr. Roman was listening to someone, he was competent. Powers believed Mr. Roman was, however, "exceedingly foolish." P.C.R. 1324.

Mr. Powers did not remember that in a hearing from which Mr. Roman was excluded, see Argument VII, infra, Dixie gave the judge and counsel plenty of reason to doubt competency:

> THE COURT: I understand that you did have some things that you thought that you should bring to my attention.
>
> MRS. RUZZO: Well, your Honor, the only thing that I would like to say is that I, and I believe the rest of my family, or the majority of my family, feel that my brother is incompetent. We would like to have you appoint him guardian at this time, ad litem, and we feel that if he were appointed a guardian ad litem, he would ask for a mistrial. One reason being for the outburst of counsel, defense counsel, which we feel could be prejudice to the defense of him.
>
> THE COURT: I think it is proper at this time for the State to make any inquiry if they wish.
>
> . . . .
>
> THE COURT: ...no, not the incompetency, that, the Court cannot accept that and cannot follow that procedure. Now, you did mention something about counsel, display of emotions. Now, I would like for you to amplify that if you would.

(R. 1322-33).

"Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advice." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983). "After informing himself fully on the facts and the law, the lawyer should advise the accused . . .", Defense Function, 5.1(a), and decisions made by clients without advice based on independent investigation are decisions made without "the guiding hand of counsel." Powell v. Alabama, 287 U.S. 45 (1932).

No attorney can hide behind the decisions of a client whose competency to decide legal questions (i.e., entering a plea of guilty) is a matter of conjecture. "Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect." Brennan v. Blankenship, 472 F.Supp. 149, 156 (D.C. W.D. Va. 1979). A mentally ill, mentally retarded, brain damaged, or insane client requires different treatment from reasonably competent counsel than does a "normal" client. Preparation and investigation in such cases likewise takes on added dimensions. Mental health and mental state issues permeate the law, and careful investigation and assessment of mental health is

necessary before strategy decisions are made. Thompson v. Wanwright, 787 F.2d 1447 (11th Cir. 1986).

B. MR. ROMAN WAS INCOMPETENT AT THE TIME OF TRIAL AND CAPITAL SENTENCING, AND HIS LAWYERS, OR THE JUDGE, SHOULD HAVE DONE SOMETHING

Mr. Roman's fifteen months of hospitalization, two earlier months of incarceration, and thirty year documented history of schizophrenic illness, all should have revealed to reasonably competent counsel that Mr. Roman floats in and out of psychosis. Even after Mr. Roman was found competent by examiners at NFETC, he continued to show bizarre, hallucinatory behavior, inappropriate affect, and other psychotic symptoms. Thus, a critical and discerning eye on Mr. Roman was imperative. A careful eye reveals the following proof of incompetency,[4] which existed four months after the competency commission found competence.

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[4]A listening ear would have done the job. During trial, Mr. Roman's sister told the attorneys and the judge that the entire family believed Mr. Roman was incompetent and, according to attorney Powers, they had much more contact with him that he did.

1. The Public Defender for the Fifth Judicial Circuit

Mr. Howard H. Babb, Jr., a former prosecutor, testified regarding his contact with Mr. Roman, and his unequivocal belief that Mr. Roman was incompetent at the time of trial:

> Q How many criminal defendants, persons charged with crimes, do you think you've spoken to since you became a lawyer?
>
> A Spoken to?
>
> Q Seen, talked with.
>
> A It certainly would be over a thousand.
>
> . . . .

(P.C.R. 974).

> Q When did you first meet Mr. Roman?
>
> A Well, I don't know the exact date but it was right after the incident or the crime that he's been convicted of. I was asked to come down and talk to him the day after he was arrested in 1981.
>
> Q So that would be -- you personally were asked?
>
> A That's right.
>
> Q As opposed to your assistants?
>
> A That's right, and we discussed that yesterday, why in the world that would be, and I don't know. I think one of the lawyers was in another county doing a case and they needed a lawyer and they called me and I drove to Brooksville and talked to Ernest in the jail.

Q How long would you say that first meeting was?

A It may very well have been Bushnell, but I thought it was Brooksville. I don't know which jail it was, but I did talk to him.

Q How long were you with him?

A An hour, at least.

Q Did you have an opinion at that time with regard to whether he was competent and able to assist counsel?

A I certainly did.

Q What was your opinion?

A My opinion from the very beginning was that he was not able to assist counsel, that he was incompetent and he needed a hospital and he -- it was just obvious to me that he was not competent to stand trial.

Q Is that based upon your experience in having seen, interviewed, talked with, observed behavior of countless other criminal defendants?

A That was my opinion, yes. I've done a lot of mental health work as an attorney. I don't know why. I did it as a prosecutor and I did it as a defense lawyer, having -- being assigned under Baker Acts to defend these indigents that are facing commitment.

. . . .

Q Did you see him, Mr. Roman, again?

A I saw him a number of times, and the reason for that is, as I explained in my affidavit, a lot of times when the lawyers have exhausted their advice to clients and

feel like they aren't communicating very well they sometimes call me in because I have a way of being able to talk to them. And I guess the fact that I am the boss may sometimes impress clients, and I'm called in quite often when the lawyers feel like they've lost communication and they need me to give good advice or our advice from the standpoint of staffing cases. And they called me in a number of times on Ernest's case because they felt like the evidence was overwhelming, that he was going to lose at trial, which in fact he did, and that he should accept a offer of life in prison.

Q By losing at trial, you mean guilt, innocence, and punishment?

A Yes.

Q Lose --

A Yes.

Q He'd get the death penalty.

A Lose all the way. And we felt very strongly in our staff, between Julian and Sam and I, and I believe even Ron Fox at the time, as well as David Franklin, our chief investigator, that the state had a case that they could prove and that he was very likely to be convicted, and if in fact he was convicted, he was very likely to get sentenced to death. So they called me in a number of times. We tried to get him to take a polygraph test simply as a tool to maybe get him to realize that he was failing the polygraph test and that he was -- maybe to get him to realize that he needed to accept this offer.

Q What offer is that?

A The offer of life in prison.

Q Were you surprised that you got an offer of life in this case, or not surprised?

A I was surprised, yes, even at that time. Of course, that was a different -- an elected state attorney, Gordon Oldham was the state attorney at that time. I was surprised that we got a life offer.

Q It was a good offer as far as you were concerned?

A I thought so, yes. A good offer as far as my client was concerned. I thought it was a good offer and I strongly counseled him to accept it, strongly. I mean, probably as strong as any client that I've ever dealt with. Strongly. Almost to the point -- well, eventually it got to the point, as I explained in my affidavit, that he was tired of me. He was tired of me. He was tired of me pushing him. He didn't -- he didn't want to even talk to me the last time. He wouldn't look at me. He hung his head and he just -- he wouldn't take my advice and I felt like I was really bordering on trespassing on him, you know. I really was pushing him too hard and finally just had to give up. And I gave up right before he went to trial. I believe on the day, the day before trial, I just gave up. He just wasn't taking my advice. He wasn't listening, and he was ready to go to trial.

Q Now, there are people who will listen to your advice, process it, hear it rationally and just disagree with you. Is that what was going on?

A I don't think so. I don't think he was listening. I think he had made up his mind that he was not going to take my advice as far as how -- what capacity he had of making up his mind. He just -- it didn't seem like he was listening. It didn't seem like he was programming what I was telling him, which led me to believe at the time that he was still incompetent.

. . . .

[Cross-Examination]

Q As far as you're concerned, did his mental condition improve between the time of his arrest and the time he returned from the state hospital?

A That's hard to say. He, of course, was not drinking when he was at the hospital, and of course when I saw him the first -- the first time, probably the first two times, he was still -- Well, the first time I saw him he was still half drunk, I believe. Shaking. Couldn't hardly put a cigarette in his mouth. Couldn't light a cigarette. So there was some change, yes, in that regard because the alcohol wasn't there. But as far as mental capacity, like I say, I never really carried on much of a conversation with Mr. Roman. I don't know if it was because he disliked me or he thought that maybe I was working for the police or what, but I didn't ever carry on much of an intelligent conversation with him.

. . . .

Q Now, you testified that you felt that at the time of the trial that he was incompetent to stand trial?

A Yes.

Q Did you inform the Court and make a motion to have his competency determined by the Court?

A Right before trial?

Q Yes, sir.

A No.

Q Did you instruct your assistants to do that?

A No.

Q Is there any reason why you did not do that?

A Not that I know of. I don't know of a reason that I didn't do it. The case was pending. It was hanging fire as we say. It needed to be tried. The defendant was not going to enter a plea, although I worked long and hard to convince him that it was in his best interest to enter a plea. The Court had already determined that he was competent and we were ready to go and we went.

MR. RIDGWAY: I have nothing further.

. . . .

[Redirect]

A I was in the Brooksville jail [day after arrest] and they put us in a small room and brought him in and I was, of course I knew what the allegations were and they weren't very pleasant allegations, and he came in and he was pitiful. It was a pitiful human being, you know. I knew the facts that he was allegedly had committed this type of crime and he was pitiful. He wasn't in control of himself and it was just a horrible situation. I just didn't think he was competent at the time. I thought he needed hospitalization. As a matter of fact, I believe that I told the nurse to watch him. I was concerned about him.

Q Could you even speak with him or could he speak with you?

A He wasn't making any sense to me. He was not speaking coherently. He was not forming his words right. He was just -- he was pitiful. And we mostly just put our elbows on our knees and sat there and talked to him about his rights and the fact that he

-- what he was charged with, and he didn't communicate with us very well.

(P.C.R. 973-989).

2. The Investigator

Mr. David Franklin testified, and corroborated Mr. Babb:

A I was chief investigator of the circuit.

Q How long had you been in that position?

A I started in that position in January, 1981.

Q Did you have occasion to see Mr. Roman before the trial in this case?

A Yes, I did.

Q And I'm speaking immediately before, the last week, two weeks, month, something like that, before the trial.

A Yes, sir.

Q Back to as much as six months before this trial?

A Yes, sir.

Q Sir, do you have any background or experience in dealing with and recognizing mental health problems that people suffer?

A Yes, sir.

Q What is that background?

A I received a bachelor or science degree in criminology and corrections from Florida State. I minored in psychology and

during one of the courses I took at Florida State, we went to the state hospital in Chattahoochee where I worked for a time as part of the class.

Q What type of work did you do there?

A It was mainly talking with the patients, observing them, looking at files, trying to get some insight into actually dealing with the patients.

Q Did you have contact with patients?

A Yes, sir.

Q During the course of your career as an investigator with the public defender's office, how many clients would you say that you had been in contact with, let's say back in 1983?

A I have no idea, there's so many.

Q Thousands?

A Yes, sir. I worked eleven years with the probation office prior to coming there and it was similar type of people that we were dealing with.

Q Now, your criminology degree, was that to prepare you for a profession in law enforcement?

A It was at the time, yes, sir.

Q And you worked for the state, for probation, is that --

A Yes, sir.

Q -- who you were working for? That's the Department of Probation and Parole?

A Yes, sir.

Q During the course of your involvement with the public defender's office and working for the state earlier for the Department of Probation and Parole, did you have occasion to come into contact with people who you believed to be incompetent?

A Yes, sir.

Q And, of course, people who you believed to be totally competent?

A Yes, sir.

Q Were you present immediately before trial in this case for any meetings that were held with Mr. Roman?

A Yes, sir, I was.

Q I'll show you what's been introduced as Exhibit Number 10 and ask you to read that. Have you ever seen that before?

A No, sir.

Q Would you read that to yourself, please, sir.

A (Reviewing document.)

Q Have you read it?

A Yes, sir.

Q Do you know Mr. Babb?

A Yes, sir.

Q Who is he?

A He is the public defender for the Fifth Judicial Circuit, my boss.

Q Has been for many years?

A Yes, sir.

Q Does that affidavit speak of the time that you recall?

A Yes, sir, it does.

Q And could you tell us, sir, if you were present at the meeting that Mr. Babb describes in that affidavit?

A Yes, I was.

Q Did you observe Mr. Roman?

A I did.

Q Can you tell us based upon your background and experience, working with criminal defendants, your background and your education, whether Mr. Roman, during the time of that meeting, was acting rationally and competently?

A He did not appear to, to me.

Q Why is that?

A There was quite a bit of discussion that day. We were -- I was participating in it as well in attempting to reason with him, to talk with him, to point out to him the many things that were going to be revealed in the case, and <u>there was absolutely no reaction at all</u>, There <u>was nothing on his fact, there was nothing in his hands. There was no body language even at all. It was just totally zero</u>.

Q When you spoke with him, would he show any expression?

A No, sir <u>nothing</u>.

Q <u>Would he react to the words that were being said to him</u>?

A <u>No</u>.

Q Where was this meeting?

A This meeting was in the -- one of the offices in the public defender's office. It was in a -- I think it was the first office. We've moved since then to another office. But it was in a -- it was kind of a closed door, the one that I had with him at that point. Actually, we may have had it in one office and then actually moved him to another office where I talked to him for a while.

Q By yourself?

A I believe so. I believe I did for a few minutes.

Q Wel, think about that because it could be important. Could you think about whether you met with him by yourself?

A I'm not sure.

Q All right, sir. During the meeting, however, that you were having with Mr. Babb and the client, is it correct to characterize his actions, your client's actions, as refusing to even consider what you were speaking about?

A Since he was making absolutely no reactions at all, that was the feeling I had, although it would be impossible to say what was going on in his mind.

Q Right. As Mr. Babb stated, then, it was like talking to a wall?

A That's a good description.

Q It was if he couldn't hear you.

A Yes, sir.

Q Do you agree with Mr. Babb that -- and have an opinion -- that the client was

not capable of making a rational decision at that point?

A I definitely feel that way.

Q Had you seen him before the last six month period before trial?

A Yes, sir.

Q In the normal everyday course of human affairs, would you thinkk that he would recognize you when you came in that day before trial?

A I would have thought so, yes, sir.

Q You've met other people the same number of times you've met him and they've recognized who you were and remembered seeing you?

A Yes, sir.

Q Did he know who the heck you were?

A No, sir.

Q Did he remember ever having met you before?

A Well, he indicated he did not. he wasn't talking, but I asked if he knew me, remembered me, and he just went like that (shaking head.)

Q Had you seen him before in the past six months at times when he should have remembered who you were?

A Yes, sir.

Q Did he?

A No, sir.

(P.C.R. 1543-50).

3. The Primary Case Worker, Ms. Vallerie Moss

At NFETC, a "team", including a psychologist, psychiatrist, social worker, and primary case worker, evaluates and treats patients. The primary case worker has day to day responsibility for working with, evaluating, treating, and documenting the treatment of, patients. Ms. Valerie Moss was Mr. Roman's primary case worker.

When Mr. Roman was found incompetent in 1981, Dr. Carrera testified. Ms. Moss' testimony that Mr. Roman was incompetent, was stipulated (P.C.R., Exhibit 15, pp. 11-12). When Mr. Roman had his competency hearing in 1982, attorney Harrison informed the Court "that we may ask the Court at the conclusion of the proceeding to continue this case for a few days to allow us to secure the attendance of Ms. Valerie Moss . . . . but we are ready to go forward with the testimony of the witnesses." (P.C.R., Exhibit 16). Counsel admitted he had not spoken to Ms. Moss. Id. At the conclusion of evidence, and the testimony of Dr. Barnard and Carrera, the State argued that "in the absence of Ms. Moss' testimony," the defendant was competent. Id, p. 26. The State then said

> We would ask the court to find the defendant is competent to stand trial at such time that the court has had an opportunity to

consider the additional testimony of Valire Moss upon presentation by Mr. Harrison.

Id., p. 27. Mr. Harrison told the court he would get Ms. Moss in. He never did.

She did not believe Mr. Roman ever regained competency, but defense counsel did not know this. Counsel knew she was important, but did not know why. She prepared a team report finding Mr. Roman competent, but she testified the team rules by majority vote, and she was in the minority. The lower court heard her testimony, and ruled that she had simply changed her mind. That is not what happened, and her evidence was compelling:

A I was hired as a rehabilitation therapist.

Q What is that?

A That is the person that is, that is the position that is responsible for developing the treatment plan for individual patients in the hospital.

. . . .

Q Who has the most contact with the patient?

A The therapist has the most.

Q Now, there was a competency hearing in this court, I believe it was before His Honor, no, it was before William F. Edwards, I believe, on July the 21, 1981, at which time the Court determined that Mr. Roman was incompetent. And during the course of that

hearing, at page eight, one of the doctors who was testifying mentioned that he had had occasion to review an evaluation report that had been submitted to the Court by the North Florida Evaluation and Treatment Center, dated the 23rd of June, 1981, with reference to Mr. Ropan's competency to stand trial. Are you familiar with that report?

A Yes, in a sense that I would have been the one that wrote it. We had to do summaries.

Q You wrote the report. And that report is a report which indicated that Mr. Roman was not competent; is that correct?

