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IN THE SUPREME COURT OF FLORIDA

CASE NO. ~~74,583~~ 73963

DAN EDWARD ROUTLY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Routly's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. It involves a 1979 offense wherein ongoing secret deals between the State and a would-be codefendant were undisclosed to the defense. The jury nonetheless recommended life but the judge overrode that decision, and imposed death; a result that could not occur with the courts today, given the nature of the crime and Mr. Routly's past history -- both of which would clearly justify only a life sentence, particularly where the jury has recommended life.

Citations in this brief shall be as follows: the record on direct appeal shall be referred to as "R. ___," with the appropriate page number noted thereafter. References to the record of the 3.850 proceedings before the circuit court shall be referred to as "T. ___," with the appropriate page number following. All other references in this brief shall be self-explanatory, or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Routly has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether Mr. Routly lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Routly, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

In 1978, Dan Routly moved with his girlfriend, Colleen O'Brien, from Michigan to Florida. Shortly thereafter problems with the relationship surfaced, and Ms. O'Brien decided to leave Mr. Routly. She thereupon met an older man, Anthony Bockini, who offered to assist her in returning to Michigan. Having moved in with Bockini, O'Brien became afraid of him and returned to Mr. Routly, only to decide once again to leave Mr. Routly and return to Bockini. Bockini was subsequently shot and killed. At trial, Ms. O'Brien claimed Mr. Routly killed Bockini. However, Mr. Routly testified that Ms. O'Brien killed Bockini, told Mr. Routly about it afterwards, and sought his help in leaving Florida.

Mr. Routly was arrested in Flint, Michigan, at 12:45 a.m. on December 5, 1979, on a charge of second-degree murder. Mr. Routly, not wanting to see a pregnant O'Brien convicted of the murder, gave a statement implicating himself to the authorities. He was furthermore promised by the agents who met with him that if he waived extradition he would be prosecuted for second degree murder and that he would serve fifteen to twenty years for the crime. At that point he, without counsel, waived extradition. He was immediately transported to the Marion County Jail in Ocala, Florida. The information charging second degree murder was not filed until 4:12 p.m. on December 5, 1979. On December 6, 1979, the Marion County Circuit Court ordered that the Grand Jury be recalled to consider Mr. Routly's indictment. On December 18, 1979, the reconvened Grand Jury indicted Mr. Routly on a charge of first-degree murder to which Mr. Routly entered a not guilty plea.

Mr. Routly's trial began on July 14, 1980, and on July 18, 1980, the jury returned a verdict of guilty of first degree murder. The only alleged witness to the murder was O'Brien, without whose testimony the State could not have secured a first degree murder conviction. O'Brien was the principle witness at

trial. Her testimony was accepted by a jury who was deprived of the facts behind the deal struck between herself and the State. Mr. Routly testified during the guilt-innocence phase of his trial (R. 1077-1084). In fact, the case was one of credibility; whether to believe Ms. O'Brien or Mr. Routly.

On July 18, 1980, the jury returned an advisory sentence of life imprisonment. A motion for new trial was filed on July 24, 1980, and, after hearing on August 20, 1980, the motion for a new trial was denied. On November 24, 1980, the circuit court overrode the jury's recommendation of life and sentenced Mr. Routly to death. This Court affirmed on direct appeal. Routly v. State, 440 So. 2d 1257 (Fla. 1983).

A timely Rule 3.850 motion was filed on January 2, 1987, with request for leave to amend. The amendment to that motion was filed on June 22, 1987. Mr. Routly's death warrant was signed on April 21, 1988 and an Emergency Application for Stay of Execution was filed on May 19, 1988. The circuit court granted a stay of execution on June 6, 1988, and ordered an evidentiary hearing which was then conducted on August 8-11, September 1 and October 20, 1988. On March 17, 1989, the circuit court denied Rule 3.850 relief on Mr. Routly's claims and this appeal was taken.

