IN THE SUPREME COURT OF FLORIDA

DAN EDWARD ROUTLY,

Appellant,

v.

CASE NO. 73,963

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The instant appeal represents one from the denial, after evidentiary hearing, of a motion for post conviction relief, filed pursuant to Fla.R.Crim.P. 3.850, by a prisoner under sentence of death. On or about August 9, 1990, Routly filed a **pro se** Initial Brief, and on January 28, 1991, the Office of the Capital Collateral Representative filed an Initial Brief on Routly's behalf. Because the claims presented in the two briefs largely overlap, the arguments presented in the instant Answer Brief should be regarded as responsive to both briefs, unless otherwise indicated.

Although this is a post conviction appeal, the events of the original trial remain relevant, and, indeed, in resolving Routly's collateral motion, the circuit court relied upon the original trial record; accordingly, citations will be made in the instant brief to both the original record on appeal and to the post conviction record created for this case. (OR ___) represents a citation to the original record on appeal, prepared in regard to Routly's 1982 direct appeal in this court, **Routly v. State**, Florida Supreme Court Case No. 60,066, whereas (PCR ___) represents a citation to the post conviction record on appeal, prepared in the instant case, **Routly v. State**, Florida Supreme Court Case No. 73,963.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellee does not accept Appellant's Statement of the Case, which is argumentative, inaccurate and notable for its lack of citations to any record. Specifically, Appellee would note that Dan Routly has never testified that Colleen O'Brien killed the victim in this case (Initial Brief at 1); rather, at trial in 1980, Routly testified only that O'Brien had told him that the victim had been shot, although he did not know by whom (OR 1092). Similarly, Appellant offers no record support for his contention that "Routly was arrested in Flint, Michigan, at 12:45 a.m., on December 5, 1979, on a charge of second degree murder." (Initial Brief at 1). At the 1980 trial, one of the officers involved in Routly's apprehension, Thomas Forstick, testified that Routly had been arrested on local Michigan charges (OR 1015-1016). Both at the original trial and at the post conviction proceeding, the Michigan police officers testified that, at the time of his apprehension, Routly had been wanted on a number of charges, and/or outstanding warrants, for such offenses as assault, larceny, nonsupport, parole violation and traffic charges (OR 1001-1003, 1016; PCR 128, 184-185). Further, as to Routly's alleged motivation for confessing or any alleged "promises" made to him (Initial Brief at 1), Appellee must note that these "facts" are derived solely from Routly's testimony at the 1980 suppression hearing and trial (OR 256-265, 1023-1034, 1089-1094). In 1980, the State presented contrary testimony from the police officers involved, to the effect that no such promises were made (OR 207, 242, 251, 1020, 1049); apparently, the judge and jury in

1980 credited this testimony, as opposed to that of Appellant. At the evidentiary hearing in 1988, some of these same witnesses reiterated that no promises of any kind had been made to Routly to induce his confession (PCR 129, 248-249). Appellee is unaware of any provision of Florida's appellate rules which authorizes collateral counsel at this juncture to represent as "fact" these discredited allegations.

As to the facts of this case, Appellee would rely upon the recitation of facts set forth in this Court's opinion on direct appeal. **See Routly v. State**, 440 So.2d 1257, 1259-1260 (Fla. 1983). As to the procedural posture of this case, Appellee would simply note, at this juncture, that while Judge Angel did afford Routly an evidentiary hearing on his claims of state suppression of evidence and/or use of perjured testimony, as well as the claims of ineffective assistance of counsel, the circuit court also specifically found certain claims presented in the 3.850 motion to be procedurally barred; although collateral counsel nowhere acknowledges this fact, Judge Angel expressly found procedurally barred two of the claims now raised on appeal - that an unauthorized person had been present in the jury room and that the sentencer had allegedly considered improper "victim impact" evidence (PCR 1380-1382). Further discussion of the procedural arguments relevant to each point will be presented in the argument section, as necessary.

SUMMARY OF ARGUMENT

Routly presents seven points on appeal in regard to the circuit court's denial, after evidentiary hearing, of his 3.850 motion. Two of them, involving alleged consideration of "victim impact" information and alleged impropriety by the court reporter, are procedurally barred and merit little comment. While the point on appeal involving the propriety of the jury override is likewise procedurally barred, it does merit some discussion. Appellee specifically disagrees with collateral counsel's contention that, in **Parker v. Dugger**, ____ U.S. ____, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), the United States Supreme Court specifically invited this Court to reconsider every jury override which it had ever affirmed. Appellee also takes strong issue with collateral counsel's seeming attempt to raise, for the first time on appeal, a claim based on **Hitchcock v. Dugger**, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); this matter was never raised in the circuit court below, and must be found procedurally barred at this juncture.

As to the remaining claims upon which the hearing was granted - alleged suppression of evidence by the State and alleged ineffective assistance of counsel at both the trial and sentencing - they are noteworthy primarily for the many contradictory allegations made in the Initial Brief in support thereof. Thus, collateral counsel contends on appeal that, on one hand, the State suppressed evidence, and, on the other, that trial counsel was ineffective for failing to utilize this same evidence. Likewise, collateral counsel argues on appeal that

counsel was ineffective for failing to present sufficient evidence in mitigation so as to render the jury's recommendation of life "reasonable", but similarly argues that the override is itself error because the recommendation was, in fact, reasonable. To further complicate matters, collateral counsel also suggests that one of the reasons that the recommendation was reasonable was that the jury was actually aware of some of the evidence which the State had allegedly suppressed! Counsel for Appellee must admit to great temptation to refute some of the arguments presented in the Initial Brief by relying on other arguments presented in the Initial Brief.

In any event, Routly simply failed to make his case in regard to the claims of State suppression of evidence or knowing use of perjured testimony. The record is clear that, despite the present position taken by trial counsel, the defense was on notice as to the existence of the allegedly undisclosed matters. Further, the allegedly undisclosed matters were not material, and would have allowed for only cumulative impeachment of the State's witness. At trial, the jury learned, through defense counsel's cross examination of this witness, that she had been granted immunity in exchange for her testimony, that she was presently in the custody of law enforcement officers and that she had been threatened with arrest if she did not appear; likewise, the jury was told by this witness that one of the terms of the immunity agreement was that she would be able to have "a life with her baby", something which, again by her own admission, meant "everything in the world" to her. Defense counsel utilized this

testimony in his closing argument, as indicative of the interest which the witness had in the proceedings. Further, the claim of knowing use of perjured testimony is based simply upon inconsistencies in the witness's testimony, and is insufficient to merit relief.

As to the claims of ineffective assistance of counsel, the bottom line is, in essence, that trial counsel performed all of the actions which he is now charged with having omitted, and, to the extent that he did not, no prejudice has been demonstrated. At the guilt phase, counsel fully litigated the admissibility of Appellant's confession on all of the theories now advanced, and likewise sufficiently cross-examined the State's main witness. At the penalty phase, defense counsel introduced into evidence a psychiatric report which contained information as to Appellant's troubled upbringing and the abuse which he had suffered at the hands of his parents. Both the jury, which recommended life, and the judge, who overrode such recommendation, considered this evidence. There has been absolutely no showing that the family members who proffered more detailed affidavits in 1988 were available or willing to testify in 1980, and, indeed, every indication that they were not. The most disturbing aspect of this case is, perhaps, the alarcity with which former trial counsel confessed his own ineffectiveness at the hearing below. Fortunately, the original trial judge also presided over this hearing, and he was, obviously, in the best position to weigh counsel's present account of incompetence against his actions at the time of the trial. The circuit court's denial of all relief should be affirmed in all respects.

ARGUMENT

POINT I

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S CLAIM BASED ON BRADY v. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), WAS NOT ERROR

Routly's primary claim for relief is that he is entitled to a new trial on the basis of an alleged violation of such precedents as **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), **United States v. Agurs**, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); although Routly also complains in this point on appeal of alleged use of perjured testimony by the State, in violation of **Giglio v. United States**, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and of ineffective assistance of counsel, in violation of **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), further discussion of these latter claims is presented in Points II and IV, **infra**. In **Hegwood v. State**, 575 So.2d 170, 172 (Fla. 1991), this Court, citing **United States v. Meros**, 866 F.2d 1304 (11th Cir. 1989), set forth the applicable standards as to a claim of this nature,

> [t]o establish a *Brady* violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

The circuit court in this case denied relief, essentially due to Appellant's failure to demonstrate "materiality" or a reasonable probability that, had any allegedly undisclosed evidence been disclosed to the defense, a reasonable probability of a different result existed at trial (PCR 1745). Appellee suggests that such ruling was correct, and that the circuit court's order should be affirmed in all respects.

Routly's **Brady** claims relates to certain documents involving an immunity agreement between the prosecution and a critical state witness, Colleen O'Brien; specifically, these documents include the July 5, 1980 immunity agreement itself, and a waiver of extradition executed by O'Brien on the same day (Defense Exhibits #11 & #12; PCR 1787-1793).[1] At the evidentiary hearing below, collateral counsel adduced testimony from the trial prosecutor, Jeffery Fitos, to the effect that he had not personally handed over the documents in question to defense counsel (PCR 602). Likewise, collateral counsel adduced testimony from Routly's former trial counsel, attorney Ronald Fox, who affirmed that he had never seen such documents, and who then proceeded to offer a lengthy discourse as to the cross examination which he would have conducted based upon them (PCR 339-369). It is apparently collateral counsel's belief that the

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[1] Routly also seems to raise a **Brady** claim in regard to Defense Exhibit #14, an affidavit of diligent search, executed by a Michigan detective (PCR 1802-1803). The evidence is uncontradicted, however, that the prosecution was never in possession of this document (PCR 616; 805), and, accordingly, it would seem that any claim of error in this regard is well founded.

above constitutes a sufficient showing to merit relief. Appellee vehemently disagrees.

In determining whether to grant relief under **Brady**, a court must look to "the entire record", **see Thompson v. State**, 553 So.2d 153, 155 (Fla. 1989), and the ultimate inquiry involves whether any discovery violation deprived the defendant of a fair trial. **See Agurs, supra.** Appellee suggests that no such showing has been made **sub judice.** In denying relief, Judge Angel looked not only to the testimony presented at the evidentiary hearing in 1988, but also to what had occurred at the time of trial in 1980 (PCR 1745). Such approach is undisputably correct under **Thompson** and **Agurs**, and, although collateral counsel nowhere acknowledges these facts, the record is clear that: (1) defense counsel was well aware, prior to trial, that Colleen O'Brien had been granted immunity in exchange for her testimony; (2) defense counsel cross-examined O'Brien on this point during her testimony at trial, and (3) defense counsel argued this matter to the jury in closing argument, as a factor which they should consider in weighing the witness's testimony. Thus, this case has nothing in common with precedents relied upon by Routly, such as **Smith v. Wainwright**, 799 F.2d 1442 (11th Cir. 1986), or **Brown v. Wainwright**, 785 F.2d 1457 (11th Cir. 1986), in which the convictions at issue were reversed because the jury in each case had not been presented with critical information regarding a state witness, **i.e.**, that the witness had given inconsistent statements, **see Smith, supra**, or that the witness had been granted immunity, **see Brown, supra.**

Here, as will be discussed below, the jury was not only aware that O'Brien had been granted immunity, but that one of the terms of the immunity agreement was that she would be able to have "a life with her baby", something which meant "everything" to her (OR 932-936). Because, **inter alia**, the allegedly undisclosed matters would have simply allowed for cumulative impeachment, reversible error has not been demonstrated. **See, e.g., Palmes v. Wainwright**, 460 So.2d 362 (Fla. 1984) (defendant not entitled to relief based upon allegedly undisclosed threats and promises to critical state witness, where jury aware that witness had received immunity, and where additional matters would have added "only marginally" to counsel's ability to impeach); **Francis v. State**, 473 So.2d 672 (Fla. 1985) (alleged failure of State to disclose fact that it had moved to vacate witness' conviction no basis for relief, where witness' interest sufficiently presented to jury through cross examination); **Aldridge v. State**, 503 So.2d 1257 (Fla. 1987) (alleged failure of State to disclose memo concerning request for favorable treatment of state witness not grounds for relief where jury aware of fact that witness had received immunity); **Steinhorst v. State**, 574 So.2d 1075, 1076 (Fla. 1991) (where jury already aware that witness received immunity, alleged failure of the State to disclose fact that witness had refused to implicate self in crime, prior to immunity, no basis for relief). On the basis of the above precedents, Routly clearly merits no relief.

Because the events which occurred at the time of trial are critical to the resolution of this point, Appellee would set

forth the following factual summary. The record indicates that defense counsel was well aware of the fact that Colleen O'Brien, Routly's girlfriend and the mother of his child, would be a critical state witness. In April of 1980, the State moved to continue the trial due to the fact that O'Brien would be entering the final stages of her pregnancy (OR 46); the defense opposed the motion. At a proceeding on May 29, 1980, when the State formally allowed defense counsel to inspect all the physical evidence, the prosecutor advised that O'Brien would be available for deposition on July 9, 1980 (OR 291). O'Brien had agreed to stay in contact with the State Attorney's Office, but, as the trial drew closer, she left Michigan for an unknown location. When the prosecutor learned of this, he took a number of steps to secure her appearance, if necessary. On June 13, 1980, he filed in the circuit court a formal request for attendance of an out of state witness, asking the court to issue a certification to the effect that O'Brien was a critical witness for the prosecution (OR 86-90). On June 27, 1980, an information was filed against O'Brien, charging her with second degree murder (State's Exhibit #6, PCR 2206-2208); according to prosecutor Fitos, although a capias was issued, such was never served on O'Brien, and she, in fact, did not know of its existence (PCR 666).