A Yes.

. . . .

Q Now, the next year there was another hearing held, this time before his Honor, Judge Booth, on October 29, 1982, at which time Mr. Harrison spoke to the Court at page one, we would, quote, we would represent to the Court that we may ask the Court for a conclusion of this -- to continue this case for a few days to allow us to secure the attendance of Miss Valerie Moss, who was Mr. Roman's primary therapist at North Florida Evaluation and Treatment Center. That's you as well?

A Yes.

Q You did not appear and testify at such a hearing; is that correct?

A I came down, but I wasn't called to testify.

. . . .

Q You have already expressed the opinion that while Mr. Roman was there and you were there that he was incompetent and

it's your opinion that he did not regain competency?

A It is my opinion he did not gain full competence.

Q What do you base that upon? You have gone through many notes over the last couple of days, more than even you and I have talked about, and I would be interested in knowing upon what you formed and what the basis for the opinion is.

A During the whole time I had contact with Ernie, which would include right before I left, there were many instances where there were mood changes, where there were lapses of memory, there was confusion. Where and with the lapses of memory in some instances, there were situations where we had, for example, had conversations in the recent past and he didn't remember them.

Very often when we talked about his case and the likelihood of him going back to trial, going to court rather, in many instances he would just dismiss it and close his mind in the sense that he no longer processed the information that was being shared with him or being discussed with him.

And it was my concern that because of that and because of the fact that he did -- he did not -- his ability to process complicated information was limited anyway. The fact that he would forget things and could not in some instances relate one thing to another caused me to feel that he would not be able to really work very well with the lawyer.

In addition to that, he started showing -- the whole time I was working with him, it seemed to me that he was going through several different stages in the sense that initially he was very withdrawn. Most of the staff could not work with him in the

sense of talking to him or he would not be involved in conversations.

. . . .

A He showed several different phases during the time that I worked with him. He started out by being withdrawn and basically quiet and so on. We worked with him, he came out of that and he became to an extent, in a limited sense, the model patient, in the sense that he was involved in programs. He attended class. He was interested in going to class and he worked, everybody basically like him and so on. And then other sides of him started to come out. For example, he went through a period which recurred several times, where he was extremely paranoid.

He would -- or he would feel that people didn't trust him or that people were trying to trick him or whatever. There was another period of time where he showed characteristics that were out of character for him. For example, he went through a period where he was very flirtatious and this lasted maybe for about two or three months or maybe two months. And up until that point he just was not that type of person. And it was bordering on, it never got to the point where it was really necessary to draw a lot of attention to it, but it was bordering inappropriate type behavior.

Then he went through a period where normally he was very serious and basically quiet and he got really silly. And you would see him running and hiding, doing all kinds of silly things. And then you would see him smiling inappropriately. You might see him sometimes with what seemed to be experiencing auditory hallucinations.

He had delusions for a little while and had -- or showed symptoms of it, I can't say that he did, showed symptoms of delusion of grandeur. He thought he was a sexy man and he had what every woman would want, which

was, again, out of character for him. And it seemed he was moving from one to the other. And even to the point when I left, he was beginning, he was showing, you know, different signs, I really do not know how many more signs were going to be shown.

So in that sense I can feel comfortable, coupled that with the fact that I didn't think, you know, I didn't think he could process a lot of things going on and the fact that he denied a lot. He consistently denied that he was involved in the crime and consistently when the discussions came up, he would very often just shut down, say, I don't want to talk about it, that's it. And from that point on, it was useless to talk to him about it.

Q And you were close with him?

A Yes, yes.

Q I have gone through many of these pages and many of the comments from information that you have and or that we've gotten from NFETC and underlined bits of items that I thought indicated that there was, and other people have indicated, more importantly, experts have indicated were indicia of psychotic behavior and other bizarre schizophrenic type behavior.

Do you have other examples that you know of or some examples that you know of that illustrate what you mean, that you haven't already mentioned, that illustrates his behavior was sometimes bizarre?

A What I would mention would be things that were in the notes, because formerly we recorded them...

Q That the...

A For example, he went through a period where he was interested and involved with voodoo type activities.

Q You have your notes with you; is that correct?

A Yes. He had a cloth that he wore around his neck. This went on for a brief -- in relative terms -- a brief period of time. But he believed that spells could be cast and those kinds of things.

Q Was he drinking during this time? Was he able to drink?

A Not to our knowledge he wasn't.

Q And would you know if he did?

A There was no way -- it would be very difficult to get alcohol into -- it was a residential setting, so it would be difficult to get alcohol.

. . . .

A I tried to get in touch with the lawyer and I couldn't get in touch with him. He didn't answer my calls or anything. And the first time I had the opportunity to see him was at the competency hearing when I came down here and I told him about -- Well, I told him my feelings about what had happened. And I also pointed out the fact that had Ernie and I not have had a decent relationship by that time, he could have conceivably committed suicide and we would not have known why or anything. And I emphasized to him the importance, if he was going to do it, that at least we should have known, you know, that he was going to do it. And I asked him why he did it and he said he was doing it to try to scare him into confessing that he had done the crime.

Q So he admitted that this had happened?

A Yes.

Q That he had said [to Mr. Roman], you can be snatched out at any time?

A Yes.

Q And electrocuted?

A Right.

. . . .

A But at that time -- Ernie fluctuated between sometimes understanding that he was in, and I'm not talking specifically about this time, I'm talking about generally now, he fluctuated between knowing that he was going to trial and that he stood the chance of being confined or electrocuted, whatever the case may be. On the one hand, too, thinking that he was acquitted and thinking everything was going to be okay when he got out...

Q That he was already acquitted?

A That he was already acquitted. And his third fluctuation was, I'm going to go to trial, be found innocent because I'm innocent anyway. And when I get out, I'm going to be a tree surgeon. In fact, during one period he started writing different people, he was fluctuating between being a tree surgeon and dealing with pest, lawn and pest control. And part of that was a result of him having met some people that worked at NFETC that had a lawn service and they offered him a job when he got out, so that when he did get out, and he was excited about it, he talked about that. So that sentence about being a tree surgeon was in line with his feeling that when he got out, that's what he would like his career to be.

. . . .

Q Now, you wrote a report or your signature appears on a report, I believe, and

the result of that report was, in fact, that he was competent.

A Right.

Q Can you explain that to us and when was it?

A This was done in March of '82. We had reached -- We were faced with the situation...

Q Who we?

A I'm sorry, the team, the medical team. The medical representative, the psychiatrist, the unit director, the initial team that was involved in the intake, that's the team that remained consistent throughout the treatment process with Ernie.

We were faced with a situation where there was the feeling that we had done about as much as we could do with him in terms of bringing him to competency. There was a feeling that he really did not need to be in an institutionalized setting any longer.

Q Is that because he wasn't a danger to himself or others?

A No, he was not a danger to himself or anybody else, it was felt that he would not. It was felt that he needed a support system still because he would decompensate if he didn't. But it was felt that he did not have to necessarily be at NFETC.

I had reservations, while it's true that I signed the form and the case summary as well, that was because I had to, I was the only person that was authorized to do it. If I had of just flat out refused, then probably the unit director would have. But I was basically the person that was responsible for doing that.

I had reservations because of the different sides that I had been seeing of him and I wasn't sure how much more was going to be showing and I wasn't comfortable with the paranoia, et cetera. However, again, the other side to that was we had done in terms of meeting the requirements that we had been given, the mandate we had been given, we had done what we could with that.

If you look at the summary itself, not the summary, I'm sorry, the competency evaluation sheet.

Q Yes.

A I put at the bottom a qualifier to that and that was intentional, that statement.

Q If I can read it, Mr. Roman continues to manifest memory deficiencies which may limit the degree of the legal process. He has reached a point where continued involuntariness to institutionalization would no longer be beneficial, thus any continued commitment may no longer be substantiated.

But you were not -- Can I take this and introduce it or do you need to keep it?

A No, I suppose not, you can, yeah.

CLERK LONG: It will be Defendant's Exhibit No. 17.

THE COURT: Does the state have a copy of that?

MR. RIDGWAY: Yes, I do, Your Honor.

THE COURT: Any objection to it?

MR. RIDGWAY: No, Your Honor.

Q I take it that the decision to find someone competent and state that they're competent is a team decision?

A It is.

Q And there may be dissension on that team?

A True. The majority rules in that situation, it's a democracy.

Q And you were obviously, well not obviously, were you in the minority in that team?

A Yes, I was.

Q The defense attorney, you were the person who had the most contact with Mr. Roman?

A Yes.

Q Did the defense attorney come and talk to you about what your opinion was about competency?

A The only time, the only time competency came up at all with him was the first time when I came down here and he was found incompetent.

(P.C.R. 921-963).

4. Dr. Cesar L. Benarroche

Competency was not redetermined from October 1982 to February 1983. Expert opinion now is that Mr. Roman was incompetent at trial. Dr. Benarroche, psychiatrist/neurologist, Director, Fair Oaks Hospital, at Boca/Delray, interviewed and evaluated Mr. Roman, looked at background information, and concluded:

Mr. Roman's ability to have assisted in his defense is questionable at best. He has only vague recollections of his relationship with his defense attorneys and he appeared confused about certain legal options that he apparently was offered. He recalls being told to "plead guilty" but told me that he did not do it because his lawyer "never told me the options". Mr. Babb's affidavit raises serious questions about Mr. Roman's ability to work collaboratively with him. Mr. Babb says that "He wouldn't listen to me, I couldn't get through to him, it was like talking a wall." Mr. Roman furthermore stated to me that the jury found him guilty "because of newspaper articles." Although Mr. Roman seemed to be able to understand court proceedings at the time of the interview, he was unable to fully comprehend the adversarial processes of law and to avail himself of legal options.

Mr. Roman did not exhibit any positive symptoms of psychosis or behavioral disorganization at the time of the interview. He was, however, tangential in his thinking and his affect was markedly blunted. He was fully oriented to date, place, and person. It is my opinion that his present medication regimen of an antidepresssant [sic] combined with an antipsychotic may have contributed greatly to his current mental stability.

At the time of the interview, Mr. Roman was aware of the nature of the charges against him (although he does not recall having being involved in it) but I seriously doubt his present abilitty [sic] to assist in his defense.

Based on the documents I have reviewed and my examination of 2/11/88, I have concluded within reasonable medical certainty that Mr. Roman was incompetent to stand trial in 1983. Furthermore, if Mr. Roman was intoxicated at the time of the offense it is highly probable that his judgment was grossly

impaired due to his borderline intellectual functioning and psychotic diathesis.

(App. 5).

5. Dr. Fox

Dr. Fox interviewed and evaluated Mr. Roman, reviewed his extensive medical history, reviewed Dr. Benarroche's report, and Mr. Babb's affidavit. He was qualified as an expert in forensic psychiatry and testified:

> Q Have you testified as an expert with regard to the matters you've just discussed; that is sanity, competency, et cetera, in criminal cases?
>
> A Yes, I have.
>
> Q How many times have you been qualified as an expert or accepted as an expert to testify?
>
> A Approximately 200 times since 1977.
>
> Q And how many of those times have you been qualified -- that you've been qualified have you been qualified as an expert and testified for either the state or the government?
>
> A Approximately half of those times.

(P.C.R. 729-30).

> Did you form an opinion with regard to whether, and I may have asked this, I don't recall, whether Mr. Roman was competent at the time of trial?
>
> A Yes, I did form an opinion.
>
> Q What is that opinion?

A My opinion is that Mr. Roman was not competent at the time of his trial.

(P.C.R. 738-39).

. . . .

A Okay. In my opinion Mr. Roman suffers from a number of conditions. First being chronic schizophrenia of an undifferentiated type. The second being alcohol abuse of a chronic and intermittent nature. And the third being mild mental retardation.

Q Do you know what organicity is or organic brain syndrome?

A Yes, I do.

Q What is that and is it relevant here at all? Is it relevant here?

A It is relevant.

Q How is it relevant?

A It's relevant -- First of all, to answer your question, organic brain syndrome refers to physical impairments of the -- physical illnesses of the brain that prevent an individual from being able to be oriented to reason, to concentrate and to remember. Any illness of the brain that impairrs an individual's ability in this area would be referred to as an organic brain syndrome.

Q Is that relevant in this case?

A It's relevant in the history of Mr. Roman in this case.

Q Could you tell us, sir, then how you came to the diagnosis of schizophrenia? And could you tell me, is that axis one and what is axis one in medical terminology?

. . . .

A Yes, from the -- from the affidavits that were just mentioned and from his medical records there is an overwhelming amount of evidence of chronicity of mental illness in this individual.

Q Let's go to the medical history chart that I gave you on Mr. Roman.

A Exhibits B you mean?

Q Yes, for identification purposes. And go to 1958. And I have done some underlining in this and I'd like to just go through some of the things in this medical history and ask you if these things are support for the diagnosis of schizophrenia.

The first entry, 11/25/58, schizophrenia, paranoid, chronic. Did the fact that he had been diagnozed with that diagnosis in 1958 enter into your opinion in this case?

A Yes, it did.

Q How so?

A This diagnosis came from his hospitalization at Florida State Hospital in 1958 and was the unencumbered opinion of the psychiatrist who was evaluating him at that time that he suffered from schizophrrenia of a chronic type with paranoid symptomatology at that time.

Q Could you tell me if the auditory, persecution and visual hallucinations are consistent with a diagnosis of schizophrenia?

A Those are consistent with the diagnosis of schizophrenia.

Q Screams and cries and jumping out of bed in the middle of the night, turns on all the lights or looking for bad guys; are

those symptoms of schizophrenia, paranoid, chronic?

A Yes, they are.

Q Are those also symptoms of alcoholism?

A They could be symptoms of alcoholism. They're not exclusively confined to a diagnosis of schizophrenia.

Q Let's go to 1968, which is all on page one, although it's not numbered as page one. It's 12/68 Marion County "Inquisition of Incompetency". You see on the right?

A Um-hum.

Q Again in '68, some ten years later, schizophrenic reaction, chronic undifferentiated with paranoid features. Did that diagnosis enter into your diagnosis in any way?

A Yes, it did. It also was evidence that I used to form my opinion.

Q Hiding under houses, hallucinations; are those things that are consistent with your diagnosis, sir?

A Yes, they are.

Q Did you make a diagnosis independent of this history?

A Yes, I did.

[Doctor discusses 25 years of schizophrenia, and treatment with psychotropic drugs]:

A Mr. Roman is currently receiving Haldol.

Q We just...

A Haldol -- I should say, Haldol is approximately ten times as potent as Thorazine.

Q And it is -- is it for alcoholism?

A No, it's not.

Q What is it for?

A It would be the same indication as Thorazine or Mellaril.

Q And it's your information that the State of Florida is now treating Mr. Roman with Haldol?

A That's correct.

A Schizophrenia is a condition that exists all of the time. The symptoms of schizophrenia fluctuate.

Q Could he, for example, be on day one able to abstract four out of five proverbs, but on day fifteen just one out of five proverbs?

A Yes, it's possible for a person suffering from schizophrenia to have that kind of fluctuation. And even more important that on one day that the person my interpret a proverb in a reasonable abstract way as you or I might and on another day interpret a proverb in a bizarre or paranoid or delusional manner.

Q Does the fact that someone says today I do not know any symptoms of schizophrenia mean, of an expert, mean that the patient does not suffer from schizophrenia?

A No, it does not mean that.

Q And that's because the symptoms come and go; is that correct?

A That's because the symptoms come and go.

. . . .

Q Now, does this indicate to you, this six, eight, ten year period that this person is an alcholic or that this person is psychotic and suffering from schizophrniz or both?

A This record indicates both things. This was a period of time in which the records refer primarily to an active sense to symptoms of alcoholism and the treatment of alcholism. I think it would be important to make a point here. Schizophrenia includes two different types of symptomatology. Symptoms that are generally referred to as the active symptoms of the illness and symptoms that are generally referred to as the negative symptoms of the illness. Let me explain what I mean by that.

Active symptoms of schizophrenia refer to hallucinations, delusions, disoriented thoughts and bizarre and inappropriate actions, things -- active as the word applies, things that you can see. Things that a person can tell you about. Things that can be demonstrated in that sense.

Negative symptoms of schizophrenia refer to -- also to symptoms that can be observed, but symptoms which have a more passive nature to them. For instance, apathy, lack of interest in personal hygiene, lack of expression of affect. Inability to appreciate one's circumstances, inability to understand the nature of one's actions.

. . . .

Q Does standing with a blank expression on face fit into any of that?

A No. That would be under the residual symptoms or the, what I referred to before as the negative symptoms of schizophrenia, which you can find beginning at the bottom of that page. That's what I meant, page 194. Marked social isolation or withdrawal, marked impairment of role functioning as a wage earner, marked peculiar behavioar, collecting garbage, talking to one's self, marked impairment of personal hygiene and grooming, blunted or inappropriate affect, which we were just referring to. Digressive, vague over elaborate circumstances, speech, poverty of speech or poverty of content of speech.