At the evidentiary hearing, evidence was presented showing that an agreement between the State and its key witness, Colleen O'Brien, had been withheld from the defense. The circuit court found as a matter of fact that the State had failed to disclose the following immunity agreement dated July 5, 1980:

CONTRACT OF IMMUNITY

> It is hereby agreed between the State of Florida, by Gordon G. Oldham, Jr., the State Attorney in and for the Fifth Judicial Circuit by and through his Assistant State Attorney, Jeffrey J. Fitos, and Coleen O'Brien, hereafter referred to as witness, that witness shall be granted immunity from prosecution for her acts related to the alleged murder of Anthony Bockini in Marion County, State of Florida, which alleged murder occurred on or about the 17th day of June, 1979, provided that witness shall comply with and expressly contingent upon

the following conditions:

1. The witness shall testify fully and truthfully under oath, before the State Attorney of the Fifth Judicial Circuit of Florida, his assistant(s), any grand jury in said circuit, in any deposition related to the alleged murder of Anthony Bockini, as provided by Florida Law, at any trial or other proceeding related to the alleged murder of Anthony Bockini (including but not limited to State of Florida -vs- Dan Edward Routly, case number 79-1270, Circuit Court, Marion County), and as otherwise directed by either the State Attorney or his assistant(s), or as directed by any court of the State of Florida.

2. That the witness states under oath that the testimony she gave to Sergeant Larry Jerald and Investigator Frank Alioto in Flint, Michigan on the 5th day of December, 1979, at 12:10 p.m., a transcript of which testimony is attached and which testimony the witness has carefully read before execution of this contract was the truth at the time she gave said testimony, is the truth now, and is substantially the testimony she will give under oath in any deposition, court appearance or other matters because it is the truth and correctly depicts what occurred in the alleged murder of Anthony Bockini and that the foregoing and all other conditions of this agreement are individually, severally and jointly conditions that must be entirely complied with by witness before immunity is granted.

3. That witness shall voluntarily be taken into custody as a hostile material witness without bond by an officer(s) of the State of Florida to assure her attendance in said State to testify at the trial(s) of Dan Edward Routly or any other proceeding related to the death of Anthony Bockini and any and all depositions, and that witness (if desired by her, along with her minor child) shall remain in custody with the Marion County Sheriff's Department, Marion County, Florida, pending her complete testimony at trial(s) or other proceedings, provided, however, that in regard to the minor child, the witness may elect to have said child remain with witness or not subject to approval by her custodian (Marion County Sheriff's Department). However, the custodian may make any decision it deems appropriate in maintaining custody over witness and this sentence shall be controlling in clause #3 of this contract.

4. That witness shall proceed from Portland, Oregon to Ocala, Florida on the 5th day of July, 1980 in the custody of officers of the State of Florida and hereby waives any and all rights to hearing(s) or appearance(s) in any court of any jurisdiction for the purpose of preventing her immediate return to Florida as a hostile material witness or otherwise, and should the witness attempt to leave custody and/or not return to Ocala as directed by the officer(s) of the State of Florida, in whose custody she shall be, she understands that the pending arrest warrant for murder in

the second degree may be served upon her and this contract upon service would be null and void at the sole option of the State Attorney or his assistant(s).

5. That witness agrees that any testimony given may be recorded stenographically or mechanically and that witness further agrees to submit to a polygraph examination in the form and before an examiner specified by said State Attorney or his assistant(s) as requested.

6. That witness shall personally appear without necessity of service of subpoena at any and all proceedings, hearings, depositions, or trials requested by said State Attorney or his assistant(s) and testify fully and truthfully as to all matters examined.

7. Witness hereby waives any and all rights to a speedy trial conferred by Federal and or State Constitutions or Laws and Florida Rule of Criminal Procedure 3.191 and fully understands that non-compliance with any condition of this contract will prevent the granting of immunity and subject witness to arrest and trial of witness concerning witness' part (if any) in the alleged murder of Anthony Bockini.