On July 3, 1980, the prosecutor served upon defense counsel another motion to continue the trial and extend speedy trial, based upon the fact that O'Brien had fled from Michigan and that her whereabouts were unknown; in this pleading, the prosecutor said that O'Brien had contacted a Michigan police officer,

Seargent Michael Hanna, on July 2, 1980, but had refused to reveal her location (Defense Exhibit #15, PCR 1804-1805). There is no doubt that defense counsel received this pleading, although in fact it was never formally filed; at the 3.850 hearing, attorney Fox verified such fact and identified the handwritten notations on the pleading as his own (PCR 328-329). Fox's contemporaneous notes on this pleading indicate that on July 7, 1980, he was advised by the State that Colleen O'Brien had returned from Oregon (PCR 1804).

Attorney Fox deposed both Michael Hanna and Colleen O'Brien on July 9, 1980. During Hanna's deposition, the officer advised defense counsel that he had tried to locate Colleen O'Brien after she had left Michigan (PCR 181). Attorney Fox extensively deposed Colleen O'Brien (State's Exhibit #3, PCR 2149-2203). The deposition includes the following exchange:

> Q (By Mr. Fox): Did you voluntarily come to Ocala?
>
> A (By the witness): Yeah.
>
> Q: How did you get here; what mode of transportation?
>
> A: Plane.
>
> Q: Who paid the cost of your transportation?
>
> A: State of Florida.
>
> Q: Who is paying for your room and board?
>
> A: State of Florida.
>
> Q: Have you been promised anything in exchange for your testimony in this case?
>
> A: Yeah.

Q: Okay. And what is your understanding of that; what have you been promised?

A: Immunity.

Q: Who made that promise to you?

A: State of Florida.

Q: Okay. Was it either of these gentlemen here in the room?

A: Mr. Fitos.

Q: Excuse me?

A: Mr. Fitos.

Q: Okay. Did you get that in writing?

A: Uh-huh.

Q: Good. What is your understanding of "immunity"; what is going to happen to you or what is not going to happen to you?

A: That I will be able to have life with my baby.

Q: Okay. Anything else other than that?

A: (No response).

Q: Are they going to prosecute you for the death of Anthony Bockini?

A: I didn't do it.

Q: Are they going to prosecute you for the death of Anthony Bockini?

A: No.

Q: Have they promised you that they would not do that?

A: Yes.

Q: All right. Had you recently been charged with second degree murder in reference to the death of Anthony Bockini?

A: Yeah.

(State's Exhibit #3; PCR 2199-2200) (See Appendix).

The copy of this deposition, which the State introduced, was that from attorney Fox's files, and, as was the State's motion to continue, this document is covered with Fox's annotations and comments (PCR 457-459) (See Appendix). These notes are highly instructive as to defense counsel's knowledge and intentions in 1980. Thus, on the cover of the deposition, attorney Fox wrote, "**MAX CROSS. CRUX OF CASE. GOOD MATERIAL BOTH CONSISTENT AND INCONSISTENT. ASK ALL.**" (PCR 2149; State's Exhibit #3) (See Appendix). Alongside the portion of the deposition where Colleen O'Brien had stated that she had been promised immunity, defense counsel Fox wrote, "**THIS CANNOT BE OVEREMPHASIZED. DO NOT STOP UNLESS ORDERED.**" (PCR 2199) (See Appendix). Similarly, apparently in reference to O'Brien's being charged with second degree murder, Fox wrote, "**JUDICIAL NOTICE OF CHARGE IN FILE. INTRODUCE IF SHE DENYS (SIC) (HOPE SHE DOES).**" (PCR 2199) (See Appendix). Alongside O'Brien's answer that the immunity agreement was in writing, attorney Fox wrote, "**JUDICIAL NOTICE AND MOVE TO ADMIT EVID. GOES TO CREDIBILITY. INTEREST IN OUTCOME.**" (PCR 2199-2200) (See Appendix). Finally, alongside O'Brien's answer concerning the fact that the immunity meant to her that she would be able to have a life with her baby, defense counsel wrote, "**WORTH IT TO YOU IN TERMS OF $? PRICELESS ONLY CHILD? VERY HANDSOME REWARD. INTEREST IN OUTCOME.**" (PCR 2200) (See Appendix). Attorney Fox moved to have this deposition transcribed, and it was available at the time of trial, inasmuch as Fox impeached O'Brien with it during her testimony (OR 105; 945).

Routly's trial began on July 14, 1980. During voir dire, defense counsel Fox questioned the prospective jurors as to whether they would believe a witness who had been given immunity in exchange for their testimony (OR 471); likewise, during opening statement, he discussed the expected testimony of Colleen O'Brien, stating,

> You will find out that she has been granted immunity from prosecution in this case, that she has been charged with murder in this case, but in exchange for her testimony, it has been promised that she will not be prosecuted and that she will have a life for herself and her baby.

(OR 637).

The State called Colleen O'Brien to testify on July 17, 1980, and defense counsel conducted a substantial cross examination (OR 915-918, 923-972). O'Brien initially denied that she had been charged in July of 1980 with the second degree murder of Anthony Bockini, but stated that she was presently in custody of law enforcement officials (OR 932). The witness stated that she was "supposed to be able to leave voluntarily", and that she "guessed" that she had come to testify voluntarily (OR 932-933). The following exchange then took place:

> Q (By defense counsel): Okay. Now you're sure. Now, have you been promised anything in exchange for your testimony in this case?
>
> A: Yes.
>
> Q: And what would that be?
>
> A: Immunity.
>
> Q: Okay. Now, what do you understand that to mean? What will happen to you in exchange for your testimony, or not happen to you in exchange for your testimony?

A: That I will be able to have a life with my baby.

Q: That you'll be able to have a life with your baby. Okay. Does that mean anything other than that to you?

A: That I have to say the same that I said in Michigan.

Q: You have to say the same thing you told the police in Michigan?

A: Tell the truth.

Q: Who made this promise to you?

A: The State of Florida.

Q: All right. Did they give you some kind of piece of paper in writing that tells you what's going to happen to you or not happen to you?

A: Yes.

Q: All right, and does it say anything like you will not be prosecuted for the murder of Anthony Bockini?

A: Yes.

Q: - - if you testify in this case?

A: Yes.

Q: Okay. Now, when was that promise made to you?

A: You mean what day?

Q: Yes, about when?

A: Uh - -

Q: You don't know?

A: No.

Q: You didn't pay that much attention or was it that long ago?

A: A couple of weeks ago.

Q: A couple of weeks ago. Okay. Now, I don't want to know where you came from for this trial. I just want to know by what method of transportation you arrived in Ocala.

A: Plane.

Q: Who paid for that transportation?

A: The State of Florida.

Q: Do you know how much they paid?

A: No.

Q: Were you threatened with arrest if you didn't come and testify?

A: Yeah.

(OR 932-935).

After some uncertainty, Colleen O'Brien indicated prosecutor Fitos as one of the persons who had threatened her with arrest (OR 935-936). Returning to one of the witness' prior answers, defense counsel asked,

Q: Okay. A life for you with your baby, what's that worth to you?

A: It means everything to me.

(OR 936).

Defense counsel Fox reemphasized this point at the conclusion of the cross examination:

Q: What do you have to lose by testifying here today, Colleen?

A: My family, the father of my baby.

Q: Okay. How would you lose your family by testifying here today?

A: Because of all the - - everything that happened.

Q: And what do you have to gain?

A: Try to make a life for my baby.

(OR 972).

Defense counsel Fox likewise stressed this theme a number of times in his closing argument:

> Then, the next factor you can consider in who (sic) to believe is interest, if any, in the outcome of the case. All right, there's no question but that Dan Edward Routly has interest, if any, in the outcome of the case; a very serious possible penalty in this case, the maximum, the most serious, the ultimate penalty. Sure he has an interest in the outcome of the case, absolutely. **What about Colleen. Does she have an interest in the outcome of this case? Well, her testimony gives her immunity which gives her a life with her baby, which she said is worth more than anything in the world, and if she didn't speak one word of truth throughout her whole testimony, certainly that was true or seemed to be true.**

(OR 1123) (emphasis supplied).

Counsel likewise reminded the jury of O'Brien's reluctance to testify and of the existence of the immunity agreement at other points in his closing argument (OR 1125, 1128, 1154-1155).

Thus, it is clear that the jury in this case was aware that Colleen O'Brien was a reluctant witness, that she had been threatened with arrest if she did not testify, that she was presently in custody of law enforcement officials and that she had been granted immunity in exchange for her testimony.[2] As for

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[2] Certain federal courts have taken the position that no **Brady** violation occurs when allegedly withheld evidence is brought out at trial during cross examination. **See, e.g., United States v. O'Neill**, 767 F.2d 780 (11th Cir. 1985); **United States v. Poitier**, 623 F.2d 1017 (5th Cir. 1980). Obviously, such precedents would seem applicable **sub judice**.

the terms of the immunity agreement, O'Brien told the jury that she was testifying so that she could have a life with her baby, something that meant "everything" to her. Appellee suggests that O'Brien's interest in the case was sufficiently communicated to the jury such that no relief under **Brady** is warranted. **See Palmes, supra; Francis, supra; Aldridge, supra; Steinhorst, supra; United States v. Valera**, 845 F.2d 923 (11th Cir. 1988) (undisclosed information would have allowed for only cumulative impeachment of witness).[3] Again, as noted, the situation **sub judice** is completely distinguishable from that in such cases as **Brown v. Wainwright**, in which the jury was totally unaware of the fact that the State's prime witness had been granted immunity; this misconception was aggravated by the prosecutor's closing argument in **Brown**, which affirmatively indicated to the jury that the witness had had no interest in the outcome of the case.

It is apparently collateral counsel's view that a new trial is warranted, because even more extensive cross examination could have been undertaken, based upon the specific terms of the July 5, 1980, immunity agreement. Such contention is unpersuasive. Appellee respectfully submits that the 1980 immunity agreement contains no material provision of which the jury was unaware. For instance, while the agreement provides that Colleen O'Brien will receive immunity from criminal conduct which occurred on or

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[3] Indeed, collateral counsel would seem to have conceded as much elsewhere in the Initial Brief, in that they later agree that the jury's knowledge of O'Brien's receipt of immunity constituted a "reasonable" basis for their life recommendation (Initial Brief at 80). As will be argued more fully **infra**, this represents just one of many inconsistent positions taken by collateral counsel on appeal.

before the day of the murder in this case, and for which O'Brien is a suspect (PCR 1791), such provision is not especially significant, inasmuch as O'Brien was not, in fact, a suspect in any other offense (PCR 456, 878-879). While it is true that the jury did not learn that, pursuant to this agreement, O'Brien could have been required to take a polygraph examination (which, apparently, she never did), or that after the trial the State would pay for her transportation home (PCR 1787-1791), the jury was advised, by O'Brien herself, that the immunity agreement provided her with the single most important thing in the world - a life with her own child (OR 936); as defense counsel reminded the jury in closing argument, such was "worth more than anything else in the world" (OR 1123). Appellee respectfully submits that when a witness tells the jury that she is testifying so as to preserve the most important thing in her life, further inquiry as to her motives is essentially superfluous.

Appellee also suggests that the testimony by attorney Fox at the 1988 evidentiary hearing as to how he "would" have cross examined O'Brien, had he only known then what he allegedly knows now, is virtually meaningless. Initially, it must be noted that Fox, for reasons best known to himself, has chosen to vigorously proclaim his own ineffectiveness (PCR 421, 491, 507), and, indeed, has even gone so far as to claim that, even if the allegedly undisclosed documents did not exist, he would still be ineffective (PCR 391, 397). Accordingly, it is difficult to detect any value in his delineation of the cross examination which he "should", in hindsight, have presented; Appellee is also

unaware of any precedent which provides that materiality under **Brady** can be proven in this manner. In any event, the critical portion of any cross examination is not the questions asked, but the answers received. In this case, collateral counsel has not only adduced the former, through the testimony of attorney Fox, but, most importantly, the latter, from Colleen O'Brien herself. At great expense and following much delay, collateral counsel secured the presence of Colleen O'Brien at the 1988 evidentiary hearing (PCR 830-903).[4] Collateral counsel then proceeded to examine O'Brien as to the terms of the July 5, 1980, immunity agreement (PCR 850-863). No doubt unintentionally, collateral counsel has demonstrated, beyond any doubt, that had attorney Fox in 1980 mounted the lengthy and detailed cross examination proffered in 1988 (PCR 339-369), no reasonable probability exists of a different result at trial. **Cf. Brady, supra.**

While it is apparently the view of collateral counsel that Colleen O'Brien is some sort of nefarious schemer, who craftly and with great calculation "negotiated" each and every term of the immunity agreement, this impression is not borne out either by her own testimony at trial in 1980 or that offered in 1988. Rather, Colleen O'Brien made it quite clear that she signed the immunity agreement at issue on the advice of her attorney, and she would not seem to have even been aware of some of the specific provisions (PCR 852-862); indeed, she had no recollection at all of signing the separate waiver of

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[4] At one point, collateral counsel sought to invoke the immunity agreement in order to have O'Brien taken into custody for failing to appear at the post conviction hearing (PCR 812).

extradition, Defense Exhibit #12 (PCR 844). O'Brien stated that her understanding of the agreement was that she was to testify truthfully and, in return, receive immunity (PCR 852); likewise, she said that if she did not testify, she would be arrested and have her child taken away (PCR 862). In short, her testimony in 1988 mirrored that in 1980, and more sophisticated interrogation as to the nuances of the specific terms of the contract, negotiated by her attorney, would have netted the defense little, if any, benefit. Perhaps most importantly, O'Brien reaffirmed that all of the testimony which she had offered in 1980 had been truthful (PCR 900). Accordingly, any remand by this Court for a new trial would be fruitless, in that, at such proceeding, no reasonable probability exists that a successor jury would be any more informed of the terms of the immunity agreement than the jury in 1980 was. Relief is not warranted **sub judice**.