Q You find that throughout these records?

A You find that without the records -- throughout the records and you find it today when you examine Mr. Roman.

Q What about childish behavior?

A You find that throughout the record. Going back to the very first entry, the reference to his jumping out of bed, screaming, crying in the middle of the night, putting on the lights, looking for bad guys, that kind of thing.

Q At page eight what about, thinks Hunters are trying to kill him. Thinks sister trying to have him killed. Tremulous and ranting. This is 1976. Does that have any...

A Again, that -- those symptoms are compatible with a diagnosis of schizophrenia. I should point out, however, that in an individual only suffering from chronic alcohol abuse, they could suffer from similar symptoms, if that were all that they were suffering from and had no history of schizophrenia. Chronic alcohol abuse can lead to an individual developing paranoid delusion, paranoid idea, and that could be

evidence either of acute or alcohol intoxication, at which time individuals become, can become paranoid or the complications of alcohol withdrawal or intermittent alcohol intoxication.

. . . .

Q Now, the records, the family affidavits and records including the jails, prisons, parole officers, probation people, et cetera, saying that this man suffers from mental illness, not the alcoholism, plus your interview with him, what during your interview led you to an independent and if it wasn't...

A Let me describe my interview -- define my interview with him.

Q All right.

A I interviewed him for approximately an hour and a half last Saturday in the colonel's office at the Florida State Prison. We were alone during the course of that examination in an interview room. We were not interrupted during the course of the examination. Mr. Roman was handcuffed at the time, but was not under coercion to answer or not answer any questions that I asked him.

At the beginning of the evaluation I explained to him what the purpose of my evaluation was, that it was to evaluate his mental state today, that day, and to try to come to a conclusion as to his diagnosis. And I explained to him

. . . .

I read an affidavit from one of his attorneys that relates to the defense attorney's opinion of his mental state at the time of his trial in 1982, in which the attorney, whose name skips my mind at the moment, although I know his first name is Skip, his name is Skip something...

Q Babb?

A ...Babb, I think. The attorney described Mr. Roman at that time as somewhat -- similar in terms of the way I've been describing him. In other words, he was withdrawn, apathetic. What you just handed me is the affidavit that I had a chance to review before.

Q From Mr. Babb?

A From Mr. Babb.

Q Is that a photocopy of the affidavit?

A Yes, this is a photocopy of it. That makes reference to the fact that in Mr. Babb's opinion he was not thinking rationally. That Mr. Babb as his attorney was trying to explain to him what he should do, what made rational sense, which as I understand it is the Florida Statutes of competency and Mr. Roman was so removed from current reality that he was unable to respond to his attorney. And that is also in line with schizophrenia.

. . . .

Q What is a primary case manager?

A Because of the large number of patients in these type of individuals, each patient is, and the small number of doctors, each patient is usually assigned someone, and this is a common term, a primary case manager. In other words, it doesn't say what her, what Valerie Moss' qualifications are, but I would assume that she is a mental health worker or mental health technician, I'm not sure what the term is here in Florida, to manage the person's case, to be their primary therapist. And that most of the treatment and interactions would go on with that person.

Q If you were to assume that she had an MSW in social work, is this kind of person, primary case manager, someone who -- when it says primary, does that mean they have a lot of contact with them?

A That would be the person who would have -- who would be responsible for them, would be responsible for writing notes in the chart. Would be responsible for reporting the patient's condition at case rounds, et cetera.

. . . .

Q This man decompensates and when he does become untalkative, if that's the right word...

A Stops talking.

Q Stops talking. Seclusive. Won't deal with people around him. Is that pretty much classic?

A Those are classic symptoms.

Q Falls into himself and won't deal with people?

A (Nodding head in an affirmative response.)

Q That's when he is out of remission and in active psychosis?

A And at other times becomes delusional or paranoid, as he did when he was in the North Florida Treatment and Evaluation Center and as he did a couple of months ago in the Florida State Prison.

Q Now, you saw the affidavit of Skip Babb?

A Yes, I did.

Q Howard Babb. Mr. Babb states in Exhibit No. 10 that he went in and attempted to assist his assistants in getting Mr. Roman to accept a plea, the state had offered him a life sentence for this crime. And according to the lawyers, they wanted Mr. Roman to accept this plea, but he refused, so Mr. Babb went to speak with him. According to Mr. Babb, quote, I talked to him two or three times after the life offer was made, he would not listen to me. He refused to accept my advice or even consider it, and underlined, underlined considered it, refused to consider my advice. Our staff knew he would be unsuccessful at trial. It was not because he was thinking rationally about his option, it was like talking to a wall. Does that remind you of anything in this man's history?

A Well, it reminds me of all these descriptiosn of him as being withdrawn and not communicating.

Q Several lawyers and investigators tried to explain the case to him and begged him to take the plea, but it was as if he could not hear us. Does that remind you of anything in this man's history?

A Also these reports of his condition. I felt at the time and feel the same today that he was not touch with reality about his situation. Now, this comes from a man who's handled, he says, thousands of cases. He's seen malingering, read articles about it and it's his opinion he wasn't malingering. He thought in his opinion he was not capable of making a rational decision about his case or siding attorneys in his defense.

Now, if you accept all of this as true, is the type of things that experts in your field normally and regularly rely upon, these kinds of statements?

A Oh, absolutely. I mean the defendant's own attorney doesn't view him as

being competent, what better expert in a way, what better expert is there than a person's own attorney in determining his competency. If you say, his attorneys says to me, my client doesn't understand what I'm saying to him, I would use that as very strong evidence for -- in support of the determination of competency.

Q Let's ignore his opinion and just look at the objective descriptions of what was going on.

A The objective description would be the same.

Q Which is?

A Which is that he, Mr. Babb describes a person who is not cooperating with him. Who is not even, in his words, not even considering the, his legal options.

Q Under Florida Rule 3.211, Criminal Procedures and under the U.S. Constitution, the test is whether -- for competence to be tried -- is whether the defendant has sufficient presentability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. That's the overriding terminology and then there's a bunch of examples to look at to determine whether that is met or isn't met.

A Those are those eleven points.

Q Right.

A And you're familiar with all of that?

A Yes.

Q Do you just have an opinion -- let's just talk about the general state, whether he had, at the time Skip Babb is

talking about...

A Um-hum.

Q ...sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Just with regard to staring, not talking, not listening, being like a wall, do those indicate to you that this is satisfied, he was not competent?

A It indicates to me that those were satisfied. In other words, that he was not competent. That he didn't have a rational understanding of the proceedings against him, of what he was being accused of or what the consequences of his not complying would result in. Mr. Babb apparently was saying to him, quote, you're going to be found guilty if you don't agree to a plea of...

Q I'm not talking about actually the actual...

A That's what I'm saying. When I read this, that's my sense of what the conversation was. That's what I'm saying.

Q In talking about his response to it.

A He didn't respond.

Q Didn't respond?

A What Mr. Babb says is he didn't respond at all, not yes or no, he just didn't respond.

A That's what Barnard and Carrera thought he should be committed for, not responding?

A Exactly, exactly. Because they couldn't make a determination back in '81 or

in '82 at those first two evaluations, of his competence. They found him incompetent just because he wouldn't respond. They found that that -- they felt that that was sufficient and I agree with that, that if a person won't respond, they're not and you're convinced that they're no malingering, which they both were, then the person is not competent.

Mr. Babb is describing exactly the same behavior that they found to be evidence of incompetence.

Q Even if Barnard and Carrera were right in October of 1982, that the defendant was competent then, Mr. Babb is describing another day?

A He's describing a state -- he's describing something six months later.

Q Now, not just his responses, but would you address -- or lack of responses -- but would you address the content of what was going on. They apparently were trying to look out after his interests.

A Um-hum.

Q And he wasn't interested.

A That's what comes across in this affidavit as I read it.

Q Now, did you discover memory loss?

A When I examined Mr. Roman he had extensive memory loss.

Q Let's talk about -- He's got memory loss, he has a history, well documented, of schizophrenia. He has the same symptoms in front of his lawyers as he had in front of Barnard and Carrera. He's been some four months without supervision or medical treatment in a hospital setting. And apparently he's not responding to people suggesting what his best interests would be.

In light of that and anything else, is it your opinion that he was competent or incompetent at the time he stood trial?

A It's my opinion that he was incompetent.

Q Now, going down the list of criteria -- or are there any other things that contribute to that; everything we've talked about?

A Everything we've talked about, yes.

Q All right. In considering the issue of competence to stand trial, the examining expert should consider and include in their report, but they're not limited to these kinds of things, number one, the defendant's appreciation of the charges. Do you have an opinion about whether, in light of what you've heard and read, that experts in your field normally and regularly reply upon, if he had an appreciation of the charges or can you form an opinion on that?

A I really can't form an opinion on that because I haven't seen anything, you know, when I evaluate -- when I evaluate somebody for competency in that setting, I will say to the person, tell me what you're charged with. That's the way I would assess his competency to appreciate the charges and it would then after -- you know, based on his response, would make a determination on that.

There isn't anything in the record at that time, at the time of his trial, in other words, to give me information about that specifically, although there was a statement that we were just discussing from when he was at the treatment center that indicated that he didn't understand what the nature of the charges were.

Q Let me go through the eleven.

A Okay.

Q Defendant's appreciation of the range and nature and possible penalties.

A He clearly didn't understand that, as the statements by Mr. Babb.

Q And again, these are [not] exclusive. The overriding consideration as to whether he had sufficient presentability to consult with Mr. Babb, or a reasonable degree of rational understanding, whether he has a rational or factual understanding of the proceedings, as indicators.

His capacity to understand the adversary nature of the legal process; do you have an opinion on that?

A I would say -- Well, yes, I do have an opinion. I would say he could not appreciate, he could not rationally appreciate that because his lawyer is saying to him, here's the choices in this adversarial proceeding and you've got to make a choice and he wouldn't respond. He didn't have any understanding that he was required to make a response. And what would happen if he didn't.

Q Apparently what would happen if he didn't was that he was getting or offered three life sentences, life, versus what lawyers are telling him is death; is that what you understand the option was?

A That was my understanding. Yes, that was my understanding of the option of what they were offering him.

Q His capacity to disclose to his attorney pertinent facts surrounding the alleged offense. I assume...

A He's always been incompetent except for, if you separate this, the taped confession from the fourteenth, that aside, he has consistently been incompetent in that

regard because he's never been able -- he has no memory and he's always said he has no memory of the events. So he's never been able to assist in that because he doesn't have any memory of it.

Q Let's skip a couple, I think we've been talking about them, but I want to go to one that strikes me here, number one. His capacity to -- Excuse me, number ten. His motivation to help himself in the legal process.

A Again, reflected in Mr. Babb's statement, when someone is offered a choice between death and life in prison, I would view choosing life in prison as helping himself when, certainly when it's explained to the person that those are the only possibilities and Mr. Roman didn't seem to raise another possibility, for instance, that he was, you know, that he was convinced that he was going to be acquitted or things like that. He was just removed from the process.

Q Distant?

A Yes.

Q Finally, his capacity to cope with the stress of incarceration prior to trial. What do you think this person's capacity is to cope with the stress of incarceration?

A He has no capacity. It didn't take very long for him to require to be transferred from the county jail, I guess it was, to a hospital, to the North Florida Treatment and Evaluation Center because he couldn't cope with being -- he was sent there because he was incompetent and because he wasn't able to cope with that situation and he remained there for a year and a half, I would assume, in a situation -- I don't know what the usual average length of stay in the North Florida Treatment and Evaluation Center is, somebody sent there having been judged incompetent to proceed.

6. Dr. Barnard

This expert informed the trial court in 1981 and 1982. He did not testify in the evidentiary hearing, after the five previous persons' opinions were in evidence. The trial court mentioned this fact in his order, whereupon the following affidavit was submitted to and was considered by the trial court (the trial court specifically gave "consideration of the affidavit of Dr. George Barnard attached to the Petition for Rehearing, together with all other relevant evidence," when denying relief, Supp. P.C.R. 13):

> 6. I evaluated Mr. Roman regarding his competency to stand trial in May 1981. At that time it was my opinion that he was not competent to stand trial based on his inability to give verbal responses making it impossible to obtain information from him.
>
> 7. On October 11, 1982 I again evaluated Mr. Roman's competence to stand trial. At that time, Mr. Roman was verbal and I felt that he was competent to stand trial and to communicate with his attorney.
>
> 8. I have reviewed an affidavit by Howard Babb, Public Defender for the Fifth Judicial Circuit, describing Mr. Roman's nonverbal affect and lack of communication with his attorney at the time of trial some four and one half months later. I understand that during this time period Mr. Roman was incarcerated in the Sumter County Jail without medication or treatment.
>
> 9. Given my knowledge of Mr. Roman's prior history of withdrawal and inability to

> communicate with his attorney, it would be my opinion that there was a reasonable probability that he had decompensated during his time in jail and was not able to communicate effectively or rationally assist counsel in the preparation of his trial or the consideration of the State's plea offer. There is no doubt that given Mr. Roman's behavior there were reasonable grounds to request a competency evaluation pursuant to Rule 3.210 of the Florida Rules of Criminal Procedure.

When the elected public defender believes his or her client is incompetent, the competency commission contemplated by the Rules of Criminal Procedure should be used. The investigators believed Mr. Roman was incompetent. In the middle of trial, Mr. Roman's sister told the judge Mr. Roman was incompetent, and requested a guardian. Mr. Roman would not respond to his lawyers, was a wall, did not act rationally, and was acting completely against his best interests. Counsel should have brought this all to the court's attention, and, had counsel, there is a reasonable probability the result in this case would have been different.

## ARGUMENT III

### TRIAL COUNSEL WERE GROSSLY INEFFECTIVE IN THEIR ATTEMPT TO SUPPRESS MR. ROMAN'S STATEMENTS

The statements in this case were the centerpiece of

the State's case. Two experts at the post-conviction hearing testified, based upon the information in footnote 1, supra, and based upon Mr. Roman's extensive history of schizophrenia, alcoholism, brain damge, and mental retardation, that he was not competent to waive his rights at the time he gave his statement. See testimony of Fox and Macaluso. Their testimony is incorporated herein, by specific reference.

Dr. Barnard testified at a pre-trial suppression hearing. He had interviewed Mr. Roman several times, and had seen his transcribed statement. He testified to the following material which he did not have:

> I saw no indication that would lead me to believe that he was drunk, intoxicated.

R. 44, Motion to Suppress Hearing, December 2, 1982.[5] He also testified:

> Q And you're not aware of anything that might have transpired between police officers and Mr. Roman prior to the taking of this taped statement, are you?
>
> A I've been given nothing, no.
>
> Q You don't really know whether they scrupulously honored his constitutional rights or whether they attempted to subvert them?

---

[5]Of course, that is the point of Argument I -- state suppression of drunk stupor.

A No.

[Objection sustained]

Q You don't know if they used any techniques designed to elicit confessions, do you?

A No, sir.

(R. 52). Dr. Fox and Macaluso were provided the evidence of coercive technique, and opined that Mr. Roman was incapable of voluntarily, knowingly, and intelligently confessing. They testified he was not. Dr. Barnard did not testify. His opinion is bound up in the Brady claim -- Argument I -- and no hearing was allowed on that claim. Included in the information not provided to Dr. Barnard pre-trial was the Brady intoxication evidence upon which the trial court would not allow a hearing in post-conviction. The lower Court's Order denying relief was, to a limited extent, based upon Dr. Barnard's failure to testify, but it must be remembered that the hearing was a limited one, that no questions about the State's withholding of intoxication proof was allowed, and that Dr. Barnard's opinion about the voluntariness of the confession was and is inextricably tied to evidence of how drunk Mr. Roman was and had been. Dr. Barnard could not testify to that total picture, given the

restrictive nature of the hearing, and the refusal to hear evidence on Brady.

When the trial court's order was received, counsel again contacted Dr. Barnard, and he executed an affidavit. Mr. Roman expressly requested that "[i]f Dr. Barnard's failure to testify is deemed dispositive of any claim, which the State has now asserted in language the Court has adopted, there is plenty of time to have Dr. Barnard testify, and petitioner so requests." Supp. P.C.R. 5. Instead, the trial court simply "consider[ed] . . . the affidavit of Dr. George Barnard . . . together with all other relevant evidence," Supp. P.C.R. 13, and denied relief.

Dr. Barnard's evidence was:

> 1. I am a board certified forensic psychiatrist, professor, chief of the Consulation Service, and chief of the Forensic Division of the Department of Psychiatry of the University of Florida. I have conducted well over 4000 forensic evaluations in my career, have qualified as an expert by numerous courts and have testified in many court proceedings.
>
> 2. I have had occasion to interview and evaluate Ernest Roman on two occasions prior to this offense namely November 1973 and June 1975.
>
> 3. Ievaluated Ernest Roman on three occasions in relation to his trial in this case namely May 1981, March 1982 and October 1982.