8. That should a new trial be required concerning the alleged murder of Anthony Bockini and or in the State of Florida -vs- Dan Edward Routly, the witness shall be bound by this agreement as if the new trial was the initial trial.

9. That the witness will not nor will her minor child have any contact with (including but not limited to physical, voice, letter or third party) Dan Edward Routly until released from this clause by the State Attorney or his assistant(s) or as directed by said State Attorney or assistant(s).

10. That the witness has consulted with her own privately retained attorney, whose signature appears below, and witness has reviewed all aspects of this agreement with witness' lawyer and upon consideration of his counsel and after carefully reading this agreement, witness did and does voluntarily and knowingly execute this agreement.

11. That witness shall also testify on behalf of the State against Dan Edward Routly concerning a charge of Possession of A Firearm By A Convicted Felon.

12. That upon completion of witness' testimony and satisfaction of this contract, witness shall be returned by the State of Florida to a destination within the continental United States selected by witness, excluding Alaska.

13. That subject to all other conditions of this agreement, immunity will also include criminal conduct which occurred on or before December 5, 1979 in Marion County, State of Florida, and for which criminal conduct the witness is considered a suspect by the Marion County Sheriff's

Department, as of July 5, 1980.

Dated this 5th of July, 1980

GORDON G. OLDHAM, JR.,
STATE ATTORNEY FIFTH JUDICIAL CIRCUIT
STATE OF FLORIDA

By: ______________________________
Jeffrey J. Fitos
Assistant State Attorney

AS TO WITNESS:

____
Witness
Coleen O'Brien

____
Francis E. Harrington
Attorney For Witness

(T. 1787-92). The circuit court's ruling denying relief was premised upon its conclusion that Mr. Routly had failed to demonstrate how this nondisclosure prejudiced his case.[1]

SUMMARY OF ARGUMENT

I. The State withheld critical exculpatory evidence. This withheld evidence included a contract of immunity, for Calleen O'Brien statments made by Ms. O'Brien expressing here fears that Mr. Routly would convince the State that she did the murder alone, and a letter from Ms. O'Brien refusing to return to testify without full immunity. The circuit court found as a matter of fact that the State did not disclose these materials to the defense. However, it ruled no prejudice had been shown. The later ruling was error of law where the case was a credibility battle between Ms. O'Brien and Mr. Routly and undisclosed evidence constituted significant impeachment of Ms. O'Brien's testimony and motives.

II. Durint her testimony, Ms. O'Brien made numerous false statements which the prosecutor knew to be false. The prosecutor's failure to correct the false testimony violated due process. The circuit erred in ruling prosecutors need

[1]Facts regarding other claims presented in the 3.850 will be presented within the corresponding argument.

not correct false testimony.

III. Defense counsel provided ineffective assistance at sentencing. Despite the jury's life recommendation, defense counsel failed to investigate and present the wealth of available mitigation which would have provided a reasonable basis for the recommendation and precluded an override. The circuit court erred in denying relief because he would still have imposed death.

IV. Defense counsel provided ineffective assistance at the guilt phase. Counsel failed to adequately litigate the voluntariness of Mr. Routly's waiver of extradition and confession to second degree murder. Counsel failed to adequately cross-examine Colleen O'Brien. Counsel in ignorance failed to move for a mistrial when the jury revealed it had been unable to hear parts of Ms. O'Brien's testimony. Mr. Routly's conviction is the resulting prejudice.

V. The sentencing court erroneously overrode the life recommendation on the basis of the victim's personal characteristics. This violted Booth v. Maryland.

VI. The affirmance of the override by this Court on appeal was arbitrary and capricious and violated Parker v. Dugger.

VII. Mr. Routly's right to a fair and reliable capital guilt-innocence verdict was violated by the presence of a court official in the jury room fro a substantial portion of the jury deliberations.