Appellee would also contend that Routly has not only failed to demonstrate materiality under **Brady**, but also, as required under **Hegwood** and **Meros**, that he has further failed to show that the allegedly undisclosed evidence was not actually possessed by the defense or that such could not have been obtained "with any reasonable diligence." As to the evidence concerning Colleen O'Brien's flight from Michigan and reluctance to testify, defense counsel was served with a copy of the prosecutor's motion to continue trial on such basis (Defense Exhibit #15, PCR 1804-1805). The pleading bears attorney Fox's handwritten notation to the effect that public defender Pierce had told him that the State had returned Colleen O'Brien from Oregon (**Id.**). At the

hearing below, Fox acknowledged that he had, in fact, known that O'Brien had fled to Oregon (PCR 455). The motion to continue averred that Colleen O'Brien had spoken with Sergeant Michael Hanna, a Michegan police officer (Exhibit #15, PCR 1804-1805). Defense counsel deposed Hanna on July 9, 1980, and attorney Fox questioned him as to his attempts to locate O'Brien (PCR 181). The fact that defense counsel did not pursue this subject further is not attributable to the State, and he was certainly on notice as to Colleen O'Brien's flight from Michigan to Oregon and general reluctance to testify.

A similar conclusion is warranted as to the existence of the charges against O'Brien and the immunity agreement itself. Although attorney Fox testified at the post conviction hearing that he was not aware that the State had charged O'Brien with second degree murder (PCR 351), this contention is obviously belied by Fox's annotations on the O'Brien deposition, "**JUST CHARGED THIS MONTH . . . JUDICIAL NOTICE OF CHARGE IN FILE; INTRODUCE IF SHE DENYS (SIC) (HOPE SHE DOES)**" (PCR 2199) (See Appendix). The information charging O'Brien was, of course, filed with the Clerk's office and available to anyone who wished to inspect it. **Cf. Roberts v. State**, 568 So.2d 1255, 1260 (Fla. 1990) (no **Brady** violation where information equally accessible to defense and prosecution). As to the existence of the immunity agreement itself, Appellee would contend that defense counsel's deposition of Colleen O'Brien put him on sufficient notice as to its existence, assuming in fact that such notice was required. During the deposition on July 9, 1980, O'Brien told attorney Fox

that she had been granted immunity in exchange for her testimony and that she had a written agreement; she specifically identified, at Fox's request, prosecutor Fitos as the individual who had promised her immunity (State's Exhibit #3, PCR 2199) (See Appendix). O'Brien also told Fox that one of the terms of the agreement was that she would be able to have a life with her baby (**Id.**). There is no doubt that Fox was aware of the existence of the immunity agreement; alongside O'Brien's response in the deposition, to the effect that the agreement was in writing, attorney Fox wrote, "**JUDICIAL NOTICE AND MOVE TO ADMIT EVID.**" (**Id.**). The prosecutor testified at the evidentiary hearing below that he had believed that Fox had been aware of the immunity agreement, apparently, at least in part, due to O'Brien's statements at the deposition (PCR 639-641, 673); Fitos testified that the immunity agreement had been kept in the State's file and he, as well as other witnesses, stated that such had always been available for inspection by the defense (PCR 600, 602, 606, 692-693, 801-802, 804-805).[5]

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[5] In the Initial Brief, collateral counsel has found it necessary to make a number of gratuitous personal attacks upon Fitos and the Office of the State Attorney for the Fifth Judicial Circuit. Thus, collateral counsel points to Fitos' later unrelated suspension from the Florida Bar as evidence of how "blatently improper" his actions were in this case (Initial Brief at 31, n.5). This is, of course, completely irrelevant. **See, e.g., Agurs**, 427 U.S. at 111 (whether constitutional error exists depends on character of evidence, not of prosecutor). Collateral counsel also points to two other prosecutions within the Fifth Circuit in which **Brady** error has allegedly been found (Initial Brief at 27, n.4). While collateral counsel opines that such was not "an uncommon practice" for the office at such time, none of the witnesses at the hearing below offered such testimony (PCR 781). The State maintains its objection to the relevancy of these matters (PCR 763, 778-779), and knows of no precedent which authorizes "**Williams** Rule" evidence in **Brady** litigation.

At the evidentiary hearing below, attorney Fox (who, as noted, has proclaimed his own ineffectiveness), testified, when confronted with the annotated copy of the O'Brien deposition, that he had thought that the witness had been referring to an earlier immunity "agreement" (PCR 774-775); previously, attorney Fox had "not been sure" if he had even seen this earlier document (PCR 386-388). This contention is dubious in the extreme. The document in question is an unsigned one page form which was prepared on December 4, 1979, at the time that the Florida authorities first went to Michigan to talk with O'Brien; the form provides that the signer would testify truthfully, would appear without necessity for subpoena, would waive speedy trial and would keep the State apprised of his or her whereabouts (Defense Exhibit #9, PCR 1784). These latter provisions are not without importance, inasmuch as they are all repeated in the July 5, 1980, agreement and, thus, were apparently known to defense counsel, even if "by mistake" (Defense Exhibit #11; PCR 1787-1791).

Appellee would still maintain, however, that this tale of "mistake" is a canard. Colleen O'Brien expressly stated during deposition that she had a written immunity agreement (State's Exhibit #3, PCR 2199); it is uncontraverted that Colleen O'Brien never signed the December 1979 form (PCR 651, 832-833). Colleen O'Brien similarly pointed out prosecutor Fitos, at attorney Fox's request, as the person who had promised her immunity (State's Exhibit #3, PCR 2199); yet, the December 4, 1979, form is signed by a different prosecutor, N. Burton Williams (Defense Exhibit

#9, PCR 1784). Most significantly, Colleen O'Brien stated during the deposition that in return for her testimony, she would be allowed to have a life with her baby (State's Exhibit #3, PCR 2199); such is most certainly not a provision of the 1979 form, and even attorney Fox acknowledged at the hearing below that O'Brien's baby had not been born at the time of the 1979 form (PCR 473). Attorney Fox's words in 1988 are simply impossible to reconcile with his actions (and annotations) in 1980. He was sufficiently "on notice" concerning the existence of the July 1980 immunity agreement and related paperwork, such that relief is not warranted under **Brady**. **See, e.g., Lewis v. State**, 497 So.2d 1162, 1163 (Fla. 3rd DCA 1986) (Jorgenson, J., concurring) (no suppression of evidence under **Brady**, where defense counsel deposed witness who could have produced, if asked, allegedly undisclosed information; disclosure of witness's name rendered witness equally available to defense); **United States v. Valera, supra** (no **Brady** violation where defense counsel could obtain information with due diligence); **United States v. LeRoy**, 687 F.2d 610 (2nd Cir. 1982) (government not required to disclose evidence when defense counsel "on notice of essential facts which would allow him to call the witness and take advantage of any exculpatory testimony that he might furnish.").[6]

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[6] As noted, defense counsel did, indeed, develop during cross examination at trial, O'Brien's interest in the case (OR 932-936, 972). Additionally, the testimony presented at trial would have put defense counsel on even "more" notice as to the existence of the July 1980 immunity agreement. Specifically, O'Brien testified that one of the terms of the immunity agreement was that she had "to say the same thing that she said in Michigan" (OR 933); this is not a provision of the December 1979 form (Defense Exhibit #9). Most significantly, O'Brien testified that

Accordingly, Appellee would maintain that the order below should be affirmed. Appellant has failed to demonstrate that the allegedly undisclosed matters are material, such that it can be said that a reasonable probability exists of a different result at trial, had the allegedly undisclosed matters been disclosed earlier; the allegedly undisclosed evidence would have allowed for only cumulative impeachment of Colleen O'Brien, in that defense counsel was able, through cross examination, to sufficiently demonstrate to the jury the witness's "interest" in the proceedings, i.e., she had received immunity and that she was testifying so as to preserve the thing in life most important to her, a life with her baby. **Cf. Palmes, supra; Francis, supra; Aldridge, supra; Steinhorst, supra; Valera, supra.** Similarly, Appellant has failed to demonstrate that he could not obtain the allegedly undisclosed evidence himself through due diligence; indeed, defense counsel's 1988 protestations to the contrary, it is clear that Routly's counsel was on notice as to the existence of the 1980 immunity agreement. **Cf. Lewis, supra; Valera, supra; LeRoy, supra.** Given the above, the State, as did the circuit court below (PCR 1745), finds it unnecessary to address

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Footnote 6 (continued)

the immunity agreement had been entered into "a couple weeks ago" (OR 934). While the agreement had, in fact, been signed twelve days previously, such response obviously put defense counsel on notice that something had occurred more recently than December 4, 1979, a point in time eight months prior to trial. As noted in note 2, federal courts have held that no **Brady** violation occurs when the allegedly undisclosed matters are presented at trial during cross examination. **See, e.g., United States v. O'Neil,** 767 F.2d 780 (11th Cir. 1985); **United States v. Poitier,** 623 F.2d 1017 (5th Cir. 1980).

whether or not a formal suppression of evidence took place. For all of the above reasons, the circuit court's order should be affirmed in all respects.

POINT II

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S CLAIM BASED UPON GIGLIO v. UNITED STATES, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), WAS NOT ERROR

In a related claim, Routly also contends that he is entitled to a new trial, based upon an alleged violation of **Giglio v. United States**, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). It is apparently collateral counsel's position that Colleen O'Brien gave false or perjured testimony, specifically as to whether she had been charged with second degree murder in this case, as to whether she had come to testify "voluntarily" and was free to return to Michigan and as to the terms of the immunity agreement, and that the prosecutor had a duty to correct this false testimony. At the evidentiary hearing below, collateral counsel adduced testimony from the trial prosecutor, Jeffery Fitos, to the effect that he did not leap up during the trial to correct any allegedly false testimony (PCR 643-650). Judge Angel denied relief on this claim, finding that, in fact, no perjured testimony had been presented; the judge further questioned collateral counsel's reading of the law (PCR 1745-1746).

As in Point I, **infra**, Appellee would suggest that things are not as cut and dried as collateral counsel assumes, and, indeed, that Routly's interpretation of **Giglio** is overbroad. **Giglio**, of course, provides that a prosecutor cannot knowingly adduce

perjured testimony or, if such is presented, allow such to go uncorrected. **See also Napue v. Illinois**, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In an instance in which such has occurred, the conviction at issue will be reversed if there is any reasonable likelihood that the false testimony effected the judgment of the jury. **Id.** In **United States v. Meros, supra,** cited with favor by this Court in **Hegwood**, the Eleventh Circuit held,

> Only in cases in which the witness' false testimony conceals his possible bias against the defendant have we found Giglio's mandate applicable. (citations omitted).

Meros, 866 F.2d at 1310.

Other federal courts have similarly observed that mere inconsistencies in testimony by government witnesses do not establish the knowing use of perjured testimony by the prosecution. **See, e.g., United States v. Griley**, 814 F.2d 967, 971 (4th Cir. 1987); **United States v. Lochmonde**, 890 F.2d 817, 822 (6th Cir. 1989). Similarly, federal courts have questioned whether a prosecutor has a duty to "correct" equivocal testimony, **see, e.g., United States v. Petrillo**, 821 F.2d 85 (2nd Cir. 1987), and have further noted that a prosecutor's unnecessary intrusion in this respect can prejudice the defense. **See Mills v. Scully**, 826 F.2d 1192, 1196 (2nd Cir. 1987) (". . . any steps the prosecutor may have taken to clarify [the witness' testimony] would have been an unnecessary interference with defense counsel's apparant decision to avoid pressing [the witness] as to her grand jury testimony.").

Keeping all of the above standards in mind, it is clear that Routly merits no relief. The convictions at issue were reversed in **Giglio, Napue** and **Brown v. Wainwright, supra,** because the jury, in each case, was given an entirely false view of the evidence. In those cases, a state witness testified, stating categorically that he had not received anything from the State in exchange for his testimony, when in fact such was not the case, and the prosecutor knew it. Nothing of this sort occurred **sub judice.** In this case, as noted, Colleen O'Brien testified, entirely truthfully, that she had in fact been promised immunity for her testimony, and the jury was able to consider this fact in weighing her testimony. At this juncture, collateral counsel is simply quibbling over certain of her specific answers which, in hindsight, may now appear to be less than precise. This is not the stuff that perjury is made of.

The first matter relates to O'Brien's legal status at the time that she testified. Defense counsel asked her whether it was true that she had been charged in July 1980 with the second degree murder of Anthony Bockini; O'Brien said, "No" (OR 932). While collateral counsel apparently views this as perjury of the rankest order, such is not the case. One thing that is clear is that Colleen O'Brien is not well versed in legal terminology; she testified at the evidentiary hearing that she felt that being taken into custody on a charge meant **not** being arrested on it (PCR 854). Additionally, it is difficult to fault O'Brien for this testimony, when she, in fact, may not have known her own legal status. She testified at the evidentiary hearing in 1988

that she had not, in fact, been aware that she could be arrested for second degree murder, if she did not testify (PCR 857-858). Likewise, prosecutor Fitos testified that, although he had filed an information charging her with the offense on June 27, 1980, she had never been arrested on the charges, and he believed that she did not know of the existence of the capias (PCR 666, 669). It would seem axiomatic that where there is no perjury, there is no **Giglio** violation.