4. At Mr. Roman's trial I testified on his behalf in the penalty phase. Specifically, I testified that Mr. Roman's capacity to conform his conduct to the requirements of law was substantially impaired.

5. Had I been asked to do so I would also have testified that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

6. I evaluated Mr. Roman regarding his competency to stand trial in May 1981. At that time it was my opinion that he was not competent to stand trial based on his inability to give verbal responses making it impossible to obtain information from him.

7. On October 11, 1982 I again evaluated Mr. Roman's competence to stand trial. At that time, Mr. Roman was verbal and I felt that he was competent to stand trial and to communicate with his attorney.

. . . .

10. In my evaluations of Ernest Roman conducted in this case, it has been ny opinion that Mr. Roman functions in a diminished mental capacity when he is intoxicated. In the penalty phase of his trial I testified that I believed that his capacity to conform his conduct to the requirements of law was substantially impaired at the time of the offense.

11. At Mr. Roman's suppression hearing, I gave my opinion that Mr. Roman was competent to waive his constitutional rights and give a reliable confession. I have since been provided with evidence some of which was not provided to me at the time of the hearing. This evidence establishes that at the time Mr. Roman gave his statement to police that:

a. Ernest Roman was seen by a police officer at 7:00 a.m. of the day he gave his statement picking up a bottle of wine. He looked hung over and appeared to have been roaming and drinking all night.

b. When he was picked up at 4:00 p.m. that same day, Mr. Roman said, "Let's get this mess over with so I can go on to Eustis." (Eustis, Florida was the location of the alcohol detoxification center.)

c. Ernest Roman repeatedly fell asleep on the way to the police station despite attempts to awaken him.

d. at the police station he responded that he could not waive his rights because he had been sent to Chattahoochee (the state mental hospital) and did not have any rights.

e. Ernest Roman was trembling, vomiting, wringing his hands, nodding off, silent for long periods of time, slumping down into his chair and withdrawn.

f. Mr. Roman believed police had promised that they would get help for him.

g. Ernest Roman had been on a drunk for the previous four days and had also consumed pot and speed the night before.

h. The day after giving his statement, Mr. Roman informed a Magistrate he wished to plead no contest to the charge of first degree murder.

i. Counsel saw Mr. Roman the day after the police interrogation which led to his statement and believed that he still appeared "half-drunk" at that time.

12. Had I been provided with all this information prior to my testimony at the suppression hearing, it wold have been my opinion that Mr. Roman was not competent to

> waive his constitutional rights or give a reliable statement to law enforcement officers.
>
> 13. I have been provided with transcripts of sworn taped statements given by Arthur Reese March 14 and 15, 1981. These statements had not been previously provided to me. Mr. Reese indicates that he was sharing a trailer with Mr. Roman the night of the murder. He states that he saw Mr. Roman at or about the time of the murder and that he was in a drunken stupor. He also states that Mr. Roman was in and out of the trailer and he assumed he was drinking from a jug of wine. Had this information been provided to me at the time of trial, it would have been my opinion that there is a reasonable probability that Ernest Roman could not have formed a specific intent to commit the offenses charged.
>
> 14. I have also been provided with life history information including family affidavits which I did not have at the time of trial which would have influenced my opinions regarding the mental health issues.

(Supp. P.C.R. 8-11). Counsel ineffectively addressed the suppression issue.

Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant is entitled to counsel who will "bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 466 U.S. at 688. The constitutional right is violated when the "counsel's

performance as a whole," United States v. Cronic, 466 U.S. 648, 657 n.20, or through individual errors, Strickland, 466 U.S. 687, falls below an objective standard of reasonableness, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A petitioner must plead and prove 1) unreasonable attorney conduct, and 2) prejudice.

A court examining the voluntariness of a confession or intelligence of a waiver "must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a produce of his own free will." Jurek v. Estelle, 623 F.2d 929, 937 (11th Cir. 1980)(en banc). It is "settled that statements made during a time of mental incapacity or insanity are involuntary and, consequently, inadmissable . . ." Sullivan v. Alabama, 666 F.2d 472, 482 (11th Cir. 1982). See also Smis v. Georgia, 389 U.S. 404, 407 (1967); Culombe v. Connecticut, 367 U.S. 568, 624-25 (1961); Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 167, 207 (1960); Fikes v. Alabama, 352 U.S. 191, 196 (1957). Counsel must act

reasonably in presenting mental health issues as they affect confessions. Counsel failed to act reasonably in this case. Since the confession was so important to the State's case, and since there is a reasonable probability that competent counsel would have suppressed it, Mr. Roman's right under the sixth amendment was violated.

## ARGUMENT IV

MR. ROMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S UNREASONABLE FAILURE TO CHALLENGE THE INCONSISTENCIES OF WITNESS TESTIMONY, UNREASONABLE FAILURE TO IMPEACH STATE WITNESSES, AND CONCEDING THAT MR. ROMAN DID COMMIT MURDER IN VIOLATION OF MR. ROMAN'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

> I want to state frankly to you that from the defense view point, from this point forward we are going to concede that factually the statements made in that statement are at least correct. I don't think that we could in any good faith stand up here and argue to you that Mr. Roman did not at least participate in the killing of that child. And, I will not do that.

Mr. Roman was presumed innocent until <u>his</u> attorney told the factfinders that he committed murder. At that point -- the defense's opening statement -- the jury learned that Mr. Roman committed murder because his lawyer told them the taped statement of Mr. Roman proved that.

> I think that that tape, if that tape were the only evidence that you had in this

> cause, and that there was proof that the child, in fact, be dead, that that tape would at the very least, if Mr. Roman were responsible for his acts, convict him as a principal to first degree murder and probably to the other crimes that are charged.

(R. 1129).

This was an unreasonable strategy. Trial counsel had at their fingertips various facts which, if presented properly, would have kept alive Mr. Roman's presumption of innocence and would have revealed the reasonable doubt surrounding the State's case. The strategy was unreasonable because the State had already presented two very experienced psychiatrists who testified that Mr. roman was indeed competent -- sane -- at the time of the offense. The jury had already heard two experts' opinions detailing Mr. Roman's past history of mental and physical problems and their opinions that, although he was a chronic alcoholic, he did know right from wrong.

Trial counsel was unreasonable in not pointing out to the factfinders that the State's case was full of inconsistencies and unreasonably failed to impeach key witnesses for the State. A critical question for the factfinders to consider was: when was the baby first discovered missing. At trial, Chip Mogg stated on direct examination:

Q. After you left, did you have occasion, or did Kellene have occasion in your presence, to notice that the baby, Tasha was missing?

A. No, not until we stopped, ran out of gas.

(R. 539, 40). During cross examination he stated:

Q. Thank you, your Honor. Chip, just let me try to get it straight by asking you a few questions. It is my understanding that you and Kellene left Mildred's trailer within five or ten minutes after you returned from the truck stop, is that correct?

A. Right.

Q. And then you all went for some period of time, ran out of gas, and noticed the baby was missing?

A. Right.

Q. Is that right?

A. Right.

A. Was that something like forty-five minutes before you noticed that the baby was missing?

A. No.

Q. How soon?

A. Probably ten minutes. Whatever time it would take to go four miles or so.

(R. 544).

The jury did not know, because trial counsel failed to bring it forward, that Mogg had earlier given a much different statement of when the child was discovered

missing. For the same reason, the jury did not hear from Richard Duncan, a disinterested third party.

On March 19, 1981, when Mogg talked with the police investigators about the child he stated:

> THOMPSON: Okay, when you left to take Eddie Beaudoin the son, to work . . .
>
> MOGG: Yeh.
>
> THOMPSON: around midnight, did you notice the baby in the car then?
>
> MOGG: I sure didn't.
>
> THOMPSON: Did you hear the baby in the car?
>
> MOGG: No, so she couldn't have been in the car at that time.
>
> THOMPSON: To the best of your knowledge?
>
> MOGG: Well I'm, I can almost guarantee it, because she definitely would have got up and you know, looked for her mother, she always did. She had to be gone around that night 10:00 when we got out there, first, you know the second time, she had to disappear around that time.

(App. 8, p. 10 and 11).

> MOGG: Yes. The baby definitely was there. The baby had disappeared the next time I went back cause I know the baby wasn't in the car when I took him to work.

(p. 13).

Mogg had a different version on September 18, 1981 of when the child was first discovered missing. In his

deposition, Mogg stated:

Q. What do you do once you get back, you go inside, I assume?

A. Yes.

Q. What is going on, anybody else arrived?

A. No, not that I could tell.

Q. Then, what next?

A. We were in there about five minutes, maybe ten minutes, and got out there and she was gone.

Q. Kellene was ready to go home?

A. Yes. I wanted to leave.

Q. Okay. And you say about five, ten minutes after you got back, you were getting ready to go back to your mother's?

A. Yes.

Q. Or where ever, you were leaving Millie's. All right. And, who discovered the child missing?

A. Kellene.

Q. When?

A. Right then, as far as I can tell.

Q. Before you left?

A. Yeah, because thought that she gotten out and walked off.

Q. What did you do?

A. We looked for her for awhile, couldn't find her.

Q. How did you go about looking? I mean, did you just walk around and call her . . .

A. Yes, Millie and Kellene looked, I didn't know where to look, I just looked right around the car, couldn't find anything.

Q. Who helped you look?

A. Kellene, Millie. I guess that is all.

(p. 15-16).

Mogg was questioned at the scene by police officers and gave yet another version. In a police report, an officer reported:

> Mogg, Herbert w/m 28 10-16-52 of Rt 3 Box 243 Stanley St Ext. Wildwood, Fla 743-1363 who stated that on 03-14-81 at approx 1205 hrs he took his friend Beaudoin, Raymond w/m to work at the 75 truck stop at which time the victim was observed in the back of his volkswagen, on the rear seat asleep and remained there the entire time from when they left the house to the truck stop and back to the house. Once arriving at the Beaudoin residence he got out of his vehicle and went inside the residence a few minutes later the mother came outside to the car and noticed the child missing.

(App. 8, p. 2-3). All of this was available to counsel. See Exhibits 19 and 20.

A fifth version available for presentation to the jury is from Richard Duncan. Duncan apparently met Mogg and Kellene as they were trying to negotiate Mogg's disabled Volkswagon back home. Duncan gave a statement

to the police, defense counsel knew of him but unreasonably failed to depose him and call him as a witness. Duncan's statement to the police states:

> We left the Bar and on the way home we seen Chip pushing his car we followed him to his house they went in the house for a minute came out went to get the baby out of his car and she was gone so we gave them a ride to were they were at and the baby wasn't there so we looked around the area were they had been Chip had given someone a ride to work and the baby was in the car then or was suppose to be so we went back to the truck wash to see if he had seen her but he said no so they called the sherriffs and we went to the fathers parents house to see if he had got her but they didn't so we went back to the trailor to look around some more then we went home and the mother stayed there with some other guy.

(App. 8).

Trial counsel could have and should have impeached Mogg. He was a key witness and his ability to tell the truth was critical to the State's case. Trial counsel's neglect in deposing and calling Duncan to the stand was an unreasonable ommission.

Kellene Smith couldn't keep her story straight about the events on the evening of March 13, 1981. She gave various versions on different days, and defense counsel had a perfect opportunity to point out to the jury critical inconsistencies of the case. The following are examples of what defense counsel could have done to

deflate the state's case by pointing out inconsistencies and by impeaching State's witness.

When did Kellene Smith and Chip Mogg really go to Mildred's trailer?

a. At trial, Smith testified she first went to Mildred's at dusk.

> Q. Kellene, did you and Chip have occasion to go to Mildred Beaudoin's trailer at sometime on March 13, of 1981?
>
> A. Yes.
>
> Q. Could you tell me, what is the first time that you and Chip went to Mildred Beaudoin's trailer that day?
>
> A. It was around dark.
>
> Q. Was she home at that time?
>
> A. No.
>
> Q. Did you have Tasha with you?
>
> A. Yes.
>
> Q. How long did you stay at her mobile home or trailer that first time you went there?
>
> A. Fifteen minutes.
>
> Q. Now, after you left, did you have occasion to come back to Mildred Beaudoin's trailer?
>
> A. Yes.
>
> Q. Do you recall approximately what time that was?
>
> A. Around Eleven.

Q. Was that Eleven o'clock at night, or in the morning?

A. At night.

(R. 489-90).

b. On the day of the offense, Smith had a different version of when she first arrived at Mildred's. She told Sgt. Montgomery that:

> At approximately 10:00 pm they went to Millie's (Mildred Boudeines) and only stayed a few minutes. Then they went to the ABC Lounge in Wildwood and picked up a bottle of Vodka. They arrived back at Millie's at approximately 10:30 p.m. to 11:00 p.m.

(App. 8). This statement was available to trial counsel. Exhibits 19-28.

c. In an affidavit executed on April 6, 1981, Smith stuck to his original story.

> Upon entering the said Trailer I asked if I could use the bathroom and either R. Beaudoin or Reese said you'll have to wait a minute because Ernest Roman is in there taking a bath. Several minutes later Roman exited the bathroom and walked by me and left out the front door of the Trailer; at which time I used the bathroom, after which Mogg, Tasha and I left. We were only there for approximately 5 minutes which made us leave at approximately 10:05 P.M on 3-13-81.
>
> Upon leaving as aforesaid Mogg, Tasha and I went to the ABC Lounge in Wildwood, Fla. and purchased a half pt. of Vodka then drove back to M. Beaudoin's said Trailer, arriving there at approximately 11:00 P.M. or a few minutes thereafter on 3-13-81.

(App. 8). See Exhibits 19-28.

Trial counsel was aware of Smith's inconsistent times of arrival and unreasonably failed to make the jury aware of them. Smith was also unsure about when she discovered the child was missing.

a. Smith stated at trial that she discovered the baby was missing shortly after leaving Mildred's, she stated:

A. We went back to the trailer.

Q. Mildred's trailer?

A. Yes.

Q. When you got back to Mildred's trailer, what did you do?

A. Walked up to the door, told Mildred that I couldn't find my baby, and I started looking around for her.

Q. Could you tell us, please, where all did you look?

A. I looked inside her trailer, to see if she might be there, she wasn't, so I went around the outside and looked under the trailer, and all around, out in the field.

Q. That is a pretty isolated area out there, isn't it? Not many mobile homes or houses, lot of open space?

A. Yes.

Q. Did Chip help you look?

A. Yes.

Q. Did Mildred help you look?

A. No.

Q. Mildred did not help you look?

A. No.

Q. Kellene, in the course of your looking, and If I could call your attention to approximately 3 o'clock, that morning, which would be now March 14th, on Saturday, did you, were you still looking for Tasha about 3 o'clock that morning?

A. Yes.

Q. And where were you looking about 3 o'clock?

A. Out in the fields, all around where ever she could possibly walk to.

(R. 497-98).

b. Closer to the event, Smith had a different version of what happened that evening. For example, in her sworn affidavit executed on April 6, 1981, Smith states:

> At approximately 1:35 A.M. on 3-14-81, Mogg and I discontinued our search and left the area in our Volkswagon. We did so in an effort to trade cars with a friend that had 2 good lights on his car and since we had only one good light on the Volkswagon we felt the 2 lighted car would enable us to make a more thorough search.
>
> We accomplished this trade of cars and we arrived back at the said M. Beaudoin Trailer at approximately 2:00 A.M. on 3-14-81 at which point in time we continued our search of the area for Tasha.

(App. 8). See Exhibits 18-28.

c. On March 14, 1981, Smith told Sgt. Montgomery the story about leaving to get a car with working headlights.

> Kellene then advised that she and Chip started to Chip's mother's house to get Chip's mothers car because the Volkswagen only had one headlight and they thought they could search better with a car with both headlights.
>
> She advised the car quit running. They got Chip's mothers car and pushed the Volkswagen home and then came back to Millie's. This was approximately 3:00 am. They decided to call the "Police".

(App. 8). See Exhibits 18-28.

d. Further, Smith repeated the same version during her deposition. Smith stated that after discovering the baby was not in the car, she looked around for 30 minutes.

> Q. Then what did you do?
>
> A. We left to go get his mother's car.
>
> Q. Why?
>
> A. Because the headlights, he only had one headlight on his car, or it wasn't good, so we went to try to get his mother's car. And then we ran out of gas.
>
> Q. Okay. Let me just take you back. I want to know who decided to go get his mother's car, do you remember?
>
> A. Well, I said 'we can't see nothing out here' and I said 'I don't know if somebody has come and got her' and we got to

do something, you know.

Q. Why did you need her car rather than the car you already had?

A. Trying to get more light, the headlights wasn't bright enough to see anything out in the fields where we was trying to look.

Q. Did you call the police from Mildred's house?

A. Yes.

Q. Right then?

A. No.

Q. When?

A. After we, his mother came, he called his mother, went to a Seven-Eleven and called her to come get the car, had run out of gas, and all. We went, we ran into his friends, and so they took us out there in their car.