ARGUMENT I

MR. ROUTLY WAS DENIED AN ADVERSARIAL TESTING. THE STATE SUPPRESSED CRITICAL EXCULPATORY AND IMPEACHMENT EVIDENCE OF ITS STAR WITNESS IN VIOLATION OF MR. ROUTLY'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, supra.

Here, Mr. Routly was denied a reliable adversarial testing. Coleen O'Brien testified Dan Routly committed the homicide (R. 895). Mr. Routly testified Ms. O'Brien, his pregnant girlfriend, committed the homicide and wanted his help in getting away from the State of Florida (R. 1082). The jury had to decide who to believe. The jury never heard the considerable and compelling evidence regarding Colleen O'Brien's immunity, her failure to honor her previous immunity deal, her demands for more, and her actual misrepresentations on the witness stand to the jury. This was critical information necessary to resolving the credibility battle. Mr. Routly's claim that his rights under due process were violated is undeniably evidenced by the testimony and documentary proof adduced at the evidentiary hearing. Not only were several exculpatory documents -- including the Contract of Immunity (T. 1787-92) between the State and Colleen O'Brien -- never turned over to the defense.[2] The inherent prejudice was clearly established through the testimony of Ron Fox and James Burke, Mr. Routly's defense attorneys at trial. Their account is corroborated by the evidentiary hearing and trial record itself. Where the case is a credibility battle between the state's star witness and the defendant, certainly nondisclosure of

[2]In fact, the circuit court found: "The State never delivered the contract of immunity dated 5 July 1980, Defendant's exhibit #11, to Defense Counsel." (T. 1745).

impeachment evidence undermines confidence in the outcome. See Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986)("There is a reasonable probability" of a different outcome where conviction rested upon credibility on one witness and jury did not hear evidence undermining that credibility.)

The five page contract of immunity found in the state attorney's but never provided to Mr. Burke or Mr. Fox at the time of Mr. Routly's trial (T. 290, 326), was shown to Mr. Fox at the evidentiary hearing. Mr. Fox identified this as a document that he had seen first immediately before the evidentiary hearing (T. 326). The document was signed on July 5, 1980, shortly before Mr. Routly's trial, and had the signatures of Ms. O'Brien, Officer Jerald, Assistant State Attorney Fitos, Mr. Harrington, and Father O'Brien (a relative of Ms. O'Brien's). At the time of trial, Mr. Fox was "not aware of the existence of this document and it was not provided to me until after Governor Martinez had signed the warrant for Mr. Routly's execution, which was just this past summer." (T. 326). Neither defense counsel had ever seen the Contract of Immunity (T. 1787-92) prior to trial, or the letter from Colleen O'Brien on her attorney's letterhead (T. 1793)("I refuse to make any statement or give any information which could relate to a prosecution of me, EXCEPTING under a CONTRACT OF IMMUNITY."), or Captain Hanna's affidavit regarding his diligent efforts to locate Ms. O'Brien as a witness for trial and his belief she was hiding (T. 1802-03)("[O'Brien] is afraid that she will be charged with the murder and that DAN EDWARD ROUTLY will testify that she perpetrated the murder alone, and further that she does not intend to run for the rest of her life."). The documents resulted from the State's efforts to secure Ms. O'Brien's presence and testimony at Mr. Routly's trial. When presented with these documents during the evidentiary hearing, defense counsel Burke stated:

> They indicated the difficulties that the State had in locating her in the affidavit of diligent effort. They indicated that she was represented by counsel. They indicated that she had a lengthy immunity agreement with the State that she had negotiated through her

attorney.

(T. 291). As to the potential value of these documents, Mr. Burke testified:

> In my opinion, they would have been extremely useful. Anytime you cross examine a witness that has an interest in the outcome and you can demonstrate it, it would be the crux of your cross examination. You would generally begin with it, go through the terms of the agreement and then you end high and take the document and maybe flick it or something and say: And isn't this the reason that you're here testifying today in this case against my client.