What is most important, despite any lack of clarity as to the existence of the legal charge, is that the jury itself was not misled as to O'Brien's status in fact. Thus, although she denied the existence of this charge and additionally stated that she "guessed" that she had come to testify "voluntarily" and that she "supposed" that she would be free to go afterwards, she also told the jury that she had been threatened with arrest by the prosecutor if she did not testify and that she was presently in the custody of law enforcement officers (OR 932, 935). Again, collateral counsel wishes an unsophisticated, frightened and confused witness to be branded as a perjurer because a cold reading of her testimony reveals inconsistencies. This is not what **Giglio** holds. **Cf. Meros, supra; Griley, supra; Petrillo, supra.** Obviously, an individual's idea of what is "voluntary" varies with the individual. Whereas one person might feel that a voluntary undertaking is one motivated solely by personal desire, another might feel that a "voluntary" choice is made between two evils. Colleen O'Brien shed some light on what she meant by the term at the evidentiary hearing in 1988; she stated that her

presence at the post conviction hearing in 1988 was motivated by the same factor as her presence at trial - a desire not to be arrested (PCR 886). In this case, the jury was not misled as to O'Brien's "willingness" to appear and they were aware of both the threats and promises which had motivated her appearance. Defense counsel drew the jury's attention to such factors in closing argument, and expressly reminded the jury that O'Brien had testified that she had come to trial in order to avoid being arrested, and had further speculated to the jury that the State would not have promised not to prosecute her "if they could not prove murder against her in the first place". (OR 1154-1155). Relief under **Giglio** is not warranted as to these matters.

Routly's final claim in this regard relates to the fact that the jury did not hear O'Brien testify as to all of the terms of the immunity agreement. It is obviously collateral counsel's position that, at some point, the prosecutor should have jumped up and finished the witness's testimony for her, crying out, "Wait a minute, Colleen. Isn't there something else you'd like to tell us?". Whereas this approach may have much to recommend it from the defense standpoint (what jury is going to believe a state witness who has been called a liar by the prosecutor?), collateral counsel has, unsurprisingly, cited no precedent which specifically mandates such action under circumstances comparable to those **sub judice**. Indeed, the law would seem to be to the contrary. Appellee would respectfully submit that this case bears great similarity to **Francis v. State**, 473 So.2d 672 (Fla. 1985). In **Francis**, as here, the defendant claimed that the State

had failed to correct false testimony when it had not brought out additional details of a state witness' "deal" with the State, i.e., that in addition to granting her immunity, the State had agreed to assist her in vacating her conviction for the offense. This Court disagreed, stating,

> The State argues that the material fact in the present case was the preferred treatment to be given Duncan by the State, that the nondisclosed evidence of the exact details of how Duncan was to be rewarded for her assistance did not deprive Francis of due process of law or a fair trial, and that the relevant fact that Duncan had made a deal with the State were made known to the jury. We agree. The record reveals that it was made abundantly clear to the jury that Duncan was motivated by her own self interest to testify.

Francis, 473 So.2d at 675.

Both federal courts which reviewed Francis' claim reached similar conclusions. **See Francis v. Dugger**, 697 F.Supp. 472, 477 (S.D. Fla. 1988), **affirmed, Francis v. Dugger**, 908 F.2d 696 (11th Cir. 1990).

This case is obviously indistinguishable from **Francis** (which also has application in Point I, **infra**). Here, even though the jury did not hear all of the exact details of the immunity agreement between the State and Colleen O'Brien, the jury was most certainly aware of the material fact that she had received "preferential treatment". As noted, O'Brien testified during cross examination that, in exchange for her testimony, she would be allowed to have a "life with her baby", something which meant "everything in the world" to her (OR 936, 1123). The fact that the jury did not hear additional terms of the agreement, which,

by virtue of O'Brien's testimony at the 1988 hearing would seem to have been of little consequence to her at the time (PCR 850-865), does not mean that Routly is now entitled to relief on the basis of **Giglio. See also Hill v. Black**, 887 F.2d 513, 517 (5th Cir. 1989), **vacated**, ____ U.S. ____, 111 S.Ct. 28, 112 L.Ed.2d 6 (1990), **reinstated, Hill v. Black**, 920 F.2d 249 (5th Cir. 1990) (no **Giglio** violation where, although prosecutor did not detail witness's plea agreement to the jury, defense counsel, through cross examination, "revealed its every essential part" and impeached witness). On the basis of all of the above, the circuit court's order should be affirmed in all respects.

POINT III

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, WAS NOT ERROR

As his next point on appeal, Routly contends that his sentence of death must be vacated because attorney Fox rendered ineffective assistance at the penalty phase in 1980. Collateral counsel contends that Fox did no investigation for the penalty phase, that he failed to present a "wealth" of "available" evidence concerning Routly's troubled upbringing, that he failed to seek assistance of a mental health expert, and that he did nothing at sentencing. Collateral counsel specifically argues that Fox was ineffective for failing to provide the jury's recommendation of life with a "reasonable basis", such task "a simple requirement of Florida law" (Initial Brief at 42, n.7); in support of this proposition, counsel relies upon **Stevens v.**

State, 552 So.2d 1082 (Fla. 1989), as well as **Douglas v. Wainwright**, 714 F.2d 1532 (11th Cir.1983), and **Porter v. Wainwright**, 805 F.2d 930 (11th Cir. 1986). Similarly, in setting forth their claim for relief, collateral counsel relies upon attorney Fox's many admissions of ineffectiveness at the hearing below (PCR 491, 492, 493, 507). In denying relief, Judge Angel found that Routly had failed to demonstrate either deficient performance of counsel or prejudice, under **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and specifically noted that the newly-proffered evidence would have had no effect on the sentence (PCR 1746).

To the extent that the Initial Brief implies that defense counsel presented absolutely no evidence to either the judge or jury in support of a life sentence, it is misleading. Indeed, in Point VI of the Initial Brief, collateral counsel contends that the sentencing judge's override of the jury's recommendation must be reversed, due to the mitigation placed before the sentencer (Initial Brief at 75-80); collateral counsel never explains this contradiction. Additionally, it is clear that attorney Fox's present declarations of ineffectiveness are not binding upon any court. **See, e.g., Johnson v. Wainwright**, 463 So.2d 207, 211 (Fla. 1985) ("We do not find the lawyer's apparent willingness to confess incompetence on behalf of his former client, who faces execution, determinative or persuasive of the question of whether appellant received the effective assistance of counsel . . ."."); **Francis v. State**, 529 So.2d 670, 672 (Fla. 1988) (former counsel's admission of negligence has "little meaning or value"

under **Strickland**); **Kelley v. State**, 569 So.2d 754, 761 (Fla. 1990). They are, perhaps, of most interest to the appropriate disciplinary panel of the Florida Bar. An objective reading of the record indicates that Routly has failed to satisfy either prong of **Strickland**, and, further, that **Stevens** is completely distinguishable.

As in Point I, it is necessary for Appellee to summarize the events which occurred in 1980. Attorney Fox called Routly himself to testify during the guilt phase, and, at such time, Appellant proclaimed his innocence of the charged crime and advised the jury of the alleged illegalities in his arrest, extradition and procurement of the confession (OR 1088-1094); after the State cross-examined Routly as to the existence of his prior convictions, defense counsel, on redirect, brought out the extenuating circumstances of such offenses, **i.e.**, that Routly's conviction for attempted breaking and entering had occurred when he was a juvenile and that his conviction for escape had involved walking away from a work camp (OR 1104-1105). At the penalty phase, the State called only one witness, Timothy Teunis, Routly's parole officer in Michigan (OR 1199-1205). Defense counsel similarly used his cross examination of this witness to bring out even more mitigating information concerning Routly's prior convictions. Thus, attorney Fox elicited testimony from the witness to the effect that the alleged breaking and entering had involved simply vandalism of a school, again while Routly was a minor, and that, at the time that Routly had walked away from the work camp, he had done so because he believed that his wife was about to commit suicide (OR 1206-1207).

Attorney Fox then called Tammy McClay as a witness, and she asked the jury to spare Routly's life (OR 1210-1211). Attorney Fox also introduced into evidence the psychiatric report prepared by Dr. Fausto Natal on April 25, 1980 (OR 1214-1215; Supplement to Original Record on Appeal at 9-12). In this report, the psychiatrist reiterated Routly's view of the case, **i.e.**, that he had been misled as to the offense with which he had been charged and had only confessed to "save" his pregnant girlfriend. (**Id.**). In the background section of the report, Dr. Natal noted that Routly had had problems in school and had first sought psychiatric help while in the third grade (**Id.**). The report also includes the following:

> He was born in Flint, MI on June 12, 1955, the third (3rd) born of a family of eight (8) children. He remembered his mother as a person that 'would not touch me - she pushed me away - never hugged me - even since I was 1½ years old'. The father was the disciplinarian and was very strict. The Examinee said that 'he beat me until I bled'. 'When I was 1½ years old, my mother went across the street, leaving my younger brother alone, who was only a few months old, and he slipped down in the high chair and choked himself to death,' he reported. Since the Examinee was so young at the time, he could not rescue or save his brother, and mother blamed him for this - all the rest of his life - and she beat him up. . . . He was not stopped by the father's beatings, and first ran away from home when he was in the fifth grade. He felt like an outsider in his own family. He would sit and watch the family and felt like a stranger. When he was in the sixth grade, his mother packed his clothes several times when he tried to run away from home, but he would come back. When he graduated from high school, then his mother gave him 48 hours to leave home.

(Supplement to Original Record on Appeal at 10).

Following the introduction of the above testimony and evidence, defense counsel presented a short closing argument, focusing primarily upon the futility of capital punishment (OR 1223-1225). The jury subsequently returned an advisory sentence of life imprisonment, and Judge Angel ordered a presentence investigation report and deferred sentencing (OR 1235, 1238-1239).

A sentencing proceeding was held on September 15, 1980 (OR 1249-1279). At this time, attorney Fox set forth, in detail, certain objections that he had to the presentence investigation report (OR 1250-1263); this report does, however, also include Routly's comments concerning the difficulties of his childhood and the abuse which he suffered at the hands of his alcoholic father (Supplement to Original Record on Appeal at 4). Counsel also reiterated the extenuating circumstances of Routly's prior convictions, as well his own opposition to the death penalty (OR 1253-1255, 1263-1267). Most importantly, however, attorney Fox then presented a lengthy legal argument as to why the death penalty was not warranted in this case (OR 1268-1273). Specifically, defense counsel argued against the application of certain of the aggravating circumstances, which the prosecutor had proposed at the penalty phase, and cited specific precedents of this Court in support of his arguments (OR 1269-1271). Most importantly, attorney Fox emphasized to the judge the importance of the jury's recommendation of life under Florida law,

> When a jury has recommended life, the Florida Supreme Court has addressed this question many times as to the ultimate sentence to be imposed and I'm quoting, now, the Florida Supreme Court in saying: In order to sustain a sentence of death following a jury

> recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ; and I cite to the court *Clifford Williams v. State*, which is Case No. 50,666, decided by the Florida Supreme Court June 12, 1980. There was no more complete cite on that at the time. I also cite to the court *Provence v. State*, (sic) 355 So.2d 111, Florida Supreme Courty 1978; also *McCaskill v. State*, 344 So.2d 1276, Florida Supreme Court 1977; *Thompson v. State*, 328 So.2d 1, Florida Supreme Court 1976; *Tedder v. State*, 322 So.2d 908, Florida Supreme Court 1975.

(OR 1268).

Attorney Fox then cited to Judge Angel those cases which he considered comparable, in which this Court had reversed jury overrides and had ordered a sentence of life (OR 1268-1269, 1271-1273). Specifically, Fox argued that a life sentence was warranted in this case due to the disparate treatment of Colleen O'Briene, as well as such mitigating factors as Routly's age, his lack of significant criminal history and "the psychiatric reports which were received" (OR 1271-1272, 1279). Proceedings were again recessed, pending the court's decision.

Formal sentencing took place on November 24, 1980 (OR 1281-1308). At this time, attorney Fox brought to the court's attention other allegedly comparable cases in which this Court had reversed a sentencing judge's override of a jury's recommendation of life (OR 1285-1287); he likewise sought to distinguish those cases in which this Court had affirmed (OR 1287-1291). He maintained that life was the appropriate sentence, and contended that the defense had presented mitigation (OR 1289, 1291-1292). Judge Angel announced that he would impose a sentence of death, and, in his written findings, found the

existence of five (5) aggravating circumstances - that the homicide had been committed during the course of a felony, to-wit: kidnapping and burglary, pursuant to §921.141(5)(d), Fla.Stat. (1979); that the homicide had been committed for purposes of avoiding arrest, pursuant to §921.141(5)(e), Fla.Stat. (1979); that the homicide had been committed for pecuniary gain, pursuant to §921.141(5)(f), Fla.Stat. (1979); that the homicide had been especially heinous, atrocious or cruel, pursuant to §921.141(5)(h), Fla.Stat. (1979), and that the homicide had been committed in a cold, calculated and premeditated manner, pursuant to §921.141(5)(i), Fla.Stat. (1979) (OR 181-184). Judge Angel found no mitigating circumstances to exist in this case "statutory or otherwise", and expressly noted that, in addition to the evidence presented, he had considered the presentence investigation report and the arguments and recommendations of counsel (OR 180, 185).

Appellee suggests, on the basis of the above, that deficient performance of counsel has not been demonstrated. Prior to the rendition of the **Stevens** opinion, this Court had uniformly held that a defense counsel, who secured a recommendation of life from the jury at the penalty phase, was not ineffective. **See, e.g., Francis v. State**, 529 So.2d 670, 672 (Fla. 1988) ("A jury's recommendation of life imprisonment is a strong indication of counsel's effectiveness."); **Buford v. State**, 492 So.2d 355, 359 (Fla. 1986) ("Appellant's contention that his trial counsel rendered ineffective assistance of counsel during the penalty phase of the trial is repudiated by the fact that the jury

recommended life in this case."). Indeed, this Court has expressly rejected contentions that trial counsel, having secured a recommendation of life from the jury, was ineffective for failing to present additional evidence or argument to the judge, and has often dismissed such contentions as speculative. **See, e.g, Buford, supra** ("We refuse to find counsel ineffective by relying on the jury recommendation and failing to present further mitigating evidence to judge."); **Lusk v. State**, 498 So.2d 902, 906 (Fla. 1986) (contention that presentation of additional evidence to sentencing judge would have persuaded him to follow the jury's recommendation or would have forced this Court to disapprove override "totally speculative"); **McCrae v. State**, 510 So.2d 874, 879 (Fla. 1987) (substantial deficiency of counsel not shown by mere fact that, after jury's recommendation returned, counsel made no additional presentation of evidence to the court prior to sentencing; whether a more thorough or detailed presentation on sentencing issues could have persuaded the trial court judge to follow the jury's recommendation "wholly a matter of speculation."). Certainly it cannot be said that Routly merits relief, on the basis of the above precedents.