Q. Who called the police?

A. Mildred called them.

Q. What time?

A. I don't know, it was Two, Three, something like that.

(p. 24-24).

As is shown in the above out of court statements, Smith stated Mogg's car had defective headlights. Mogg, on the other hand, stated at trial that nothing was wrong with his headlights. (R. 540).

Trial counsel could have and should have simply asked Smith why her trial testimony differed from her recollections at the time of the offense and shortly after. The factfinders should have had the opportunity to learn all the facts and versions of the efforts to locate the baby, but didn't due to unreasonable ommission by trial counsel.

There was other evidence which should have been presented to the jury showing that Smith left the area for quite some time. For example, Mildred states in her deposition: "Kellene and her boyfriend left at 1:30 and they came back to my house, pounding on my door a little after three o'clock." (Deposition of Mildred Beaudoin, p.12). Yet trial counsel didn;t even ask Mildred any questions concerning Smith's inconsistent testimony.

Likewise, trial counsel unreasonably failed to point out the inconsistencies in the time that Smith and Mogg left. This was an unreasonable and critical omission that should have been argued to the jury. Smith and Mogg both stated they left shortly after Mogg returned from bringing Raymond Beaudoin to work. Smith stated:

> Q. Did you stay there for awhile after Chip got back inside the trailer?
>
> A. Fifteen minutes.

Q. Now, you stayed for about fifteen minutes, did you then leave?

A. Yes.

Q. Did Chip leave with you?

A. Yes.

(R. 495). And Mogg stated:

Q. After you got back to Mildred Beaudoin's trailer, did you go back inside?

A. Yes.

Q. Was Kellene still there?

A. Yes.

Q. Now, how long did you and Kellene stay there at the trailer?

A. About five or ten minutes. Then we left. Maybe fifteen.

(R. 539).

In contrast, Mildred Beaudoin and Arthur Reese testified that the two left an hour later. Beaudoin stated:

A. The third time. They came to my house at 9, they left at, at 9:30, then they came back about 11, and they left at 1:15, 1:20, and she came back to look for her baby around 3 o'clock, just before I called the police.

(R. 1159). And Reese stated:

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.

(R. 610).

Only five people witnessed Mr. Roman's condition that evening. Mogg said he couldn't tell if he was drunk (R. 541). Smith said that she saw Mr. Roman with a bottle of wine (R. 530). Beaudoin stated that Mr. Roman was very drunk and had been so for four days (R. 1135). At trial, Reese would not say Mr. Roman was drunk, but did tell the police he was. (See Argument I) The fifth person, Raymond Beaudoin, knew Mr. Roman was drunk, and told the trial attorney during his deposition that Mr. Roman had been drinking from 6:00 until midnight (Deposition of Raymond Beaudoin, p. 3). Yet trial counsel unreasonably failed to present that simple but critical fact to the jury.

In his opening statement, trial counsel told the jury they could believe a hung over, mentally defective, mentally diseased person who gives a statement while being vigorously interrogated behind locked doors. He told the jury that Mr. Roman's statement was true and that he was a principal to first degree murder. This was an unreasonable and prejudicial action.

The jury was instructed that they could disregard the statement if they found it was not given freely due to threats or promises (R. 1500). And rightly so, trial

counsel brought out some of the circumstances surrounding the statement in his cross examination of the interrogators. At the time of the defense's opening statement, the issue was "alive", then defense counsel "killed" it.

Trial counsel had an opportunity to present to the jury just how the interrogators got what they wanted. Mogg was a suspect, and was interrogated for six hours. The day after Mr. Roman was arrested, Mogg asked the interrogators why they acted the way they did, and was told, "if we didn't act that way, really give you a hard time we would never get a confession, never get anybody

.cp3

convicted of any crime." (Deposition of Chip Mogg, p. 42).

The complete story, not just the police version of interrogation techniques, could have been presented to the jury. In Mogg's deposition he stated,

> Q. Did they tell you that you had the right to a lawyer, you had a right to not say anything?
>
> A. No. I was told that at the psychologist. They told me I shouldn't talk to them again without a lawyer. They said I had that right.
>
> Q. First time you knew that was when some psychologist told you, after Sheriff Adams had you down here in his jail?

A. Yes.

Q. And told you that you were going to prison for murder?

A. That's what he was telling me out there, and then when I got down here, it was Ed Galvin and Thompson, I guess. It was mainly Ed Galvin.

Q. When Ed Galvin, when you were down here talking to Ed Galvin, did he have any weapons on him?

A. He took them off.

(p. 40).

Q. Did they tell you 'well, we know you are sick and we will get you help if you did it', or anything like that?

A. Sure. I am sure they said stuff like that. Just trying to get me to say I did it, when I couldn't.

Q. How long did that go on?

A. It was a long time, I don't know, seems like it was about five, six hours. I was down here all day.

(pp. 41-42).

Q. Can you remember any particulars in their questioning of you of how they tried to get you to change your story, or things they told you they knew that you knew weren't true? How did they try to...

A. ...mainly just insinuations, insinuating something. Seeing how I would react to it, I guess.

Q. Just kind of throw something out...

A. ...yeah...

Q. kind of like I did when I said 'well if the baby wasn't around, the divorce would go through'?

A. Yes.

. . .

Q. They give you food?

A. No.

Q. Let you sleep?

A. No.

Q. Leave you alone?

A. The people walked out, maybe once or twice, come right back. When they went out to get coffee or something or whatever they had. It was such a mess, it messed me all up. I didn't know what to think about any of it.

. . .

Q. Did they succeed in confusing you?

A. He tried hard. I knew I didn't have anything to do with it.

Q. What kind of educational background you got, Chip, high school?

A. That and a couple years of college.

Q. Where did you go?

A. I have been to Ocala, Central Florida, and Lake Sumter.

Q. Did you get a two year degree?

A. No, I transferred.

Q. What kind of stuff did you take?

A. Medicine. Going to be a lab tech.

Q. I see. So, as far as intelligence, you have never had any learning disabilities? Anything like that?

A. No.

Q. Did they have you convinced at the end of the six hours that maybe you did have something to do with it?

A. No.

Q. Did you get the impression that is what they were trying to do?

A. Yes, the whole time.

Q. Did you get the impression they didn't really care who did it, just so somjebody admitted it?

A. Jamie Adams, yes.

Q. He gave you that impression?

A. Yes. I wouldn't even talk to him no more.

Q. Why not?

A. He's just rude. Couldn't be any ruder. Taking me out of a car, throwing me in another car, up there ---shit, you know, telling me all that stuff. 'If we find the baby dead, you did it, we know you did it', --what what I going to say, 'No, I didn't, but it didn't do any good.

Q. He didn't believe you?

A. No, he didn't believe me at all. He knew I did it.

Q. He knew it?

A. Yes, he just knew that I had done it.

Q. Did he tell you where he got that information?

A. No, out of his own head I suppose.

Q. Does he have some devine connection that we don't know about?

A. I don't know. He sure is a rude man, that is all I can tell you. He couldn't be any crueler if he tried.

(pp. 43-46).

Q. Chip, when they brought you down here, they transferred you from the scene down to here, in a car, were you in the back seat of a patrol car?

A. Yes.

Q. Were you handcuffed?

A. Yes.

Q. Who handcuffed you?

A. Jamie Adams or this other one, one was right next to me.

Q. One of the ones who brought you down?

A. At the place was when they got me, they grabbed me before I even got back out to the trailer to look for the kid.

Q. And they handcuffed you then?

A. Yes. Put me in the back of that car, carried me out there and left me in the sun while they was looking around, then they took me out of that one and threw me in another car, and that is when Jamies started in on me. Him and the other guy. I guess he

was a detective. Then they took me over and threw me in another hot car. Thought I was going to burn up.

Q. Did they leave you in a car with the windows rolled up?

A. Sure, for quite a while, I sat out there probably hour and a half, while they were out there doing something, digging.

. . .

Q. Who was with you when they first stopped you on the road?

A. I was driving with my mother's car.

Q. What did they do with it?

A. Gave it to her. She took off.

Q. She was with you?

A. Yes.

Q. Did she see them handcuff you?

A. Yes.

Q. Did she them put you in the back of the car?

A. Yes.

Q. Did they tell you at that time that you had the right to remain silent, you had the right to a lawyer?

A. They didn't tell me nothing. Just 'get in the car'.

Q. Ever use any abusive language with you, obscene language or call you derogatory names?

A. No. Just, mainly, you know, 'he did it', --Jamie Adams was the worst one.

Q. Ever raise their voice, or get right in your face and shout at you?

A. Sure, they did it a little bit. It was all so confusing. It was so messed up. I couldn't believe they were doing it. Couldn't even figure out why, and they wouldn't tell me.

(pp. 47-49).

The only other evidence linking Mr. Roman to the death of Tasha Smith was fiber and hair analysis results, which is circumstantial and inconclusive evidence. If the dynamics of fiber and hair analysis had been properly presented to the jury, the jury would have understood the nature of the evidence. Trial counsel did not choose to do so. Trial counsel was told by the prosecutor that if he questioned the analysts about the methods used in their testing, the prosecutor would call the defense's court appointed expert in to testify (R. 917). Instead of challenging "Mr. Brown's offer," trial counsel told the court that their expert's findings were consistent with the State's findings. This "acceptance" of the "offer" was unreasonable and was ineffective assistance of counsel. Counsel should have challenged the propriety of Mr. Brown's "offer" and should have effectively cross examined the witnesses.

In closing argument, trial counsel pointed out his failure to effectively cross examine the fiber analyst:

> No testimony about odds, or the probability. No testimony about underlying any studies conducted. We don't know, from her testimony, what the odds are that those fabric match-ups actually match.

(R. 1473). And pointed out his ineffective cross examination of the hair analyst:

> Specifically, she did not say what the odds were either. That they might, or might not be Ernest's hairs. We don't know if there is one out of a thousand possibilities that it could be somebody else's hair, or one out of ten possibilities. I really wondered why Mr. Brown didn't ask her that. Maybe she could have answered it. But, she wasn't asked that.

(R. 1474). Trial counsel should have and could have asked that question. He unreasonably failed to.

In summary, trial counsel's decision to tell the jury that Mr. Roman committed murder was unreasonable trial strategy. He unreasonably failed to point out inconsistencies. He unreasonably failed to effectively examine the State's analysts. He unreasonably failed to point out to the jury and reliability of circumstantial evidence. And most importantly, trial counsel unreasonably told the jury they could believe the taped statement was true. For these reasons, Mr. Roman was denied his right to effective assistance of counsel in

violation of his sixth, eighth and fourteenth amendments rights.

## ARGUMENT V

### TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE VIS-A-VIS MENTAL HEALTH ISSUES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Reasonably effective counsel would have conducted a thorough and independent investigation of Mr. Roman's mental health history. There is no possible strategy for counsel having failed to do so, and counsel offered none. Counsel was on notice that such an investigation was required in that he was well aware (1) that Mr. Roman had an extensive history of mental illness and alcoholism; (2) that he intended to rely solely on the insanity defense at trial and (3) that mental health issues would be critical at the penalty phase and sentencing as well as at trial.

### A. Family Background and Medical History Which Should Have Been Researched and Presented to the Mental Health Experts, Court and Jury at All Phases of the Trial.

The record is now rife with evidence of Mr. Roman's extensive and documented life-long disabling mental illness. The sworn affidavits by family members

presented to the court through the mental health experts at the evidentiary hearing provide crucial evidence regarding family history and mental health issues. Dr. Barnard's evidence was that this information would have helped him. (Defendant's Exhibit 3). The affidavits reveal that Mr. Roman's entire family has a history of mental illness, retardation, and alcoholism. His paternal grandfather died in a mental institution. His father and all of his siblings were alcoholics. His children had learning disabilities. One sister has been committed to a mental institution as incompetent. Several nieces and nephews have been hospitalized with mental illness and/or retardation. Another sister was so retarded she could not be trusted to pick the right vegetables on the farm. Trial counsel, reading from Mr. Roman's sister's deposition at the evidentiary hearing, revealed that he knew very little of this background. He could give no reason for having not presented what he knew, and all the rest that he unreasonably failed to learn. The history is compelling, and is important to many legal issues in this case.

Ernie Roman was born in the mountains of Virginia in a small shack consisting of a small kitchen and one bedroom for eight people. His father was an alcoholic

who inflicted severe physical abuse on the mother. During one incident, he broke a fruit jar of home brew over her head scarring her for life. The children alternately tried to defend their mother or sought sanctuary in other homes. The father struck a sister hard enough to knock her unconscious.

Ernie Roman's mother had a nervous problem and was also extremely abusive to the children. A neighbor who lived next door to the Romans when Ernie was a child could hear the mother screaming, cursing, and whipping the children on a daily basis. No one could ever recall seeing the mother ever hug or kiss one of her children.

The family's poverty was extreme. The children never had enough food, blankets, or clothes. They all suffered from malnutrition. The children got one pair of shoes a year from the welfare department. They often went to school barefoot. In the mountains they had to bathe in the creek summer and winter. They went to school in the clothes they slept in.

The family moved to the Eastern Shore of Virginia when Ernie was 7 years old. There they had to carry water and wood several miles. They traveled back and forth to Florida as migrant farm workers with the children in the back of an old truck. They lived in

tents and one of the children was born in a tent.

It was obvious that Ernie was mentally slow and "different" at an early age. He was sexually molested at about the age of 7 by one of his father's drinking buddies. He was always fearful; he was afraid of the dark and hid when children or others came to the house. Into his adult life he was a bed-wetter and hid under beds and houses. Ernie's father took it out on Ernie for being retarded and mentally ill. He verbally taunted him by calling him "dumb bell" and punished him by making Ernie do more of the wood and water carrying than the other children. Sometimes his sister would feel sorry for him and help him.

Ernie started school at the age of 10. By the age of 16 he had only gotten to 6th grade and was terminated from school. He was considered a slow learner but there were no special classes to help him. The other children made fun of him and he would run away and hide.

By the age of 12, Ernie's father had started letting him sip home brew and by 16 he had a steady drinking habit. When he was twenty-one, he fell in love and married a girl who was already pregnant. They had no choice but to live with Ernie's mother. The mother was known to hit anyone in the head with anything in her

hand. One time the mother knocked Ernie's pregnant wife against the wall and on another occasion hit her over the head with a frying pan. The wife left after 6 months of abuse and Ernie was devastated. He began to drink everything he would get his hands on.

At the age of 22, Ernie's mother had him committed to Florida State Hospital on November 25, 1958. In the commitment order, the court recounted bizarre behavior of jumping up in the middle of the night, turning on all the lights and running outside looking for people who were after him. The psychiatric team of three doctors diagnosed him as schizophrenic, paranoid, chronic with symptoms of auditory, persecution, and visual hallucinations. At Florida State Hospital, Mr. Roman was medicated with mellaril. After being in and out of the hospital, he was finally discharged on September 26, 1960.

Over the next few years, Ernie had intermittent work as a tree surgeon. Others often took advantage of him, and his family was very abusive toward him. He continued to be a heavy drinker, reporting that he drank to control his nerves.

In 1968, he was again committed to Florida State Hospital in a civil proceeding. His diagnosis was

schizophrenic reaction, chronic undifferentiated with paranoid features; alcoholism; and borderline intelligence. His symptoms were hiding under houses, excessive drinking, hallucinating voices, quitting jobs and blackouts. This time he was hospitalized for 2 1/2 years and one doctor informed the family that he should be institutionalized for the rest of his life. He was again medicated with mellaril. (Defendant's Exhibit # 7, page 1-2.)

In August, 1972, Ernie Roman was referred to the Lake Sumter Community Mental Health Center in Eustis, Florida. During the next eight years, Mr. Roman was in and out of this mental health center often referred by law enforcement officers. In August, 1972, the psychotherapy notes report that the police will supervise the taking of antabuse and prescribe 100 mg. of librium and 50 mg. of mellaril. In October, 1972, he returned back to the Center with pending D.T.'s. He was diagnosed with chronic alcoholism, chronic anxiety neurosis and possible undifferentiated schizophrenia. He was treated with 100 mg. mellaril, 100 mg. thorazine, 50 mg. librium, 500 mg. chloral hydrate, and antabuse. In November, 1972, the Center diagnosed Ernie as chronic alcoholic and simple type schizophrenia and prescribed 5 mg. valium and

100 mg. of librium.