Stevens, likewise, does not change this result, and Appellee would respectfully submit that such case is largely limited to its unique facts. Thus, in **Stevens**, defense counsel was advised, after the jury had returned its recommendation of life, that the judge would, in fact, overrule it and sentence Stevens to death. **Stevens**, 552 So.2d at 1085. Despite this knowledge, defense counsel did nothing to dissuade the judge, and presented no

evidence or argument on behalf of his client, even though such was apparently available. Further, this Court noted that defense counsel "made inexcusable misrepresentations regarding Stevens' background and criminal history during his penalty phase summation", and further failed to provide the sentencing judge with an answer brief in response to the State's brief which had demanded the death penalty; likewise, in failing to respond to the State's arguments, defense counsel had allowed certain erroneous allegations and misstatements to go unchallenged. On the basis of all of the above, this Court concluded that defense counsel "essentially abandoned the representation of his client during sentencing." **Id.**, at 1087. Obviously, no such conclusion can be reached **sub judice**. Initially, it must be noted that, in contrast to **Stevens**, attorney Fox was certainly not "on notice" that the judge in this case intended to impose a sentence of death. Further, attorney Fox did not "abandon" his client after rendition of the jury's recommendation. While he presented no further testimony **per se**, attorney Fox vigorously contested those portions of the presentence investigation report which he considered inaccurate; similarly, he utilized the hearing of September 15, 1980, to present extensive legal arguments as to why the jury's recommendation of life should be followed. Fox even repeated some of the same arguments at the formal sentencing on November 24, 1980. Given the fact that defense counsel in this case functioned as a zealous advocate throughout the penalty process, Routly is not entitled to relief on the basis of **Stevens**.

Collateral counsel also asserts, as noted, that attorney Fox was ineffective for failing to present sufficient evidence as to Routly's background, so as to make the jury's recommendation "reasonable"; collateral counsel, however, takes grant pains not to concede that the recommendation is, in fact, unreasonable, so as not to moot out the claim presented in Claim VI, **infra** (Initial Brief at 40, 74-80).[7] While there is language in **Stevens** regarding the fact that counsel's failure to present evidence in mitigation effected the overall reliability of the sentence, **Stevens**, 552 So.2d at 1086-1088, it would also appear, from this Court's opinion, that counsel in **Stevens** presented absolutely no evidence to the jury at all. **Stevens**, 552 So.2d at 1086 ("in the absence of any mitigating evidence, the jury considered . . ."). Again, such was clearly not the case **sub**

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[7] Whether or not collateral counsel chooses to concede the point, the jury's recommendation in this case **was** unreasonable. Indeed, under applicable precedent, this Court could not have affirmed the override unless it had made such finding, **see, e.g., Tedder v. State**, 322 So.2d 908 (Fla. 1975), and this Court's finding that the recommendation is in fact unreasonable is law of the case. **Cf. Johnson v. Dugger**, 523 So.2d 161, 162 (Fla. 1988) (". . . even though jury override might not be sustained today, it is the law of the case."). Accordingly, should this Court grant any relief entailing a new sentencing proceeding, a new jury would have to be empaneled, in that Appellee can see no justification for Routly to retain the "benefit" of an unreasonable or unreliable advisory verdict. Indeed, the most recent decision of this Court in **Buford v. State**, 570 So.2d 923 (Fla. 1990), clearly indicates a necessity for such holding; in **Buford**, this Court reversed a reimiposition of the death penalty, which had been imposed following a sentencing proceeding before the judge alone, based upon a finding that, had the evidence in mitigation which was presented to the judge in 1988 been presented to the jury in 1978, their recommendation at such time would have been reasonable. The State is respectfully unaware of any provision of the Florida or United States Constitution which requires such puzzling legal gymnastics, and would respectfully request that the analysis employed in **Buford** not be followed.

judice, in that defense counsel most undisputably did present mitigation to both the judge and jury.

Further, Appellee disagrees with collateral counsel's reading of the law, to the effect that, in order to sustain a jury's recommendation of life, an attorney need only meet the "simple requirement" of presenting some evidence in mitigation (Initial Brief at 42, n.7). This Court would, itself, seem to have rejected such a simplistic approach. **See, e.g, State v. Bolender**, 503 So.2d 1247, 1249 (Fla. 1987) (granting of 3.850 motion, based on ineffective assistance of counsel, reversed, where court had found that death sentence, following jury override, could not be imposed when any evidence in mitigation had been presented); **Pentecost v. State**, 545 So.2d 861, 863, n.3 (Fla. 1989) (premise that override can never be warranted when valid mitigating circumstances exist rejected, receding from **Fead v. State**, 512 So.2d 176 (Fla. 1987)). Neither **Stevens, Douglas v. Wainwright**, nor **Porter v. Wainwright**, support such contention; in **Porter**, the federal court simply reversed for an evidentiary hearing, whereas in **Douglas**, the Eleventh Circuit found counsel ineffective for making disloyal comments concerning his client to the sentencing judge.

Additionally, Appellee strongly disagrees with the contention that trial counsel in this case failed to present "available" evidence in mitigation concerning Routly's troubled background. This case represents an example of a not uncommon phenomenon in capital litigation - family members, who wanted nothing to do with the defendant at the time of his trial, coming

forward with detailed proffers of testimony years later, after a death warrant has been signed. There has been absolutely no showing that the family members who have submitted affidavits (Defense Exhibit #19, PCR 1820-1832, 1848-1855, 1872-1884), were willing or able to testify in 1980; it should also be noted that none of these witnesses testified at the 1988 evidentiary hearing. Attorney Fox testified that he did in fact contact Routly's mother concerning her possible testimony at the penalty phase, and that in 1980, she had indicated a complete lack of interest in participating, stating that she could not afford to travel to Florida for the trial (PCR 405, 407, 436); Fox stated that he believed that he had also talked to another family member at the time, apparently with similar results (PCR 411). Defense counsel stated that he had gotten the impression that Routly's mother did not like him very much, and he also testified that Routly himself had discouraged counsel from calling his family, telling Fox to "leave them out of it" (PCR 436-438). Fox also testified that he had contacted one of the schools which Routly had attended in Michigan, and that he believed that he had secured a letter from the principal regarding Routly's behavioral problems while there (PCR 405). Fox stated that he believed that it was this letter which he had introduced at the penalty phase, along with Dr. Natal's report (PCR 426); unfortunately, while it is clear that Fox did indeed move into evidence two exhibits at the penalty phase (OR 1214-1215), the second exhibit was omitted from the record on appeal, and its precise identity has never been determined. Fox did, however, affirm that he had offered

Dr. Natal's report into evidence "for mitigation", and acknowledged that it contained details of Routly's troubled upbringing and parental abuse (PCR 438-441); Fox also noted that an advantage to the admission of a report, as opposed to live testimony, was that such could not be cross-examined or impeached (PCR 441).[8]

Appellee suggests that, under all of the circumstances of this case, deficient performance of counsel has not been demonstrated, given what attorney Fox had to work with and what he achieved. **Cf. Blanco v. Wainwright**, 507 So.2d 1377, 1382 (Fla. 1987) (counsel not ineffective for failing to present testimony of family members at penalty phase as to defendant's background, where, **inter alia**, record indicated that witnesses did not wish to testify); **Henderson v. Dugger**, 522 So.2d 835, 838 (Fla. 1988) (counsel not ineffective for failing to call family members at penalty phase where, **inter alia**, defendant refused to cooperate or allow such); **Cave v. State**, 529 So.2d 293, 297-298 (Fla. 1988) (counsel not ineffective for failing to call family

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[8] Despite offering this testimony, attorney Fox still maintained his opinion that he was, in fact, ineffective (PCR 491, 492, 493, 507). Appellee would note, however, that attorney Fox's identical actions in another capital case have been found to constitute effective performance. Thus, in the **Lightbourne** case, both this Court and the federal courts concluded that Fox's method of introducing background information concerning his client, in the form of a written report, as opposed to through the presentation of live testimony, was reasonable. **See Lightbourne v. State**, 471 So.2d 27 (Fla. 1985); **Lightbourne v. Dugger**, 829 F.2d 1012, 1024-25 (11th Cir. 1987). Significantly, this result was reached, despite the fact that attorney Fox, as here, proclaimed his own effectiveness throughout the post conviciton proceedings. Appellee respectfully submits that defense counsel **sub judice** should be found to be effective, even if such is apparently against his express wishes at this point.

members, where trial counsel below testified that mother refused to be involved in case; mother's failure to attend trial, despite knowledge of its occurence, "suggests either a lack of interest or a desire not to be linked to [defendant]."). The fact that more detailed information has been presented eight years after the fact does not mean that counsel's performance in 1980 was deficient. **See Maxwell v. Wainwright**, 490 So.2d 927, 932 (Fla. 1986). Judge Angel's finding that counsel was not defective for failing to present additional background information was correct, and should be affirmed.

A similar result is warranted as to counsel's alleged failure to investigate or present mental mitigation, although the State would respectfully submit that such claim was abandoned in the circuit court below. Although Routly was afforded an evidentiary hearing on his claim of ineffective assistance of counsel, he failed to call as witnesses those experts whose affidavits are contained in the appendix to the post conviction motion (PCR 1218-1229). Accordingly, inasmuch as these allegations have never been substantiated, and inasmuch as the State has had no opportunity to cross examine the authors of these affidavits, Appellee can see no reason why any allegations raised therein must be credited on appeal; accordingly, the State respectfully moves this Court to disregard any of the arguments contained in the Initial Brief on this point (Initial Brief at 57-58).

Assuming, however, that this matter is not abandoned, Appellant's contention is nevertheless not well-taken. Defense

counsel below had Routly examined by Dr. Natal, a psychiatrist, and the doctor's report makes clear that he was well aware of Routly's background and the fact that he had sought psychiatric help at an early age (Supplement to Original Record on Appeal at 9-12). Dr. Natal found "no obsessions, phobias, hallucinations or delusions", and diagnosed Appellant as suffering from an anti-social personality disorder (**Id.**, at 12). The 1985 reports now contained in the appendix are not more favorable. The neuropsychologist, Dr. Vallely, found no indication of any psychotic processes or organic brain dysfunction; he also measured Routly's IQ as 95, or average (PCR 1227-1228). While Dr. Krop apparently found that the results of Routly's MMPI "suggested" a chronic emotional disturbance, "most likely a character disorder or paranoid-type schizophrenia", he also found "no indications of psychotic processes." (PCR 1224). Appellee respectfully suggests that the equivocal "suggestion" by a mental health expert, retained years after the trial, does not throw into doubt the effectiveness of counsel's representation in 1980, and further suggests that Routly has failed to adduce any competent substantial evidence to the effect that his childhood traumas resulted in any life-long psychological problem. Relief is not warranted as to this portion of Appellant's claim.

Appellee also suggests that Judge Angel did not err in denying relief, on the basis of lack of prejudice under **Strickland v. Washington**. It must be noted that, to some extent, the evidence now proffered is cumulative to that which the judge and jury actually heard in 1980. Thus, Dr. Natal's report

contained information concerning the abuse that Routly suffered from both of his parents - the beatings from his father and the emotional torture inflicted by his mother (Supplement to Original Record on Appeal at 10). This Court has consistently found a lack of prejudice under **Strickland**, when the unpresented evidence in mitigation is cumulative to that already before the sentencer. **See, e.g., Maxwell, supra; Provenzano v. Dugger**, 561 So.2d 541 (Fla. 1990); **Jackson v. Dugger**, 547 So.2d 1197 (Fla. 1989). Further, while it is perhaps true, as attorney Fox testified below, that it is often preferable to have "live" witnesses testify as to these type matters, so that they can "cry on the stand and things like that" (PCR 441), Appellee would respectfully submit that a sentencing judge, in deciding whether or not to override a jury's recommendation, is much less inclined to be swayed by such an emotional appeal, than a venire of laypersons; additionally, a judge, as opposed to a jury, is much less likely to place undue emphasis upon the repetition of testimony, and a judge, who customarily receives such matters in such fashion, will draw no adverse inference from the fact that defense counsel has chosen to submit information in the form of a written report, as opposed to through live testimony. Accordingly, Appellant is not entitled to any relief on this basis.

Appellee does recognize, however, that some of the matters now proffered, specifically as to Routly's being classified as an emotionally handicapped child in the fourth grade, as evidenced by the testimony of Janet Fouts (PCR 519-574), were not presented

to the judge or jury in 1980. Appellee respectfully suggests, however, that reasonable probability exists of a different result at sentencing, had this evidence been presented at such time. **Cf. Washington, supra.** On one hand, Routly's emotional problems in school were, apparently, the result of the abuse which he was then suffering in the home; as noted, both the judge and jury were already aware of this abuse, and Appellee respectfully suggests that testimony as to how such effected Routly, as a fourth grader in 1965, was not critical to an individualized sentencing. On the other hand, testimony as to Routly's behavior in school would seem to have been something of a two-edged sword, in that his mode of "acting out" his feelings apparently involved violent disturbances of class, attacks upon other students and extensive vandalism of school property (PCR 1900); Routly's conviction for attempted breaking and entering in 1974 stemmed from vandalism of a high school which involved over four thousand dollars ($4,000) in damages (Supplement to Original Record on Appeal at 6). Whether a judge of jury might regard such as "mitigating" would seem open to dispute, and Appellee would additionally suggest that the sentencer could regard this evidence as remote. **Cf. Stone v. State,** 481 So.2d 478 (Fla. 1985) (no prejudice under **Strickland** due to counsel's failure to present evidence as to remote incident in defendant's childhood); **Francis v. State, supra.**

No reasonable probability exists of a different result at sentencing, had this evidence been presented in 1980, because the evidence now proffered in mitigation would have had no effect

upon the substantial findings in aggravation by the sentencer. Routly was twenty-four at the time that he committed this offense, and had been living on his own for a number of years. He had served time in prison, held employment and married and fathered a child, whom, apparently, he subsequently failed to support. At the time of this crime, Routly was living in Florida with two of his girlfriends. The evidence now proffered as to the problems which he experienced in grade school says nothing about his culpability for the instant homicide. The victim in this case was a seventy-five year old retiree who made the fatal mistake of attempting to befriend one of Routly's girlfriends. In exchange for that, he was relieved of his money and his car, bound hand and foot, gagged with a bandana which belonged to Routly, placed in the trunk of his own vehicle, driven to a remote location and murdered. There can be no doubt that the victim suffered extreme mental anguish prior to his death, in that, while imprisoned in the trunk, he frantically attempted to signal for help, by fumbling with the wires of the taillights; once Routly detected this, he pulled the car over and shot the victim. Appellant has failed to demonstrate prejudice under **Strickland**. **Cf. Buenoano v. Dugger**, 559 So.2d 1116, 1119 (Fla. 1990) (no prejudice under **Strickland** where unpresented evidence as to defendant's childhood creates no reasonable probability of outweighing applicable aggravating circumstances).[9]

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[9] The record also supports a finding that Routly was on parole at the time of the homicide, §921.141(5)(a), Fla.Stat. (1979), based on the testimony of his parole officer (OR 1200-1201). **See, e.g., White v. State**, 403 So.2d 331, 337 (Fla. 1981).

Appellee also finds it significant that it was the original sentencing judge, Judge Angel, who presided over the 3.850 proceeding in this case, and who found a lack of prejudice, as to the unpresented evidence in mitigation. Whereas collateral counsel dismisses this fact as trivial, under **Hall v. State**, 541 So.2d 1125 (Fla. 1989) (Initial Brief at 59), Appellee cannot agree, and would note that **Hall** was not a case involving a claim of ineffective assistance of counsel arising out of a jury override. The most applicable precedent **sub judice**, is unquestionably **Francis v. State**, 529 So.2d 670 (Fla. 1988). **Francis** is also an override case, and when the original sentencing judge therein denied the 3.850 motion, which in turn had alleged ineffective assistance of counsel at the penalty phase due to counsel's failure to present background information as to the defendant, he found that the newly-proffered evidence "would not have altered Francis' sentencing." **Id.**, at 673. In a footnote, this Court observed,

> The judge who heard this motion presided at Francis' third trial. Who, better than he, could determine whether failure to introduce this evidence prejudiced Francis sufficiently to meet the *Strickland v. Washington* test? Post conviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.

Francis, 529 So.2d at 673, n.9.

As collateral counsel concedes, Judge Angel made a similar finding in this case, to the effect that the newly presented evidence "would have had no effect on Routly's sentence" (PCR 1746). On the basis of all of the above precedents and

arguments, the circuit court's denial of relief as to this claim should be affirmed in all respects.

POINT IV

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, WAS NOT ERROR

Routly also contends that he is entitled to a new trial, because attorney Fox rendered ineffective assistance at the guilt phase of the trial, as well. Collateral counsel identifies three (3) specific deficiencies in counsel's performance: (1) counsel's litigation of Routly's motion to suppress his confession, based upon alleged illegalities in the extradition process and alleged promises made to Routly; (2) counsel's cross examination of Colleen O'Brien, and (3) counsel's failure to move for a mistrial following a jury request. As in the preceding point, Judge Angel denied relief below, finding that Routly had failed to demonstrate either deficient performance of counsel or prejudice under **Strickland v. Washington;** as to the claim involving the admission of the confession, the judge likewise noted that this matter had already been raised on appeal (PCR 1746). Appellee respectfully submits that the circuit court was correct in all respects, and that its ruling should be affirmed. Each of the three claims will now be addressed.

(A) Counsel's Litigation of the Confession Issue

As noted, collateral counsel contends that attorney Fox rendered ineffective assistance in 1980 through his failure to properly litigate Routly's claim involving the admission of his

confession; specifically, counsel is faulted to failing to argue in 1980 that Routly's extradition was illegal, in that no charge was pending at the time of Routly's waiver, and in failing to argue that Routly's confession was involuntary because it had been induced through promises by law enforcements officers (Initial Brief at 60-66). As will be demonstrated below, the simple answer to the above is that, in fact, attorney Fox raised all of these matters in the trial court in 1980, and, hence, ineffective assistance of counsel has not been demonstrated under **Strickland v. Washington**. Appellee suggests, however, that, as noted by the trial court, it is also significant that Routly did in fact raise a claim of error in his direct appeal to this Court concerning the admission of his confession. Although this Court held that attorney Fox's objection, at the time that the confession was actually admitted, had been insufficiently specific, **see Routly**, 440 So.2d at 1260-1261, this Court then did, alternatively, address the merits of Routly's arguments, and conclusively rejected them. **See Routly**, 440 So.2d at 1261. It is, of course, well established that a defendant cannot present issues, which either could have been raised on direct appeal, or which actually were raised, and rejected, on direct appeal, on 3.850 in the guise of claims of ineffective assistance of counsel. **See, e.g., Medina v. State**, 573 So.2d 293, 295 (Fla. 1990) (claim involving admission of defendant's confession could not be relitigated on 3.850, in guise of ineffective assistance of counsel claim); **Woods v. State**, 531 So.2d 79, 82 (Fla. 1988); **Quince v. State**, 477 So.2d 535, 536 (Fla. 1985); **Sireci v. State**,

469 So.2d 119 (Fla. 1985). Accordingly, Appellee would contend that this portion of Routly's claim of ineffective assistance of trial counsel is procedurally barred.[10]

To the extent that this Court disagrees, Appellee would nevertheless contend that relief is not warranted under **Strickland v. Washington**. As in the preceding points, the State must set forth what actually occurred at trial. The record reflects that attorney Fox filed a motion to suppress Routly's confession on January 31, 1980, on the grounds that such had been obtained illegally (OR 14). Fox filed a memorandum of law in support thereof on April 15, 1980 (OR 34-42). In this memorandum, Fox specifically contended that Routly's waiver of extradition in Michigan had been illegal, because no Florida charge had then been pending (OR 34); likewise, Fox maintained that the evidence would show that Routly's confession had been obtained illegally, due to improper promises made by law enforcement officers, to the effect that he had been told that he would only be charged with second degree murder (OR 40).

A portion of the suppression hearing was also held on that day, at which Investigator Jerald, of the Marion County Sheriff's Department, testified (OR 200-228). At this time, Jerald

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[10] In the **pro se** Initial Brief, filed August 9, 1990, Routly himself also seeks this Court's review of a comparable claim on the merits, to the effect that his confession should not have been admitted (**Pro se** Brief at 28-36). This claim is likewise clearly procedurally barred, under this Court's precedents. **See, e.g., Medina v. State**, 573 So.2d 293, 294-295 (Fla. 1990) (claim involving admission of confession procedurally barred on 3.850); **Cave v. State**, 529 So.2d 293, 295 (Fla. 1988) (same); **Palmes v. State**, 425 Sop.2d 4, 5-6 (Fla. 1983) (claim that defendant's statement should have been suppressed as fruit of illegal arrest procedurally barred on 3.850).

testified that when he had first come in contact with Routly in Michigan on December 5, 1979, he had advised Appellant of his rights, under **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that Routly had appeared to understand them, and that he had then waived his rights and given a confession (OR 202-205); the witness specifically stated that Routly had not been promised anything, including a lesser sentence or a "break" for Colleen O'Brien, in exchange for his statement (OR 207-208, 225). Jerald stated that he had not formally arrested Routly on the Bockini homicide until Appellant had been returned to Florida (OR 210). He stated, however, that, after Routly's statement in Michigan, he had contacted the State Attorney's Office in Florida and had advised them of Routly's status; at such time he had been advised that a warrant for second degree murder was being drawn up (OR 211). On examination by attorney Fox, Jerald stated that he had been present when Routly waived extradition in Michigan (OR 211-212). Fox then pointed out to the court,

> Let me suggest to the court that a constitutional prerequisite to his extradition was that a charge, a crime, against Dan Routly was existing in Florida at the time that he waived extradition; and the court will clearly see from taking judicial notice of the contents of the file that in fact no charge of second degree murder existed until long after he was booked into the Marion County Jail.

(OR 214).

The hearing resumed the next day, at which another Marion County officer, Investigator Alioto, testified (OR 238-256). Alioto corroborated Jerald's testimony, to the effect that Routly had been advised of his rights, that he had understood them, and

that he had waived them (OR 242, 248-249); he likewise testified that no threats or promises had been made, including any promise that Colleen O'Brien would be released if Routly made a statement (OR 242, 254). Attorney Fox then called Routly himself to the stand, and Appellant offered contrary testimony, to the effect that he had never been advised of his rights, that he had been told that, if he gave a statement, O'Brien would be freed, and that, at most, he had been told that he would receive a ten to fifteen year sentence (OR 257-262). At the conclusion of the hearing, the judge announced that he would deny the motion (OR 272-273).

As noted, trial commenced in this case on July 14, 1980. At Routly's request, Fox objected to the court's jurisdiction, on the basis of the allegedly illegal arrest (OR 328-330). Fox likewise made a challenge to the court's jurisdiction, based upon the fact that Routly had been arrested on a charge which did not then exist (OR 443-444). Subsequently, the State called Officer Randall Black of the Flint Police Department, who testified that, while on duty on the evening of December 5, 1979, he had, at the request of a radio communication, followed and stopped a vehicle operated by Appellant; Black stated that the car had been operating at a high rate of speed and without any headlights, both traffic offenses in Michigan (OR 991, 993). Black stated that he had arrested Appellant because he had been advised that Routly was wanted for questioning in a Florida murder; however, he also noted that he had been advised that there were also "other charges" (OR 992-993). When the State then announced that

it intended to call Investigator Alioto, so as to introduce Routly's statement, attorney Fox requested a proffer, so that the judge could consider the testimony of the Michigan officers, who had not been previously available (OR 998); the request was granted.

Three witnesses testified at this proffer (OR 1000-1034). Sergeant Michael Hanna of the Flint Police Department testified that, as of December 5, 1979, there were several outstanding criminal warrants for Routly's arrest pending, involving Michigan charges, and that the officer had, in fact, been looking for Routly on such basis (OR 1001). He testified that Routly was arrested on the night in question and that he had come into contact with him at the station (OR 1002). He stated that he was present when Routly was advised of his **Miranda** rights, that he had not heard the officers promise Routly anything in exchange for his statement, and that Routly's statement had appeared to be voluntary (OR 1004, 1008). Officer Forstick of the Flint Police Department also testified (OR 1013-1021). He likewise stated that he had been present during Routly's statement, that Appellant had been advised of his rights, and that he had never heard Routly being told that he would only be charged with second degree murder (OR 1014-1015, 1020); the officer testified that it was his understanding that Routly was under arrest for the Michigan charges (OR 1015). Finally, Routly himself testified (OR 1023-1031). Routly again denied that he had ever been advised of his rights, and claimed for the first time that he had requested an attorney; he likewise stated that he had been

promised that he would only be charged with second degree murder and that he had been told that, if he gave a statement, Colleen O'Brien would be released (OR 1023-1027). Routly specifically affirmed that he had waived extradition on the offense of second degree murder (OR 1028). After this testimony, attorney Fox formally asked the court to take judicial notice of the extradition transcript which he had previously introduced into the record (OR 1035; 98-101). Attorney Fox then strenuously argued that the State had failed to prove the voluntariness of the statement (OR 1035-1041). Judge Angel announced that he found the statement admissible, and voluntary, and, prior to its formal introduction, Fox interposed an objection (OR 1041, 1051).[11]

Accordingly, it is the State's position that deficient performance of counsel has not been demonstrated under **Strickland v. Washington**, in that attorney Fox in 1980 made all of the same arguments which collateral counsel now charges that he did not. Specifically, he introduced the transcript of the evidentiary hearing in Michigan, and contended that the proceeding had been invalid because the charge of second degree murder had not existed at the time of the waiver (OR 214, 1035). Likewise, he strenuously argued Routly's version of events, to the effect that his confession had been involuntary, due to promises and threats

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[11] Although this Court found, on appeal, that this final objection had not been sufficiently specific, **Routly**, 440 So.2d at 1060-1061, there has obviously been no prejudice under **Strickland**, in that this Court nevertheless performed an alternative merits review, and concluded, ". . . even if he had preserved this argument, we would hold it to be without merit." **Id.** at 1261.

(OR 40, 1035-1041). The fact that these arguments were not successful is not attributable to counsel's performance. Accordingly, no relief is warranted as to this procedurally barred claim.

Although Appellee would contend that any discussion of prejudice is unnecessary, certain observations would seem to be in order. As to any alleged illegality in Routly's arrest, it should be noted that this Court expressly found, on direct appeal, that probable cause had existed to support the arrest, not only based upon Colleen O'Brien's statement, as to this homicide, but also due to the existence of the pending Michigan charges. **Routly**, 440 So.2d at 1261. The fact that Officer Black had not been privy to all of this information was found to be irrelevant. **Id.** Routly has presented nothing to call this holding into question. **See also Carroll v. State**, 497 So.2d 253 (Fla. 3rd DCA 1985), **cert. denied**, 511 So.2d 297 (Fla. 1987) (discussion of "fellow officer rule"); **Whiteley v. Warden of Wyoming Penitentiary**, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); **United States v. Hensley**, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); **Thomas v. State**, 395 So.2d 280 (Fla. 3rd DCA 1981).