In May, 1973, Ernie was readmitted to the mental health center with a diagnosis of alcoholism and schizophrenia, and treated with 50 mg. librium. The social worker noted that Ernie might require treatment at Florida State Hospital. (Defendant's Exhibit 7, p. 3.) Mr. Roman is described as delusional, inappropriate, withdrawn and worried and is treated with up to 800 mg. mellaril a day. After his release, Mr. Roman continued to drink and was treated as an outpatient. In October, 1973, due to arrests for intoxication, Mr. Roman is jailed and then released as incompetent. (Defendant's Exhibit 7, p. 4.) In November, 1973, Drs. Barnard and Carrera performed a court-ordered examination for competency due to 7 or 8 arrests for intoxication over a month's time. The doctors gave their opinion that when Ernest Roman is drinking, he is not competent. They report that Ernest states he drinks to calm his nerves and concludes that he needs to be treated with tranquilizers and antabuse. Ernest could only abstract one out of five proverbs. Dr. Barnard commented that Mr. Roman is not capable of taking medication on his own and at some point "the community will have to accept responsibility." (Defendant's Exhibit 7, p. 5.)

In 1974, Mr. Roman had numerous outpatient visits to the mental health center and three inpatient admissions. On one occasion, he was not intoxicated but his sister reported he had been "talking crazy." Although he requested treatment at the halfway house, he was released back to the community. Dr. Cunningham observes diminished judgment, memory loss and assumes there is some organic brain syndrome. (Defendant's Exhibit 7, p. 5-7.)

Ernest Roman continued to be seen and treated with valium at the mental health center throughout 1975. Psychotherapy notes recorded childish behavior, rambling, restlessness and little insight. In June of 1975, Drs. Barnard and Carrera again evaluated Ernest Roman by court order. They found that he rambled and could only abstract two of five proverbs. They again found that he was competent only if he had not been drinking. (Defendant's Exhibit 7, p. 8.) Later in 1975, Dr. Cunningham documented chronic anxiety, diminished judgment, memory problems and emotional lability. He notified Social Security that Mr. Roman suffered from chronic alcoholism, chronic anxiety neurosis, and possible alcoholic deterioration with a guarded prognosis for the future. Probation officer, Fred Dietz, records

that Ernie Roman was a slow learner and recommends that he must receive treatment for alcohol and mental problems. (Defendant's Exhibit 7 at p. 8.)

In 1976, a volunteer case worker reported that she went to see Ernie Roman. When she arrived he was tremulous and ranting because he believed that some nearby hunters were trying to kill him. He also stated that his sister was trying to kill him. Throughout the remainder of 1976, Ernest Roman continued being seen as an outpatient at the mental health center and medicated with valium and librium. His drinking was still out of control. He was arrested for DUI, wrecked a truck, and fell from a tree. He was admitted to the emergency room vomiting blood, said he was 99 years old and had been drunk for 80 years. He was incoherent and reported drinking a case of beer a day plus vodka and gin. In addition to chronic alcoholism, he was diagnosed as schizophrenic and medicated with mellaril. A psychiatric evaluation noted that alcohol is used as a substitute for other medications and psychotherapy is nonproductive. (Defendant's Exhibit 7, p. 8-10.)

Throughout 1977, Ernest Roman continued to suffer from the inevitable results of untreated mental illness and alcoholism. He is repeatedly placed in protective

custody by the police and referred to the mental health center. The mental health center provided short term detoxification, outpatient drug therapy and returned him to the community. On September 23, 1977, Ernest requested controls to help him stop drinking. He did not receive the requested controls and in December 1977, he was beaten so badly that he had to have an operation to insert metal plates in his jaw. (Defendant's Exhibit 7, p. 11.)

In the first two months of 1978, Ernest Roman was admitted to the mental health center twice. The first time the police brought him and the second time he referred himself asking for help. He was filthy and too drunk to sign the admission form. In March, 1978 his probation officer wrote a letter stating that inpatient treatment may be needed. He was admitted to the Center again in August, 1978. (Defendant's Exhibit 7, p. 13.)

In February, 1979, Ernest Roman came to the Center complaining of sleep disturbance and requesting medication. He was treated with 5 mg. of valium until March when he was brought to the Center by the sheriff's department for detoxification. In early August, 1979, he was again beaten severely resulting in a fractured facial maxilla and stab wounds to his face. Later that month he

was confined in the Marion County Jail and treated with 25 mg. of mellaril. In October he was arrested and taken to the mental health center. According to the police report Ernest was "talking off the wall." Upon his subsequent release from the Sumter County Jail, he was treated with 5 mg. of valium and 25 mg. of elavil four times a day. (Defendant's Exhibit 7, p. 13-14.)

In 1980, Ernest Roman was back in the Marion County Jail where he was treated with 50 mg. of elavil. In a court-ordered examination, Dr. Natal determined that Ernest Roman's concentration was impaired, he could not do serial 7's, his memory was impaired, abstraction was poor and he could not name the last four presidents. In spite of these deficits, he was found competent and sent to prison for grand theft auto. At the Lake Butler Reception and Medical Center he was diagnosed as a chronic alcoholic with poor prognosis. He was described as tense, anxious and lacking in insight and judgment. Fifty mg. of elavil was prescribed to be given twice a day. When he was transferred to the Avon Park Correctional Institution, he was described as confused, disoriented, shallow affect, possibly mentally retarded, poor judgment, indifference in thought content and with impaired memory. When given a two week supply of

medication, he took it all in two days and thereafter he had to have his medication administered daily by prison personnel. (Defendant's Exhibit 7, p. 15.)

Upon his release from prison, Mr. Roman went to the mental health center complaining of sleep disturbance and he was given a prescription for valium and elavil on January 15, 1981. Family members report that upon his release from prison, he immediately resumed drinking heavily. (Defendant's Exhibit 7, p. 15.)

The mental health history documents Mr. Roman's mental illness over a span of 24 years prior to his arrest in this case. Through records from the Lake Sumter Community Mental Health Center, police records, court records, court-ordered evaluations, jail records, prison records, probation records and family affidavits an appalling picture of Ernest Roman's decline and suffering emerges. Despite his numerous requests for help and appropriate treatment, he is repeatedly returned to the street without appropriate medication to cope with his mental illness and the resulting chronic addiction to alcohol. Although the need for long term inpatient treatment is referred to here and there, after his release from Florida State Hospital in 1971, he is never afforded long term treatment. Although Dr. Barnard warns

that "the community will have to accept responsibility" that never happens. Untreated, Mr. Roman lies drunk in the streets, a victim of his illness and subject to severe beatings and abuse.

With the exception of scattered reports, little of this dramatic and significant mental health history was presented to the mental health experts who examined Mr. Roman before his trial. Almost none of this information was presented to the jury or the court, for no apparent reason. Dr. Fox and Dr. Macaluso testified at the evidentiary hearing that a complete history is essential to an accurate diagnosis and the more history the more reliable the diagnosis. The mental health experts who testified at the trial would have been able to have made an accurate and complete diagnosis had this information been provided to them, and counsel, armed with this diagnosis, could have presented mental health issues in such a way that there would be a reasonable probability that the result would have been different. Given the correct life history and medical health history diagnosis, the experts would have been able to correctly assess Ernest Roman's mental state at the various stages of the court proceedings.

Three days after his arrest for this offense on March 14, 1981, the Hernando County Jail doctor, Dr. Escamillo, reported that Ernest was dirty, not oriented to time and though he was in a hospital. The doctor prescribed 50 mg. Vistaril and 10 mg. of Librium. Two days later the jail doctor diagnosed anxiety depression and recommended a psychological evaluation. A day later the doctor notes Ernest is disoriented. A week later Dr. Escamillo wrote to Assistant State Attorney James Brown and recommended further and complete evaluation of Ernest's mental condition due to severe anxiety. In April Ernest ceased speaking. Subsequent x-rays revealed no physical injury to his neck or throat. On May 4, 1981, Dr. Lecarczyk reported that Ernest didn't know where he was or why and was visually hallucinating. On May 9, 1981, Drs. Carrera found him nonverbal and incompetent to stand trial. On May 15, 1981, Dr. Taubel examined Ernest for the Social Security Administration. He diagnosed Ernest as being schizophrenic, chronically psychotic and thought Ernest was hallucinating during the interview (Defendant's Exhibit 7, pp. 16-17).

On May 18, 1981, Ernest Roman was admitted to the North Florida Evaluation and Treatment Center where he was to remain for the next 17 months. On admission

Ernest Roman had been mute for several weeks and had not eaten for one week. He had no memory, didn't know where he was or the date. Mellaril was prescribed at a dosage of 50 mg. twice a day. May 19, 1981, Ernest stayed in bed with his covers pulled over his head (Defendant's Exhibit 7, p. 18). On May 21, 1981, he started speaking and eating but was confused and disoriented. A few days later his condition improved slightly and he was taken off of Mellaril. Within 48 hours his mental condition had deteriorated until he was withdrawn, paranoid, shaking and drooling. Medication was resumed with 50 mg. Vistaril to be given twice a day. After remaining in his room for a week, he started coming out and interacting with others but showed no insight into his past. (Defendant's Exhibit, p. 22) On June 23, 1981, he still could not do psychological testing although he had been hospitalized for five weeks. On June 24, 1981, he did not remember seeing Dr. Lecarczyk two months earlier or remember his lawyers. (Defendant's Exhibit 7, p. 23) On July 2, 1981, Ernest was visited by his attorney. He was so upset that he had to be placed on suicide watch and decompensated so severely that he did not return to his July 2nd level of competency for a month. (Defendant's Exhibit 7, pp. 24, 28)

Ernest was often observed to be easily exploited by

the other patients. (Defendant's Exhibit 7, p. 24) His memory was consistently impaired both for short-term and long-term memory. On July 15, 1981, he genuinely could not remember a therapist he had met several times. Not until September 4, 1981, did he remember his sister Mildred whom he lived with before his arrest. (Defendant's Exhibit 7, pp. 26, 30)

Throughout his stay at NFETC Ernest remained seclusive, shallow, anxious and withdrawn. He continued to have memory deficits and never regained memory of the events surrounding the offense. He was consistently cooperative. At no time did the staff suspect malingering. A neurological exam in October, 1981, revealed brain dysfunction and a very poor performance for memory, abstract reasoning and problem solving. (Defendant's Exhibit 7, p. 35)

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(Defendant's Exhibit 7, p. 35)

Ernest reacted to staff confrontations about his upcoming trial by blocking it out and stated that he had been acquitted. (Defendant's Exhibit 7, p. 37, 38) Instead he focused on what he would do when he got out. He constantly refers to plans for getting into a business as a tree surgeon and never rationally addresses his options given a pending change of first degree murder. (Defendant's Exhibit 7, 0p. 37, 40, 42, 50, 51) In December, Ernie admitted believing he can psychically manipulate others. He began wearing a voodoo claw necklace and exhibited bizarre behavior. (Defendant's Exhibit 7, 0p. 41, 43) In January, 1982, he added a red paper heart to the voodoo necklace, exhibited inappropriate laughter, very slow movement, and mood swings (Defendant's Exhibit 7, p. 45) It is during this time that the Treatment Center finds that he is competent to stand trial even though he was exhibiting bizarre behavior with female staff and still wearing his voodoo necklace.

On March 21, 1982, Ernest reported that his lawyer said he would either get the chair, go to prison or go to Chattahoochee. Instead of considering these options, Ernest responded by talking about making money as a tree

surgeon when he was released. Despite this obvious inability to make a rational assessment of his situation, he was found competent to stand trial by the treatment team. (Defendant's Exhibit 7, p. 54, 53)

In April, 1982, Ernest was withdrawn, physically moving very slowly, spent time rolled up in a blanket, and laughed inappropriately. He explained that he was moving slowly because he must concentrate on his breathing. The staff reported that Ernest hides behind the door, jumps out and says, "Boo". (Defendant's Exhibit 7, p. 57-58) Ernest tells his therapist that he is in the process of writing people and places trying to get information about licensing and pest control.

In May, 1982, he reported that his attorney visited him, told him that his charges would be dropped and he would be released soon. For several days thereafter Ernie exhibited bizarre behavior by childish actions, walking slowly and laughing to himself. He continued to fantasize that his charges would be dropped. (Defendant's Exhibit 7, p. 60-61)

In June, 1982, Ernest lost track of time, at times moved very slowly, often stayed secluded in his room, and exhibited child-like behavior playing "hide and seek". In July, 1982, Ernest is observed lurking around a tree,

making a "scary" noise, breaking into laughter, had increased tremors, was more withdrawn and took his shoes on and off while talking to his therapist. He reported setting a trap for another patient and asked that his room be locked. (Defendant's Exhibit 7, p. 66-67)

In August, 1982, Ernest suffered mood swings, trembling, was paranoid, lost his thought processes and was giggling when talking to female staff. (Defendant's Exhibit 7, p. 70, 71) In September, 1982, Ernest said he wanted to open a craft shop when he was released, complained about his therapist and lawyer and said he can't trust anyone. Ernest was still exhibiting inappropriate laughter and nervous behavior. When asked about court proceedings, he was vague, mumbled, smiled inappropriately, and could not maintain eye contact. Ernest stated that his lawyer lies all the time. (Defendant's Exhibit 7, p. 74)

In October, 1982, Ernest was very anxious, nervous, shaking and his speech was slurred. He was so seclusive that he was punished for failure to interact with the staff. When asked about his inappropriate behavior with females, he broke into hysterical laughter and refused to discuss it. He acted strange and talked about psychic power. Ernest stayed hidden away and talked about

cutting yards when he is released. After a meeting with his attorney, he was nervous, had hand tremors, and inappropriate laughter. He said his lawyer did hiss wrong but he would let his therapist "take care of it". (Defendant's Exhibit 7, p. 75-78)

Despite his bizarre behavior and inability to realistically understand and assess his legal options, the court found that Ernest Roman was competent to stand trial on October 29, 1982. At no time did his trial counsel attempt to obtain or present any of the Hernando County Jail records or the North Florida Evaluation and Treatment Center records to the trial court. Although counsel obtained some sketchy life history information, trial counsel's failure to present this critical and compelling testimony was unreasonable and fell below constitutional standards for the effective assistance of counsel.

B. COUNSEL WAS INEFFECTIVE

As the testimony at the evidentiary hearing revealed, trial counsel agreed that the North Florida Evaluation and Treatment Center records would have been helpful to the judge, jury, defense, and experts, and that all of Exhibit 7 (Mr. Roman's mental history; See

Initial Brief, App. A) could have been used, had counsel had it. All experts who testified agree, based upon the documented history, and proper information at the time of offense, that Mr. Roman was insane, could not form specific intent, he was incompetent to confess, he was incompetent at trial, and there was much to offer in mitigation. Counsel ineffectively presented these issues, and certainly the result would have been different had counsel acted competently.

## ARGUMENT VI

### MR. ROMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO EXAMINE A DEFENSE WITNESS REGARDING A STATUTORY MITIGATING CIRCUMSTANCE IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

During the charge conference following the presentation of evidence in the penalty phase, trial counsel requested the Court to instruct the jury on the statutory mitigating circumstance involving extreme mental or emotional disturbance. Section 921.141 (6)(b), Florida Statutes 1985. Trial counsel stated:

> Well, we would contend that there is enough evidence for an instruction as to number two, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. I know the Doctors were equivocal on that, but we could request an

> instruction based on it, the alcoholism, the other symptoms of some organic damage, based on that we would request number two.

(R. 1578).

In response to this request, the Court denied the motion, stating:

> I think they are talking about a different thing than the evidence showed that was presented in this trial. I think that the influence of extreme mental or emotional disturbance -- I think that goes to a different type of situation than was presented here. I don't think it covers what you are wanting. I think that you would be, the procedures are so liberal in the second stage, I think you can properly bring it in under 6.

(R. 1580).

The penalty phase witnesses testimony presented by trial counsel were Dr. Largee and Dr. Barnard. Dr. Barnard was never asked the question as to whether in his opinion Mr. Roman was under the influence of extreme mental or emotional disturbance. Dr. Barnard was qualified to render such an opinion. If Dr. Barnard had been asked the question, he would have presented testimony stating that Mr. Roman was indeed under the influence of extreme mental or emotional disturbance. The Court would have instructed the jury to consider that mitigating circumstance and the sentencers would have more than likely found it to exist. No evidentiary

hearing was allowed on this claim, but, had there been one, Dr. Barnard would have testified:

> 5. Had I been asked to do so I would also have testified that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(Supp. P.C.R. 8-9).

Trial counsel's unreasonable failure to examine Dr. Barnard on this mitigating circumstance denied Mr. Roman effective assistance of counsel. Likewise, this unreasonable omission allowed the jury to recommend a sentence which is unreliable. The finding of a second statutory mitigating factor would likely have outweighed the aggravating factors and, thus, would have given the sentencers a reasonable basis for a life sentence recommendation. Mr. Roman's rights under the sixth, eighth, and fourteenth amendments were denied by trial counsel's ineffective assistance.

In its order, the lower court stated:

> Claim IX involving the alleged ineffectiveness of counsel in failing to present evidence supporting the application of the extreme mental or emotional disturbance statutory mitigating circumstance is facially insufficient. A movant for post-conviction relief must proffer the facts and other conditions available to support an allegation of ineffective assistance of counsel. Tedder v. State, 495 So.2d 276 (Fla. 5th DCA 1986); Keith v. State, 492 So.2d 444 (Fla. 1st DCA 1986); Zeigler v.