As to any alleged "glitch" in the extradition process, i.e., the fact that the waiver may have preceded the formal charge, collateral counsel has failed to demonstrate what effect such fact would have on Routly's conviction; inasmuch as the confession preceded the waiver of extradition by a good twelve hours, it is difficult to see how any irregularity in the latter

could "taint" the former. In any event, Routly's remedy would seem to have been to contest the extradition in Michigan, and his having failed to do so, waived any claim of error in this regard. **See, e.g., Hunter v. State**, 174 So.2d 415 (Fla. 3rd DCA 1965) (after defendant had been returned to demanding state, it was too late to litigate claim that he had not signed a waiver of extradition and that warrant itself had not been signed by governor); **Akins v. Hamlin**, 327 So.2d 59 (Fla. 1st DCA 1976) (failure of state to utilize, or employ, extradition process no bar to conviction). It should also be noted that both Florida and Michigan allow for a fugitive to be arrested without a warrant, **see** §941.14, Fla.Stat. (1979), §780.13 Mich.Stat. (1979), and that Florida expressly provides that, while written waivers of extradition are obviously favored, "nothing in [the] section shall be deemed to limit the rights of an accused person to return voluntarily and without formality to the demanding state." **See** §941.26, Fla.Stat. (1979). Of course, the fact that Routly was ultimately charged with, and convicted of, first degree murder is of no moment. **See, e.g., Lascelles v. Georgia**, 148 U.S. 537, 13 S.Ct. 687, 37 L.Ed. 549 (1893) (defendant may be charged with different offense than that which extradited upon); **Jones v. State**, 386 So.2d 804 (Fla. 1st DCA 1980).

Finally, as to this last matter, the State would simply note that, although collateral counsel apparently views the existence of the second degree murder charge as evidence of a fiendish plot by the State to hoodwink Routly, the record indicates otherwise. At the hearing below, there was testimony presented to the effect

that, at the time that the Florida officers traveled to Michigan to interview Colleen O'Brien, Routly was not in custody and there was no expectation that he would be. When Routly was arrested, a warrant for second degree murder was drawn up, because, in the absence of a grand jury indictment, such was the highest offense which could be charged (PCR 230, 250, 675-676). Further, the testimony from the police officers, both at trial in 1980 and at the 1988 hearing, is uniformly to the effect that there were no promises of any sort made to Routly, including any promise that he would only be charged with second degree murder (OR 207-208, 225, 242, 248-249, 251, 1020, 1049; PCR 129, 248-249). While it is apparently collateral counsel's position that the State can never prove that a statement was voluntary as long as the defendant continues to maintain otherwise (Initial Brief at 65-66), no caselaw has been cited in support of this extremely dubious assertion. Neither deficient performance nor prejudice has been demonstrated under **Washington**, and no relief is warranted as to this procedurally barred claim.

(B) Counsel's Cross Examination of Colleen O'Brien

In this portion of the claim, collateral counsel contends that attorney Fox's cross examination of Colleen O'Brien was ineffective. There are, essentially, two components to this argument. On one hand, collateral counsel argues that attorney Fox was ineffective for not utilizing on cross examination the matters which the State had allegedly withheld from him (Initial Brief at 66-67). On the other hand, collateral counsel also contends that, even if the allegedly undisclosed matters did not

exist, trial counsel was still have been ineffective (Initial Brief at 67-69). Attorney Fox, ever obliging when establishing his own ineffectiveness, offered testimony below in support of both defense theories (PCR 389-397, 507). As this Court noted in **Roberts v. State**, 568 So.2d 1255, 1259 (Fla. 1990), there is a certain inconsistency in simultaneous **Brady** and **Washington** claims - "[c]ounsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the State." Whereas there might be some justification for such inconsistent allegations in **Roberts**, inasmuch as no evidentiary hearing was held therein, Appellee can see no such justification **sub judice**. Collateral counsel was afforded a hearing in this case, and, presumably, should be aware of which, if any, of the inconsistent allegations presented were actually proven. Appellee does not see why it must be the State's burden, at this juncture, to defend against everything that Routly has ever alleged.

It is, perhaps, not completely necessary to resolve the above legal quagmire. The United States Supreme Court recognized in **Bagley**, that the "materiality" standard of **Brady** was the equivalent of the "prejudice" standard of **Washington**, each requiring a showing of reasonable probability of a different result, but for the act or omission at issue. **Bagley**, 473 U.S. at 682-683. Because, as maintained in Point I, **supra**, Routly has failed to demonstrate materiality as to the allegedly undisclosed matters which could have been used to further impeach Colleen O'Brien, he has likewise failed to demonstrate prejudice under **Strickland v. Washington**.

Appellee would go even further, however, and also contend, attorney Fox's 1988 testimony notwithstanding, that deficient performance of counsel has likewise not been demonstrated. As noted earlier, attorney Fox's cross examination in 1980 brought out the fact that O'Brien had been granted immunity in exchange for her testimony, that she was presently in the custody of law enforcement officers and that she had been threatened with arrest if she did not appear; likewise, Fox elicited testimony from O'Brien to the effect that one of the terms of the immunity agreement was that she would be allowed to have a life with her baby, something which was worth "everything in the world" to her (OR 932-936, 972). As also noted, defense counsel utilized this testimony in his closing argument, when he reminded the jury of O'Brien's interest in the case (PCR 1123, 1125, 1128, 1154-1155).

Appellee respectfully submits that Appellant has failed to demonstrate that no reasonably competent attorney in 1980, in attorney Fox's position, would have concluded that the above cross examination was sufficient, or, in other words, that it would be totally outside the wide range of reasonable professional assistance, for any attorney to have halted cross examination at such point in time. **See Washington, supra.** Again, the State would maintain that when a witness has identified her primary motivations for testifying, which, in her own words, relate to the most important thing in the world to her, further interrogation would seem pointless, if not counterproductive. During his closing argument, the prosecutor described O'Brien as "quite meek" and "not the most intelligent

person in the world." (OR 1142). Assuming that these characterizations are accurate (and nothing has refuted them), it is clear that competent counsel could quite well conclude that putting O'Brien through the Ocala version of the Spanish Inquisition would serve little purpose, especially given the answers which she had already provided. No relief is warranted as to this portion of Routly's claim.

A similar result should obtain as to Routly's contention unrelated to **Brady**. Thus, collateral counsel argues that attorney Fox did not effectively cross-examine Colleen O'Brien, because he did not question her as to her alleged "psychiatric counseling" and as to the alleged existence of a pending Michigan charge (Initial Brief at 68). Neither argument is convincing. Collateral counsel adduced the following testimony from O'Brien at the 1988 hearing:

> Q (By Mr. Nolas): Okay. During the trial or during the deposition, you indicated at one point that at some point before you had seen Mr. Routly that you had seen a psychiatrist.
>
> A: Yeah.
>
> Q: A psychologist. What was that all about?
>
> A: We were supposed to get married and --
>
> Q: Who is we, now?
>
> A: Me and Dan.
>
> Q: Okay.
>
> A: And then --
>
> Q: And it broke up?
>
> A: I spent a lot of money and I bought one car and he blew it up trying to help him find a job and then I bought him another car and

there was an agreement that he was supposed to make the payments.

Q: Okay. But -- but everything fell apart, basically?

A: Yeah.

Q: Okay. What -- when you saw -- how many times did you see the psychiatrist?

A: I think just once that I remember.

Q: Okay. Did they -- how long did they talk to you for?

A: Probably an hour.

(PCR 893-894).

Collateral counsel similarly elicited, at the hearing below, testimony concerning the allegedly pending charges against O'Brien. Thus, Sergeant Michael Hanna testified that he had in fact been looking for O'Brien in the summer of 1979, in regard to a larceny complaint filed against her and Routly by her own mother (PCR 140-141). This larceny involved the theft of twenty-six thousand dollars ($26,000). According to Hanna, however, O'Brien's mother indicated that she did not wish to press charges against her daughter after learning of the instant homicide; she did, however, wish to prosecute Routly (PCR 141). The 1988 examination of Colleen O'Brien by collateral counsel likewise revealed the following:

Q (By Mr. Nolas): Okay. When you mentioned before that you were arrested for what they told you when they arrested you in Michigan, was that there were some -- some charges in Michigan, what was that all about?

A: With my mom.

Q: Okay. What -- what happened with your mom?

A: He had taken some money from my mom.

Q: Okay. Who had?

A: Dan.

Q: Okay. Then why would they want to charge you with it?

A: Because I guess they figured I was involved with it.

Q: Okay. Were you involved in taking anything from your mom?

A: I didn't take it from my mom and I asked him to give it back.

(PCR 871).

Appellee respectfully submits that no reasonable probability exists that, had the above cross examination been presented in 1980, as opposed to 1988, the result of Routly's trial would have been different. **Cf. Washington, supra.** Obviously, the answers elicited through the above cross examination reflect much less favorably upon Dan Routly than they do on Colleen O'Brien. While the expert retained by collateral counsel did, indeed, feel that attorney Fox's cross examination had been ineffective, it is difficult to regard such testimony as binding upon any court, in that such expert was likewise unfamiliar with the standards of **Strickland v. Washington** (PCR 741-742, 734-737, 752). Neither deficient performance of counsel nor prejudice has been demonstrated under **Washington**, and no relief is warranted as to this claim.

(C) Counsel's Failure to Move for a Mistrial

The final attack upon counsel's competence relates to his failure to move for a mistrial, when, during a jury question, the foreman of the jury indicated that they had not heard the testimony of Colleen O'Brien. At the hearing below, both attorney Fox and the expert retained by collateral counsel opined that such omission had constituted ineffective assistance (PCR 414-415, 743-744). In the Initial Brief, collateral counsel contends that attorney Fox was ineffective because Colleen O'Brien "was the State's case." (Initial Brief at 71). The record indicates that, after the jury had begun its deliberations, it returned with three requests; the foreman indicated that the jury wanted a tape recorder, in order to be able to play the taped confession, as well as a transcript of the testimony of Colleen O'Brien and of William Doran (OR 1187); the foreman said, "We weren't able to hear the testimony of Miss O'Brien." (OR 1187). Neither of the attorneys objected to the tape recorder being sent back to the jury, but both pointed out that no transcript of any testimony was available; Judge Angel indicated that he would instruct the jury to rely upon their own recollection, and both counsel indicated agreement with such solution (OR 1187-1188). Following Routly's conviction, attorney Fox filed a motion for new trial, on July 28, 1980, and, in such pleading, argued that Judge Angel should have granted a mistrial in light of the above (OR 168); the motion was later denied (OR 172).

Appellee would respectfully contend that neither deficient performance of counsel nor prejudice has been established under **Strickland v. Washington**. Collateral counsel has failed to show that no reasonably competent attorney, in Fox's position in 1980, would have failed to move for a mistrial, or that such omission falls outside the wide range of reasonable professional assistance. **See Washington, supra**. Appellee would submit that an attorney in Fox's position, who has just been advised by the jury that they had not in fact heard the testimony of the State's critical witness, is literally "sitting in the cat bird seat." Counsel knows that the chances for acquittal have just gone up, inasmuch as the jury has indicated that it has not heard the testimony of a witness whom collateral counsel describes as "the State's case." Similarly, counsel knows that, if in fact a conviction results, he can raise this point later, as attorney Fox did **sub judice**, in a motion for new trial. Appellee would maintain that the one thing that counsel would not want at such point in time would be a mistrial prior to the verdict, inasmuch as he could be sure that, at any retrial, the State would make every effort to assure that the jury in fact heard every single word of O'Brien's testimony. Accordingly, the State would contend that attorney Fox did, in fact, act reasonably in 1980, even if, for his own reasons, he now wishes to disavow such fact. **Cf. Johnson, supra; Francis, supra; Kelley, supra**. Further, the contrary view of collateral counsel's expert is similarly flawed, due to his unfamiliarity with **Strickland** (PCR 734-737, 752).

There has also been a lack of prejudice demonstrated. Although collateral counsel grumbles that Fox's omission was "premised upon ignorance of the law" (Initial Brief at 71), collateral counsel has come forward with no Florida precedent which would have indicated that a motion for mistrial, even if made at such juncture, had any reasonable probability of being granted. Motions for mistrial are addressed to the sound discretion of the court, **see, e.g., Dufour v. State**, 495 So.2d 154 (Fla. 1986), and it should be remembered that the jury's request was primarily directed towards something that did not exist - a transcript of the witness's testimony. Further, collateral counsel has cited no Florida precedent, to the effect that Fox's presentation of this claim in his motion for new trial was untimely; collateral counsel has likewise failed to demonstrate that any reasonable probability exists that a timely objection on this matter would have affected the result of the proceedings, in that a trial court likewise enjoys wide discretion in deciding whether or not to have testimony reread to the jury upon request. **See, e.g., Kelley v. State**, 486 So.2d 578 (Fla. 1986); **Haliburton v. State**, 561 So.2d 248 (Fla. 1990). Accordingly, relief is not warranted under **Strickland**. The circuit court's denial of relief as to this claim, in its entirety, should be affirmed in all respects.

POINT V

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S PROCEDURALLY BARRED CLAIM BASED ON BOOTH v. MARYLAND, 482 U.S. 496, 107 S.CT. 2529, 96 L.Ed.2d 440 (1987), WAS NOT ERROR

In this claim, collateral counsel contends that Routly's sentence of death must be vacated, because Judge Angel allegedly considered improper "victim impact" evidence, contrary to **Booth v. Maryland**, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), in overriding the jury's recommendation; specifically, in the sentencing findings relating to the homicide having been heinous, atrocious and cruel, the judge had observed that the victim had been an elderly retiree who had done volunteer work (OR 183). Collateral counsel maintains that this Court's decision in **Jackson v. Dugger**, 547 So.2d 1197 (Fla. 1989), excuses the lack of contemporaneous objection, and renders this claim cognizable on 3.850 (Initial Brief at 73). In his order below, Judge Angel did, indeed, find this claim procedurally barred, but also made an alternative ruling on the merits (PCR 1380-1381). Such ruling should be affirmed in all respects.