> State, 452 So.2d 537 (Fla. 1985); Fla. R. Crim. P. 3.850(f). Roman's allegation that he was "in very poor mental shape around the time of this offense" hardly supports the bald assertion that Roman was under extreme mental or emotional disturbance at the time of the victim's murder, as required by Section 921.141(6)(b), Florida Statutes. Because Roman has failed to present facts in his motion which would support the application of the subject statutory mitigating circumstance, this claim is appropriately stricken without the necessity of an evidentiary hearing;

The lower court is wrong. There are many references contained in the motion pertaining to Mr. Roman's mental and emotion status at the time of the offense. For example, "the mental health experts agree that Mr. Roman's mental condition at the time of the offense had so deteriorated that, upon intoxication, he literally could not tell the difference between right and wrong, and could not conform his actions to the requirements of law." (Motion to Vacate, p. 19); and "He is a hopeless alcoholic, he is mentally ill, he is mentally retarded, and his brain is not intact." (Motion to Vacate, p. 19). Extensive information regarding Mr. Roman's mental health history and mental health status at the time of the offense is contained in Claim I of the Motion to Vacate; the lower court's reference to a phrase that Mr. Roman was "in very poor mental health around the time of the offense" as a basis for finding this claim as facially

insufficient is not understandable. Had Mr. Roman only pled that statement, the court's ruling may stand up to appellate scrutiny, but the fact is, and this Court merely needs to read Claim I for support, that Mr. Roman sufficiently outlined his "extreme mental or emotional disturbance." Dr. Barnard would have testified to that fact at trial and would do so at an evidentiary hearing. The lower court erred in striking the claim and this Court should remand the case for a proper and full evidentiary hearing.

## ARGUMENT VII

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY CRYING IN RESPONSE TO THE STATE'S EVIDENCE, COUNSEL HAD A CONFLICT OF INTEREST IN ARGUING THAT THERE WAS NO REASON FOR A MISTRIAL BASED ON HIS OWN OUTBURST, AND THE TRIAL COURT'S TAKING OF EVIDENCE TO RESOLVE THE ISSUE IN DEFENDANT'S ABSENCE VIOLATED MR. ROMAN'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

During the introduction of photographs of the victim, and the victim's clothing, defense counsel openly wept in front of the jury. Newspaper coverage of the event stated that:

> Shortly after Harrison broke down, Sumter County Circuit Court Judge John W. Booth asked Deputy State Attorney Jimmy Brown, "How long of a recess do you need?"

> "Actually, it's Mr. Harrison who requested the recess," clarified Brown.
>
> Harrison, standing 10 feet away at the defense table, his head bowed, answered in a shaky voice, "About 10 minutes."
>
> Realizing Harrison was shaken, Brown walked over and placed his arm around the shoulders of his portly opponent.
>
> "I'll be all right," said Harrison, his head still bowed and his back to the dozen spectators.
>
> He then turned and walked to his nearby office. Tears flowed freely from his eyes.

(App. 6) See "Defense Attorney Loses Composure At Trial", "Slain Girl's T-Shirt Shakes Up Defense" ("Public Defender...Showed Tears During Testimony");

Three hearings were held on this matter, two on the record and one off, and Mr. Roman was not present at any of the hearings. First, the judge met informally (on the record) in chambers and asked court personnel whether the jury saw the outburst. No lawyers were present. The defendant was not present (R. 2399). Then, the judge spoke with the prosecutor and other attorneys, took their statements, and decided there was no problem, on the record, and in the absence of the defendant (R. 2511-2512). He had spoken to attorneys, off the record too. Defense counsel actually argued against a mistrial, while

Mr. Roman's sister testified that Mr. Roman needed a different lawyer, a guardian, and a mistrial (R. 2509). According to her, the entire family believed Mr. Roman was incompetent. Mr. Roman did not get to hear this.

This was a bizarre scene. A defense attorney, behind his client's back, testifying to the judge that when he did cry actually helped his client, the judge taking evidence on the issue three times, and the client not knowing. There was no advocate present at any of the "hearings" to argue that counsel had prejudiced Mr. Roman. The crier can hardly decide whether it was all alright, without a conflict, and the state was certainly not protecting Mr. Roman. These proceedings violated Mr. Roman's right to a fair trial, to effective counsel, to be present during all critical stages, and his right to reliable sentencing, in violation of the sixth, eighth, and fourteenth amendments.

The Court below ruled on this issue stating in its order that it was "procedurally barred."

> "the issue of counsel's crying could have been raised on direct appeal and is now being untimely raised in the appearance of an ineffective assistance of counsel claim . . . Moreover the factual basis necessary to resolve a claim of ineffectiveness arising out of counsel's failure to secure a mistrial is evident from the record and therefore could have been raised on direct appeal."

Mr. Roman's trial counsel was ineffective for failing to preserve and assert Mr. Roman's rights or to see that his rights were adequately protected. A claim of ineffective assistance of counsel is cognizable in a motion for post-conviction relief, Raulerson v. State, 437 So. 2d 1105 (Fla. 1983), or on appeal. Blanco.

The court below erred in ruling that the claim is now being raised "in the guise of ineffective assistance of counsel." It is the claim of ineffective assistance of counsel.

The court below took judicial notice of the three proceedings from which Mr. Roman was excluded and concluded that there was no violation of the constitution. This was erro. Part of the violation was Mr. Roman's absence, and in one of the hearings his sister requested that Mr. Roman's competency be determined, and the court refused. See Claim 1, supra.

## ARGUMENT VIII

### 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

The State withheld crucial material evidence from the defendant. The State should have revealed:

a. handwritten notes of an interview with Chip Mogg (Ap. 7);

b. handwritten notes of interview iwth Mildred Beaudoin on March 14, 1981 (App. 7);

c. handwritten notes of interview with Arthur Reese on March 14, 1981 (App. 7);

d. handwritten notes of interview with Douglas Calvert on March 14, 1981 (App. 7);

e. and handwritten notes of names and addresses of potential witnesses obtained March 14, 1981 (app. 7).

These notes of interviews which were withheld from the defendant contained crucial material evidence for the defense. Furthermore, they had great credibility in that they were given immediately after the offense, before witnesses had discussed their testimony with others and wile events were still fresh in their mind. No evidentiary hearing was allowed.

At trial Chip Mogg stated that he and Kellene did not notice that the baby was gone until they ran out of gas (R. 540). In the statement withheld from defense counsel, he said that after giving Eddie a ride, "Went back into the trailer and Kelly came to the driver's side and says the baby's gone. I opened door and Kelly looked inside. Kelly Millie me looked around yard approximately

10 minutes to 15. Kelly called sheriff's office." (App. 7). This is a completely different version than the one presented at trial where Chip states that they left the house and didn't miss the baby until after they ran out of gas (R. 540), and is exculpatory.

Mildred Beaudoin's statement on March 14 is very important in that it documents that "Roman was drinking very heavy." This provided inportant corroborative evidence that her testimony at trial was truthful.

The handwritten notes of an interview with Arthur Reese on March 14 provide the interesting information that he heard the baby cry at 1:30 a.m. when Chip and Kellene were leaving. Also "he heard a motor running sounded like a p/u truck." (App. 7). This statement is even more significant in that Mildred Beaudoin also describes hearing a truck at the same time (App. 7).

At trial Douglas Calvert testified for the State. Unaccountably the defense attorney did not take a pretrial deposition from this witness. One of the features of the State's case was an allegation that Ernie Roman was competent at the time of the offense because he broke into the abandoned trailer to avoid detection (R. 1427). Had Douglas Calvert's statement not been suppressed, the defendant would have shown that Calvert

saw Ernie Roman go toward trailer on March 13, 1981 approximately 1500-1600 hours; possibly had a bottle of wine hid back there and he made several trips back there. "Roman and Reese goes back to the trailer quite often. Possibly they cut through and go to K.O.A. campgrounds to buy beer" (App. 7). This statement shows that both Ernie and Reese frequented the trailre which would be important in explaining how fibers from the inside of the trailre got on Ernest Roman's clothing. It also contradicts Arthur Reese's testimony at trial that he had never been up to the trailer before the 15th of March (R. 612).

The deliberate suppression of critical evidence regarding major issues of the trial and the knowing presentation of false testimony and argument, denied Mr. Roman's right to a fair trial contrary to the fifth, sixth, eighth and fourteenth amendments of the United States Constitution. An evidentiary hearing was required.

## ARGUMENT IX

DEFENSE COUNSEL'S FAILURE TO ASK THE TRIAL JUDGE TO INSTRUCT THAT THE STATE HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT MR. ROMAN WAS LEGALLY SANE AT THE TIME OF THE COMMISSION OF THE OFFENSE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED MR. ROMAN OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AS GUARANTEED BY THE UNITED STATES CONSTITUTION AND THE INSTRUCTIONAL ERROR WAS FUNDAMENTAL CONSTITUTIONAL ERROR.

The Court below denied Mr. Roman a hearing on this ineffective assistance claim stating that the "issue of [Mr. Roman's] sanity is resolved as a matter of law without the necessity of an evidentiary hearing as it is without merit." Mr. Roman alleged his trial counsel was ineffective and pointed the court to specific reasons which required a hearing. The Court erred and this Court should remand the case for a proper resolution of this claim.

In his direct appeal, Mr. Roman argued that the trial court committed fundamental error when it failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that Mr. Roman was legally sane at the time of the commission of the alleged offense. This Court summarily disposed of this critical issue stating, "Appellant did not preserve this point, as

he did not request the trial court to give this instruction. We find no error." Roman v. State, 475 So. 2d 1228, 1234 (1985). This failure was ineffective assistance.

In two cases consolidated for consideration by this Court, Smith v. State, 497 So. 2d 910 (Fla. 3d DCA 1986) and Lentz v. State, 498 So. 2d 986 (Fla. 1st DCA 1986), this Court answered in the negative whether the jury instruction on insanity disapproved in Yohn v. State, 476 So. 2d 123 (Fla. 1985) is fundamental error requiring reversal in the absence of objection. 13 F.L.W. 42, 43 (Jan. 1988)(emphasis supplied). Both Smith and Lentz involved defendants who presented insanity defenses. In both cases the trial courts gave the standard jury instruction on the subject. Neither defendant, however, objected to the standard instruction nor requested a special instruction on the subject. The court in Smith rejected the claim on appeal due to the absence of an objection. The Lentz court, on the other hand, relying on Yohn, held that the giving of the faulty instruction was fundamental error, and therefore could be raised on appeal. This Court disposed of the certified question by relying on its recent decision in Roman, supra.

This Court's decision in regards to Smith and Lentz in no way affects its decision in Yohn. In Yohn, the trial court also gave the standard jury instruction on insanity. The difference among these cases is that Yohn specifically requested instructions which more properly set forth Florida law with respect to the burden of proof in insanity cases. In Yohn, this Court acknowledged that the standard instructions did not "completely and accurately state that law." Id. at 127, 128.

> We hold that [the jury instructions] do not inform the jury that once a reasonable doubt is created in the minds of the defendant's insanity, then the state must prove beyond a reasonable doubt the defendant's sanity.

Id. at 126.

In sum, once the presumption of sanity is rebutted the prosecution must prove sanity beyond every reasonable doubt. Mr. Roman was entitled to have the jury informed of this since the trial judge had the responsibility of correctly charging the jury on the applicable law. Even though the standard instruction makes no reference to burden of proof, Mr. Roman could have had this crucial concept reiterated to the jury had his counsel so requested. But his counsel failed to do so. And his failure can only be regarded as unreasonable and ineffective assistance.

The instruction in Mr. Roman's case framed the issue as one of finding him legally insane. But it placed the burden of proof on his shoulders to establish his insanity. The jury was never told that the State must prove anything in regard to the sanity issue. This is not the law in Florida, and was not the law at the time of trial, Yohn, supra, at 128, or under the fourteenth amendment. Counsel's performance was ineffective and violative of Mr. Roman's fifth, sixth and fourteenth amendment rights to the United States Constitution.

The Court below ruled that Mr. Roman would not prevail on this claim under the "performance" prong of Strickland. The Court wrote that "Counsel was not ineffective for failing to anticipate a subsequent revision in the Standard Jury Instruction." Counsel was ineffective for failing to request an instruction which adequately and correctly stated the law at the time of trial, not because he didn't challenge the Standard Jury Instruction.

At the time of trial, the law of Florida on the issue of burden of proof on sanity was clear. Counsel unreasonably failed to raise it. This Court in a death case entitled Holmes v. State, 374 So. 2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980) stated:

> It is the law of Florida that all men are presumed sane, but where there is testimony of insanity sufficient to present a reasonable doubt of sanity in the minds of the jurors the presumption vanishes and the sanity of the accused must be proved by the prosecution as any other element of the offense, beyond a reasonable doubt. . . .
>
> The test is whether or not the eviden was such that the jury could only have concluded that there was reasonable doubt of sanity and the absence of evidence sufficient to overcome that reasonable doubt. . . .

at 948, quoting Jones v. State, 332 So. 2d 615 (Fla. 1976). In the present case, the entire defense was insanity at the time of the offense. Competent counsel would have first read the law existing at the time of the trial, and second, would have argued that the issue of sanity was indeed doubtful in the minds of the jurors. The Standard Jury Instructions "are a guideline to be modified or amplified depending upon the facts of each case." Yohn, supra at 127 (emphasis supplied). The facts of this case cried out for an instruction that correctly stated the law and correctly allocated the burden of proof.

Further, the court below found that Mr. Roman was not prejudiced by the erroneous instruction because the "instruction [was] not fundamentally erroneous." The determination of the prejudice prong in Strickland is not dependent upon whether an error is fundamental or not.

Strickland speaks of "unprofessional errors," and unprofessional errors can result when an attorney fails to read the applicable law and raise it to support the only defense presented, and such a failure creates a reasonable probability of a different result in this case.

Mr. Roman was on trial for his life and the jury was told that this addled alcoholic was presumed sane. Error as to the instruction existed. See Smith, supra; Holmes, supra. The unreasonable ommission of trial counsel in failing to address and correct the error creates the question of whether there is a reasonable probability the proceeding would have been different.

The questions presented in this claim are entitled to evidentiary development, and the court below was in error for resolving the claim as a matter of law. Accordingly, this Court should remand the case for a hearing on this claim.

## ARGUMENT X

THE PRESUMPTION OF SANITY AS SET FORTH IN FLORIDA'S STANDARD JURY INSTRUCTION 3.04(B) UNLAWFULLY RELIEVES THE STATE OF ITS BURDEN OF PROOF, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

As a matter of practice and as a matter of firmly established state law, Florida follows a procedure for trying insanity cases which ignores the centerpiece of constitutional protections afforded the accused -- the presumption of innocence. The framework within which insanity issues are decided in Florida commits unlawful burden-shifting by expressly placing on the defendant the burden of persuasion on the issue of insanity.

In it's order denying relief on this issue, the Court below stated:

> Claim VII involving Roman's assertion that the presumption of sanity as set forth in Florida's Standard Jury Instruction 3.04(b) constitutes a denial of due process is procedurally barred. Bush v. Wainwright, 505 So.2d 409 (Fla. 1987); Porter v. State, 478 So.2d 33 (Fla. 1985); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984). It is clear that the issues could have been presented on direct appeal in view of the fact that a burden-shifting problem was perceived at trial by defense counsel.
>
> Moreover, even if the claim were cognizable, and not procedurally barred, no denial of due process has been demonstrated. The sanity of the accused must be proved by

> the prosecution as any other element of the offense, beyond a reasonable doubt. Holmes v. State, 374 So.2d 944, 948 (Fla. 1979). Whether the state or the defendant has the ultimate burden of proof on this issue does not in either case make the trial fundamentally unfair. Leland v. Oregon, 343 U.S. 790 (1952); Smith v. State, 13 F.L.W. 42, 43 (Fla. Jan. 21, 1988); State v. Lancia, 499 So.2d 11, 12 (Fla. 5th DCA 1986). The jury instructions in this regard were adequate, not burden-shifting, but even if so, were actually favorable to Roman so that any error was harmless;

The lower court was wrong. No constitutional guarantee is more guarded than the presumption of innocence, and none keeps faith more with the "fundamental value determination of our society" that "it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970). This "bedrock, axiomatic and elementary [constitutional] principle" . . . "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." Winship, 397 U.S. at 364. The lofty language invoked by the courts when the innocence presumption is at stake is not just rhetoric. The constitutional mandate has been consistently enforced by the United States Supreme Court. The Due Process Clause

> prohibit[s] the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden

> of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis v. Franklin, 105 S. Ct. 1965, 1970 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

Florida has strayed from the constitutional path. It is textbook law that insanity is an element of a criminal offense and Florida has so declared. Yohn v. State, 476 So. 2d 123, 128 (Fla. 1985); Parkin v. State, 238 So. 2d 817 (Fla. 1970), cert. denied, 401 U.S. 974 (1971). Despite this, Florida unlawfully requires the burden of persuasion on the issue to be shifted to the defense. Yohn v. State, supra at 128. ("In sum, the law in Florida provides for a rebuttable presumption of sanity, which if overcome by the defendant, puts the burden on the State to prove sanity beyond a reasonable doubt just like any other element of the offense.")(emphasis added).