As to the issue of procedural bar, it is difficult to see why Routly relies upon **Jackson v. Dugger**. In such opinion, this Court reviewed, on habeas corpus, a contention based upon **Booth**; this Court explained its decision to do so, noting that the claim involving "victim impact" had, in fact, been raised earlier and rejected on direct appeal. Inasmuch as this is not a habeas corpus action, and inasmuch as Routly has never raised any comparable claim on appeal, **Jackson** obviously lacks application **sub judice**. **See also Parker v. Dugger**, 550 So.2d 459, 460 (Fla.

1989) (distinguishing **Jackson** on such basis). Further, to the extent that collateral counsel contends that contemporaneous objection is not necessary in cases involving jury overrides, where the claim of error focuses upon the written sentencing order, it must be noted that this Court has conclusively rejected such contention in at least two prior cases. **See, e.g., Engle v. Dugger**, 16 F.L.W. S123 (Fla. January 15, 1991); **Porter v. Dugger**, 559 So.2d 201 (Fla. 1990). In **Engle**, this Court noted the lack of objection, and further observed, ". . . judges are trained to render their decisions without regard to impermissible evidence." **Id.** at S125. In **Parker**, the defendant contended that he was entitled to relief under **Booth**, because in the sentencing order wherein the judge had explained his reasons for overriding the jury's recommendation, the judge had noted, "It so happens that Raleigh Porter was tried by a Judge that has a lot more sympathy for the feelings of the victims than he does worry about the sensibilities of the murderer." **Porter**, 559 So.2d at 202, n.3. This Court found the claim procedurally barred, and likewise found no violation of **Booth**. This claim is clearly procedurally barred, on the basis of **Porter** and **Engle**.

Even if it were not, Routly would be entitled to no relief. In the order below, Judge Angel also found:

> Inasmuch as a proper basis exists for the finding of all five aggravating circumstances, this Court's reference to the victim in this case, as a retired widower who devoted his retirement years to volunteer community service, can be regarded as mere surplusage, as such factors did not enter into this Court's decision to override the jury's recommendation or to sentence defendant to death.

(PCR 1381).

Collateral counsel, who nowhere acknowledge the existence of this finding, has clearly failed to demonstrate any basis for relief.

POINT VI

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S PROCEDURALLY BARRED CLAIM BASED ON THE PROPRIETY OF THE JURY OVERRIDE, WAS NOT ERROR

Routly filed his original 3.850 motion in this case on January 2, 1987, and, with leave of court, twice amended such, on June 22, 1987, and on May 23, 1988, respectively (PCR 910-956, 957-1001, 1304-1313). In the first amended motion, Routly raised a claim of error to the effect that the jury's recommendation of life "should not have been overridden" and would not have been "but for" the State's alleged suppression of evidence, defense counsel's alleged ineffectiveness and "the trial court's consideration of improper factors"; the allegedly improper factors considered were an alleged presumption that death was the proper sentence, due to the automatic finding of an aggravating circumstance based upon felony murder, as well as the court's allegedly improper consideration of confidential psychological evaluations (PCR 982-999). In its response, filed June 2, 1988, the State contended, **inter alia**, that any renewed attack upon the propriety of the jury override was procedurally barred, as was Routly's claim involving the sentencer's alleged consideration of improper matters (PCR 1349-1351). In his order denying relief, Judge Angel found, **inter alia**, that certain portions of this claim had already been presented on appeal, or other collateral

proceedings, and denied (PCR 1746). Appellee suggests that the circuit court's denial of relief as to this claim was correct, and should be affirmed.

Appellee would initially point out, however, that the version of this claim now presented on appeal is not identical to that raised below. The claim does, indeed, repeat the contention that Judge Angel applied an unlawful "presumption" in overriding the jury's recommendation, although this presumption is now one involving the shifting of the burden of proof onto the defense to prove that life is the appropriate penalty (Initial Brief at 79). Likewise, the claim does also seek to relitigate the propriety of the override, due to collateral counsel's belief that the recent decision, **Parker v. Dugger**, ____ U.S. ____, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), "was a reversal of this Court's prior holdings that an affirmance of an override in (sic) law of the case and not subject to collateral review." (Initial Brief at 78); **Parker**, of course, had not been rendered while this case was still pending in the circuit court, and, indeed, was decided during the eighteen (18) months in which collateral counsel prepared the Initial Brief in this appeal. Collateral counsel has, however, also seemingly added a new claim, which was **never** presented to the court below. Thus, on appeal, collateral counsel contends for the first time, "**The judge did not consider the nonstatutory mitigation in the record, nonstatutory mitigation which formed an eminently reasonable basis for the jury's recommendation of life.**" (Initial Brief at 79) (emphasis in original). Appellee will address this latter contention first.

The State would contend that the above claim bears suspicious resemblance to one alleging a violation of **Hitchcock v. Dugger**, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); **Hitchcock** is, in fact, cited elsewhere in that point on appeal (Initial Brief at 74, 78). If such is, indeed, the case, Appellee would strongly urge this Court to find any claim in this regard procedurally barred, for a number of reasons. It is, of course, axiomatic that a claim of error cannot be asserted on appeal which has not, previously, been presented to the lower court for consideration. **See, e.g., State v. Barber**, 301 So.2d 7, 9 (Fla. 1974). This principle is applicable to 3.850 appeals filed by those under sentence of death. **See, e.g., Doyle v. State**, 526 So.2d 909, 911 (Fla. 1988) (point on appeal procedurally barred because it was not presented to the trial court in [defendant's] Rule 3.850 motion and could not be raised for the first time on appeal.). The record clearly indicates that Judge Angel was never on any notice that collateral counsel believed that his consideration of mitigating circumstances had been limited to those in the statute; indeed, the entire focus of Routly's presentation below was that trial counsel was ineffective, because he had failed to introduce nonstatutory mitigation so that the judge **could** consider it. **See** Point III, **infra**. It is undisputably this Court's intention that **Hitchcock** claims be presented initially to the circuit court. **See Hall v. State**, 541 So.2d 1125, 1128 (Fla. 1989). Because, just as undisputably, such was not done **sub judice**, and because Appellant is seemingly seeking to raise a claim of such nature for the

first time on appeal, any such claim must be found procedurally barred. To hold otherwise would reward "sandbagging" of the highest, or lowest, order. **Cf. Maggard v. State**, 399 So.2d 973, 975 (Fla. 1981) (defendant could not withhold claim of error and "sandbag" trial court, by raising claim initially on appeal); **Ferry v. State**, 507 So.2d 1373, 1375 (Fla. 1987) (allowing appellant to raise matter concerning his voluntary absence for the first time on appeal "would promote deliberate sandbagging.").[12]

Turning to the other matters presented, the State likewise maintains its position that any "burden-shifting" claim, especially one with a new basis, is procedurally barred. This is clearly a matter which could and should have been raised on direct appeal; indeed, in the prior habeas corpus action in this case, **Routly v. Wainwright**, 502 So.2d 901 (Fla. 1987), Routly contended that appellate counsel had rendered ineffective

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[12] This result is not unduly harsh, given the fact that Routly has **twice** amended his 3.850 motion following rendition of the **Hitchcock** claim, and has never added any claim of this nature. Additionally, it must be noted that this Court held in **Adams v. State**, 543 So.2d 1244, 1246-1247 (Fla. 1989), that all 3.850 claims for relief based upon **Hitchcock** had to be filed on or by June 30, 1989. **Cf. Mills v. Dugger**, 574 So.2d 63, 64, n.1 (Fla. 1990) (untimely **Hitchcock** claim procedurally barred). Any **Hitchcock** claim **sub judice** is barred on such additional basis, as well. Finally, Appellee would simply note that both attorney Fox and Judge Angel were unquestionably aware of **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), inasmuch as Fox filed a motion attacking the constitutionality of §921.141 on such basis (OR 18-23); Judge Angel denied such motion, following argument by counsel, immediately prior to trial (OR 427-430). Additionally, in the sentencing order in this case, Judge Angel found that no mitigating circumstances existed, "statutory or otherwise." (OR 185). Any **Hitchcock** error would, in any event, have been harmless, given, **inter alia**, the weight of the valid aggravating circumstances **sub judice**.

assistance by failing to litigate this very matter (**See** Petition for Writ of Habeas Corpus, filed in **Routly v Wainwright**, Florida Supreme Court Case No. 69,089, on July 25, 1986, at pages 57-60). This Court has, in any event, consistently regarded claims of this nature procedurally barred, when first presented on collateral attack. **See, e.g., Engle, supra** (claim procedurally barred, in jury override case); **Kight v. Dugger**, 574 So.2d 1066, 1072 (Fla. 1990) (claim in regard to judge's application of improper standard procedurally barred); **Roberts v. State**, 568 So.2d 1255 (Fla. 1990) (same); **Correll v. Dugger**, 558 So.2d 422, 427, n.6 (Fla. 1990) (same); **Hill v. Dugger**, 556 So.2d 1385 (Fla. 1990) (same). This portion of the claim is procedurally barred, and, even if it were not, this Court would seem to have rejected a virtually identical argument, premised upon language in a comparable sentencing order. **See Hamblen v. Dugger**, 546 So.2d 1039, 1041 (Fla. 1989).

Finally, as to collateral counsel's attempt to relitigate the propriety of the jury override itself, Appellee maintains its position that this claim is procedurally barred. It would seem that virtually every one of those inmates whose sentences of death have arisen out of a jury override, and whose sentences have been affirmed by this Court on direct appeal, have sought to relitigate such matter on collateral attack; this Court has uniformly applied its procedural bar. **See, e.g., Dobbert v. State**, 409 So.2d 1053, 1058 (Fla. 1982); **Buford, supra; Burr v. State**, 518 So.2d 903, 905 (Fla. 1987); **Johnson v. Dugger**, 523 So.2d 161, 162 (Fla. 1988) (applying "law of the case"); **Eutzy v.**

State, 536 So.2d 1014, 1015 (Fla. 1988); **Mills v. Dugger**, 559 So.2d 578, 579 (Fla. 1990); **Porter v. Dugger, supra; Engle, supra**. Whereas **Parker v. Dugger** is, of course, a decision of the United States Supreme Court, and, hence, eligible for retroactive application on 3.850, **see Witt v. State**, 387 So.2d 922 (Fla. 1980), there is no indication that any such retroactivity is intended or that **Parker**'s holding would have any application **sub judice**. Appellee is respectfully unable to determine the presence of any "new law" in the holding of **Parker** or to divine any intention on the part of the nation's highest court that this Court revisit its affirmance of every single death sentence arising out of a jury override. A careful reading of **Parker** indicates that the fact that Parker's sentence of death had arisen out of a jury override had absolutely nothing to do with the Court's holding. Rather, the Court found, on the basis of the specific facts of the case before it, that this Court, after striking two aggravating circumstances on appeal, had failed to take into account the presence of mitigation, in its harmless error analysis. **Parker**, 111 S.Ct. at 740. Inasmuch as this Court **affirmed all** of the aggravating circumstances at issue **sub judice, Routly**, 440 So.2d at 1262-1265, **Parker** obviously has no application to the case at bar. Accordingly, collateral counsel's invitation to this Court to revisit its prior holding must be rejected, and this entire claim is procedurally barred. The circuit court's denial of relief should be affirmed in all respects.

POINT VII

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO ROUTLY'S PROCEDURALLY BARRED CLAIM BASED ON THE PRESENCE OF A COURT OFFICIAL IN THE JURY ROOM, WAS NOT ERROR

Saving the most frivolous claim for last, collateral counsel finally contends that Routly is entitled to a new trial, due to the fact that the court reporter was allowed to play a tape recording for the jury in the jury room. This action was taken pursuant to the jury's request, and, indeed, it was attorney Fox's idea that the court reporter be the one to perform this act (OR 1188); surprisingly, there is no allegation that attorney Fox rendered ineffective assistance in making this suggestion, and, at the hearing below, attorney Fox omitted this action from his recitation of his many other alleged failings. In any event, collateral counsel now contends that obvious improprieties occurred, in that that the tape which was played only lasts twelve minutes, whereas the record indicates that the court reporter was in the jury room for twenty minutes (OR 1189) (Initial Brief at 81). Judge Angel found this claim procedurally barred, as representing a matter which should have been raised on appeal; he alternatively noted counsel's role in this entire proceeding, and found any allegation of prejudice to be totally speculative (PCR 1381).

Collateral counsel apparently concede the correctness of the circuit court's finding of procedural bar, in that they nowhere discuss or dispute it. Such finding would seem to be undeniably correct. **Cf. McCrae v. State**, 437 So.2d 1388 (Fla. 1983) (matters which should have been raised on direct appeal not

cognizable on 3.850); **Cave, supra** (same). As to the merits, in the alternative, it is difficult to take this claim seriously, inasmuch as such would seem to be grounded solely upon paranoid speculation. Routly has made no showing that the "eight minute gap" in this case did not result from the fact that, upon entering the jury room, it was necessary for the court reporter to set up the tape machine, load the tape into it, push the play button, sit down in a chair, rewind the tape at the conclusion of its play, remove the tape from the tape machine, pack the tape machine back up, and exit the jury room. No doubt had the unfortunate court reporter been aware, eight years ago, this his every action would be subject to such strict scrutiny, and suspicion, at this juncture, he would have made more of a contemporaneous record. His failure to do so hardly entitles Routly to a new trial. No relief is warranted as to the ludicrous, procedurally barred claim.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's denial of Routly's 3.850 motion should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Martin J. McClain, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301; and to Mr. Dan Edward Routly, #076205, Florida State Prison, Post Office Box 797, Starke, Florida 32091, this 29th day of April, 1991.

RICHARD B. MARTELL
Assistant Attorney General