This Court previously struck down a Florida statute it found created an irrebuttable presumption of sanity, in State ex rel. Boyd v. Green, 355 So. 2d 785 (Fla. 1978), but has continued to approve of a procedure requiring a rebuttable presumption on the same issue to be imposed on the defendant. Yohn; Holmes v. State, 374 So. 2d 944 (Fla. 1979). It is a presumption the Due Process Clause does not permit.

Francis v. Franklin, 105 S. Ct. 1965 (1985), was decided the same term as Yohn and was apparently not considered by this Court when it approved the rebuttable presumption of sanity. And no case has specifically addressed the issue raised herein since the Florida Supreme Court's decision in Yohn. In Francis, the Court declared unconstitutional an instruction on "the dispositive issue of intent" in a malice murder case, which advised the jury a "person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Id. at L.Ed.2d 351. The mandatory presumption (though rebuttable) was found by the Court to unconstitutionally relieve the state of its burden of proof of every essential element of a crime.

We do not contend that the Constitution requires the state to make sanity an essential element of a criminal offense, for which the prosecution must carry the burden of persuasion. There is no such requirement yet. Patterson v. New York, 432 U.S. 197 (1977); Leland v. Oregon, 343 U.S. 790 (1950). But Florida has expressly chosen to make sanity an element of a criminal offense, Yohn, and the Due Process Clause controls the rest.

The Florida rebuttal presumption framework for resolving sanity issues was utilized to convict Mr. Roman, and it affected his defense with a vengeance. The state had it easy in Mr. Roman's trial. On the issue of sanity it was relieved of its burden of proof. The procedure by which the jury would transfer to Mr. Roman the burden of proving his innocence and his sanity was established during jury selection and was finally imprinted by the closing instructions.

The presumption of innocence on the mental state issue vanished as the trial began. The jury was told

> An issue in this case is whether the defendant was legally sane when the crime allegedly was committed. You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity.

(R. 24). This "shifting burden" procedure for trying the insanity issue set the stage for the instructions to come.

The jury was instructed, as required under Florida law, that it was to assume Mr. Roman was sane even though sanity is an element of the offense, and that it was the the defense burden to overcome the presumption. The relevant section of the instruction reads:

> An issue in this case is whether the defendant was legally insane when the crimes allegedly were committed.

> You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity.

(R. 1500).

This instruction set forth a mandatory rebuttable presumption indistinguishable from the one condemned in Francis. It told the jury exactly what Florida law required of them; i.e., to presume sanity. To decide this claim:

> The analysis is straightforward. 'The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes.' Id. at 514, 99 S.Ct. 2450. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see id., at 520-24, 99 S.Ct. 2450, or merely a permissive inference, see Ulster County Court v. Allen, 442 U.S. 140, 157-63 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts but does not require the jury to draw that conclusion.

Francis, 105 S.Ct. at 1971 (emphasis added).

There is no constitutionally significant difference between a conclusive and rebuttable presumption:

> A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the state has proved the predicate facts giving rise to the presumption. A rebuttable presumption does

> not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See Sandstrom v. Montana, 442 U.S. 510, 517-18, 99 S.Ct. 2450 (1979).

Francis, 105 S. Ct. at 1971 n.2 (emphasis added). Both are constitutionally intolerable if they are mandatory, and Florida's instruction is as was the manner in which it was given.

The conviction can be saved only if the burden-shift was harmless beyond a reasonable doubt. Rose v. Clark, 106 S. Ct. 3101 (1985). It was not. Harmless error is to be determined by "consideration of the entire record." United States v. Hestine, 461 U.S. 499, 509 n.7 (1983). "[T]he inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Rose, 106 S.Ct. at 3109, (quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983)). Godfrey v. Kemp, slip op. No. 85-8570 (11th Cir. Jan. 20, 1988) concluded that the jury charge violated Godfrey's constitutional rights under Sandstrom v. Montana, 442 U.S. 510 (1979), because it impermissibly shifted to him the burden of proof on the issue of his intent to commit the murders. The language of that charge follows.

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted . . . . Every person is presumed to be of sound mind and discretion but the presumption may be rebutted.

Id. at p. 4. Both the Eleventh Circuit and the Supreme Court have evaluated this language in light of the mandates of due process and have concluded that this instruction does not comport with due process because it impermissibly shifts to the defendant the burden of proof on the issue of intent. Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965 (1985) and cases cited. Id. at pp. 4-5.

As the Godfrey Court stated:

> Fairly read, the charge allowed the state to prevail on the issue of intent by relying on a presumption rather than proving beyond a reasonable doubt that Godfrey had the requisite intent. An unbroken line of authority condemns this instruction as unconstitutional.

Id. at p. 5. The Court then proceeded through its harmless error analysis. It first considered whether the erroneous instruction was applied to an element of the crime that was not an issue at trial. After that it considered whether the evidence specifically related to

intent was so overwhelming as to render the error harmless. Id. at pp. 5-6. Mr. Roman, like Mr. Godfrey, pleaded and failed to prove insanity but intent remained in issue, thus harmless error could not then be applied here on the ground that the instruction addressed a non-issue. The Court's analysis as to the record question, reiterated that intent is an element that the state must prove beyond a reasonable doubt. It went on to point out that

> A defendant may introduce competent evidence at trial that is insufficient to prove insanity and yet potentially sufficient to raise a reasonable doubt about his ability to form the intent required for the crime. The existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. [citations omitted]. A jury could find a defendant mentally incapable of the premeditation and deliberation required to support a first degree murder verdict or of the intent necessary to find him guilty of either first or second degree murder, and yet not have found him to have been legally insane.

In determining whether the Francis error is harmless in this case, therefore, the focus must be on whether the evidence is overwhelming in support of sanity. Instead we look at the evidence bearing on intent, which appears to require an awareness and understanding by the defendant that he is taking certain actions and that those actions are likely to cause death.

The Francis error cannot be found harmless in this case. Mr. Roman presented to the jury competent evidence tending to show a lack of mental capacity to form criminal intent even though the jury necessarily found that he was not insane. This evidence is sufficient to raise at least a reasonable doubt as to whether the Francis error was harmless under Rose and Chapman.

In support of his insanity defense, Mr. Roman called both expert and lay witnesses. A long history of mental illness was laid out for the jury. This history included general instances of hospitalizations and committments. Mr. Roman twice was civilly adjudicated incompetent for periods in excess of two years. Shortly after his arrest, he was also determined to be incompetent for the purpose of standing trial in the case at bar. That status continued for a period of fifteen months.

The jury was never told that if the defense "overcame" the presumption of sanity, the state then had to be put to its imposed burden. The jury began their deliberations presuming Mr. Roman sane. The instruction could have done nothing but tip the balance to convict him. With the aid of the instruction, the insanity defense was rejected, and Mr. Roman was convicted.

This case presents a claim of fundamental error -- "a constitutional violation [that] has probably resulted in the conviction of one who is actually innocent," Murray v. Carrier, ___ U.S. ____, 106 S. Ct. 2639, 2650 (1986).

Mr. Roman's claim that the jury instructions in his case shifted the burden of proof to him on the issue of intent -- when intent was the only material issue in dispute in his case -- raises a claim of fundamental error. In Stewart v. State, 420 So. 2d 862 (Fla. 1982), this Court cited with approval the test utilized by the district courts of appeal to determine whether an instruction which omits an element of the offense amounts to fundamental error. They "have held that fundamental error occurs only when the omission is pertinent or material to what the jury must consider to convict." Id. at 863. Thus, if the omitted element is "not at issue," the error is not fundamental. By the same token, if the omitted element is at issue, the error is fundamental.

As Mr. Roman's argument on the merits of this issue makes clear, his sanity at the time of the offense -- and thus whether he had "the requisite intent," State ex rel. Boyd v. Green, 355 So. 2d at 793 -- was not only "at issue," but was the critical issue for the jury to decide

in reaching a verdict on guilt or innocence. Under Stewart's teaching, therefore, instructional error on this element must be fundamental error. Whether the state was relieved of its burden to prove the material element of an offense by the instruction's omission of the element or by a burden-shifting presumption, the effect is the same: the state had not been required to prove the material element of the offense beyond a reasonable doubt, as the Due Process Clause so plainly requires. See In re Winship, 397 U.S. at 364. Accordingly, if the Court determines that the instruction did shift the burden of proof on insanity to Mr. Roman in violation of the requirements of due process, his claim must be treated as presenting fundamental error.

The Florida Supreme Court has recently rejected a "fundamental error" analysis in two consolidated cases (Smith v. State and Smith v. Lentz), 13 F.L.W. 42 (Jan. 1988). These cases, however, dealt with the trial court's failures to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the defendants were legally sane at the time of the commission of the respective offenses. Neither case dealt with the specific issue Mr. Roman now asserts, i.e., the burden shift aspect of the standard jury

instruction as to insanity. Moreover, defense counsel did object in this case. And his objection, albeit inartful, was directed at the burden shifting aspect of the standard charge. "We are not objecting to the form of that. It is just that we, . . . the instruction that shifts the burden of proof." (R. 1411)(emphasis supplied).

> We are objecting to the State's instruction on insanity on the burden of proof issue.

(R. 1412).

> Number 2, our objection to the insanity instruction on the issue of burden of proof on which we had not submitted a written requested instruction.

(R. 1508).

The evidence in this case as to the critical issue of sanity was in equipoise. It is in just such a situation that "the fact-finder must know at the outset . . . how the risk of error will be allocated. . . ." Santosky v. Kramer, 455 U.S. 745, 757 (1982). The burden-shifting instruction here allocated that risk entirely to Mr. Roman. He was required to rebut the presumption that he was sane, and if his proof of insanity failed -- in the view of the jury -- to rebut that presumption, he would lose -- even though the jury might be in error.

In State ex rel. Boyd v. Green, supra, the Florida Supreme Court had already held that an irrebuttable presumption of sanity relieved the state of its burden to show "the requisite intent" to commit the crime charged, in violation of due process. 355 So. 2d at 793-94. The decisions in Sandstrom v. Montana, 442 U.S. 510 (1979); Patterson v. New York, 432 U.S. 197 (1977); and Mullaney v. Wilbur, 421 U.S. 684 (1975), provide the basis for extending that ruling to a rebuttable, burden-shifting presumption of sanity. In Yohn v. State, this Court noted that in Patterson the Supreme Court held "that it is not unconstitutional to place the burden on a defendant to prove he was insane at the time of the commission of the offense." 476 So. 2d at 126. Patterson's holding, however, was limited to those states which do not define insanity as "the inability to intend." The affirmative defense in Patterson was like "insanity" in Wisconsin, where, as this Court explained in State ex rel. Boyd v. Green, "a finding of insanity 'is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is to be excused from criminal responsibility for his act.'" 432 U.S. at 206-07. However, in a state like Florida, where insanity negates intent, State ex

rel. Boyd v. Green, supra, Patterson would require that the state prove sanity beyond a reasonable doubt and would allow no presumption of sanity. Thus, the burden-shifting instruction issue in Mr. Roman's case is ripe for resolution. Accordingly, Mr. Roman deserves at the very least a hearing in which he can present the merits of this issue.

## ARGUMENT XI

MR. ROMAN WAS DENIED HIS FUNDAMENTAL DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE COURT FAILED TO CORRECTLY CHARGE THE JURY AS TO THE VOLUNTARINESS OF HIS STATEMENT TO THE POLICE AND AS TO THE BURDEN OF PROOF.

In a case where the so called voluntariness of Mr. Roman's statement was a crucial issue, the judge charged as follows:

> A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.
>
> Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made.
>
> In making this determination, you should consider the total circumstances, including but not limited to

> One, Whether when the defendant made the statement he had been threatened in order to get him to make it, and
>
> Two, whether anyone had promised him anything in order to get him to make it.
>
> If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

(R. 1500).

This instruction was wholly deficient. It in no way incorporated the concept of an "intelligent" waiver and how, when deciding that question, the jury should consider, as a factor, Mr. Roman's mental state at the time he made his statement. As the record indicates, Mr. Roman regarded himself as legally incompetent at the time hence unable to legitimately sign a requested waiver form (R. 2129).

Moreover, the instruction never informed the jury that the State had the burden of proving voluntariness by a preponderence of the evidence.

These errors were in derogation of Mr. Roman's constitutional rights as guaranteed by the fifth and fourteenth amendments to the United States Constitution. Trial counsel unnecessarily failed to require a correct and constitutionally adequate instruction regarding one of the most important issues.

## ARGUMENT XII

DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO COLLATERALLY ATTACK THE PRIOR CONVICTION USED TO AGGRAVATE MR. ROMAN'S SENTENCE AT THE PENALTY PHASE CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Defense counsel should have collaterally attacked the conviction on the grounds that Ernie Roman was incompetent at the time of the offense, or at least introduced such evidence in mitigation.

In 1973, Dr. Barnard and Dr. Carrera found that Ernie Roman wwas incompetent at the time of a 1973 offense in that he did not know right from wrong due to the effect of chronic alcoholism and being in a state of intoxication. When Drs. Carrera and Barnard examined Ernie Roman in 1975 to determine his competency for shooting into an occupied vehicle, they based their findings on his account of the circumstances including his statement that he had not been consuming alcohol. In fact the record shows that Ernie Roman had been drinking and was inebriated.

Mr. Roman's sister stated to the investigating officer that Ernie had been drinking. She drove to the nearby town of Oxford to help Ernie's common law wife

recover her vehicle. She then went to Tommy Brady's residence when she found Ernie drinking with Tommy Brady and another male. She exchanged "hot words" with them whereupon Tommy told her to get off his property. He then drew a gun and fired into the ground. She heard another shot fired. Other witnesses said Ernie fired at the trunk of the car and the bullet bounced off.

Had defense counsel properly investigated the prior conviciton, he would have found that Ernie Roman's mother had recently died and that Ernie was very upset by her death in that she was his prior caretaker. Ernie's sister Betty had taken over his mother's old house and rented it out. When Ernie went to Oxford to see his mother's old house, Betty became very angry and this was in fact the precipitating event of this domestic strife.

In the presentence investigation report the probation officer reports that Ernie said he was not drinking. However, he goes on to state, "It's known that subject is a heavy user of alcoholic beverages and of some type of pills and according to the arresting officer and victims subject was totally inebriated."

Finally, we know that Ernie Roman was on medication at the time that he entered his plea on September 8, 1975:

Q. Are you now taking or under the influence of any drugs, narcotics, medication or alcohol?

A. Medication, sir.

Q. What kind of medication?

A. Melicon.

Q. When was the last time you took some?

A. This morning.

Defense counsel was well aware that the expert opinions regarding competency at the time of the offense were based on incorrect information regarding intoxication. Particularly in light of the earlier findings of incompetency due to intoxication by the very same mental health experts, defense counsel failed to provide effective assistance of counsel in failing to attack the faulty conviction. By failing to do so defense counsel violated Mr. Roman's sixth, eighth and fourteenth amendment rights.

## ARGUMENT XIII

Mr. Roman was also entitled to relief, or at least an evidentiary hearing, regarding the following:

a. The trial judge communicated with the jury about the jurors' desire to have a dictionary and a tape recorder, R. 1510, in Mr. Roman's absence, and about the

jurors' question: "Is it possible for the jury to vote guilty in the first degree and charged and have the penalty so that he remains in prison for life without parole," R. 1512, in Mr. Roman's absence, and counsel did not object, in violation of the sixth, eighth, and fourteenth amendment rights.

b. Counsel rendered ineffective assistance of counsel, and Mr. Roman was absent when counsel told the court that their independent expert had found certain physical evidence (fibers, hair) to be inculpatory (R. 917), in violation of Mr. Roman's sixth, eighth, and fourteenth amendment rights.

c. Counsel was prejudicially ineffective for allowing the state to introduce evidence that:

1. A police officer did not believe Mr. Roman was mentally ill because he did not take Mr. Roman to the mental health center. R. 831.

2. Guilty people will not speak to police officers.

3. Other suspects were interviewed and eliminated as suspects, R. 843-45.

4. It is typical for defendants to try to get out of taking responsibility by claiming drunkenness or insanity, R. 831.

5. It was not unusual for guilty people to vomit while confessing, R. 890.

6. Florida does not excuse criminality based upon intoxication, R. 1056, 1059.

These errors occurred in violation of Mr. Roman's fifth, sixth, eighth, and fourteenth amendment rights.

## CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Mr. Roman respectfully requests a stay of execution and that his conviction and sentence be vacated.

Respectfully submitted,

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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.

Attorney