(T. 292).

Mr. Burke stated that Colleen O'Brien was the "singular most important witness for the State" (T. 293), and without the documents, Mr. Fox was unable to effectively impeach and confront her. Mr. Burke explained that the immunity agreement was a "very comprehensive immunity agreement" and had it been brought to the attention of the jury "certainly would have impressed the jury that perhaps there was some funny business" (T. 301). Mr. Burke noted that the contract of immunity was signed on July 5, 1980, the deposition of Colleen O'Brien was taken on July 9, 1980, and Mr. Routly's trial was held on July 14, 1980 (T. 303). The agreement thus was in effect well before the deposition and before the trial -- it was nevertheless not turned over to the defense.

When asked to look at the undisclosed documents to determine their potential usefulness, defense counsel Fox explained:

> I can only say that the contract of immunity which is really the culmination of all the information contained or suggested in these other documents, would be like finding gold in this case.

(T. 336). Mr. Fox had never seen an immunity agreement this complete:

> This is -- you couldn't beat one of these out of the State Attorney with a stick now. I mean, this is -- this not only grants her immunity for this incident, this grants her immunity for -- effectively grants her immunity for charges in other jurisdictions. it grants her complete immunity for anything she might have ever done prior to the date of this document in the State of Florida or, at least, in Marion County.
>
> It's been referred to . . . as the supersaver contract of immunity and it's very definitely that.

(T. 338). Mr. Fox then detailed how he would have been able to use this agreement in cross-examination of Colleen O'Brien:

> A I would start out by questioning her about her first agreement, how she dropped from sight and then how they recontacted her, made a trip out to find -- to see her out in Oregon, all the lengths that the State went to to accommodate Colleen O'Brien.
>
> And then the introductory part of the contract says that she will be granted immunity from prosecution for her acts related to the murder of Anthony Bockini.
>
> My first question becomes what acts, Miss O'Brien, did you do in the murder of Anthony Bockini and --
>
> * * *
>
> A Okay. And then say: Well, what acts did you do in the murder of Anthony Bockini and then either she says: Well, I did A,B, C and D, which arguably makes her an accomplice or a participant or else she says: Nothing, in which case I say: Well, why would the State Attorney go to all this trouble to give you immunity for something that you didn't do, thereby either undermining her credibility or the prosecution's, whoever.
>
> Then, also in the first paragraph under there, it says that she will testify truthfully and fully at any trial or other proceeding related to the murder of Anthony Bockini, including but not limited to the case of the State of Florida vs. Dan Routly.
>
> And then it goes on to say: as otherwise directed, which I previously talked about. I would suggest to -- by my questions that as otherwise directed meant that she was under the exclusive domination and control of the State Attorney, that for her to get the benefit of this bargain, she had to say what he directed her to say.
>
> Whether or not that's true or not, of course, I don't know; but --
>
> Q And wasn't there a portion during her testimony where she said something to the effect of you're not asking me the questions you were going to, to Mr. Fitos?
>
> A One of -- one of the things that I can specifically remember from the trial is that encounter.
>
> After Fitos is directly examining her, she's getting aggravated with him and says: Well, these are -- this -- either these are not the questions you said you were going to ask me or this is not how you said you were going to question me.
>
> So I would couple that, assuming that response came out again under other circumstances and I had this, I would use that to support my position.

* * *

Then you can say that. Also I'd want to know what other proceeding you are testifying at, what's it about and including but not limited to the State of Florida vs. Dan Routly.

Well, because the language says that any trial or other proceeding related to the alleged murder of Anthony Bockini, then parenthetically it says: including but not limited to the State of Florida vs. Dan Routly, Case No. 79-1270, Circuit Court of Marion County, well, my question to her then is: What other proceeding are you going to testify in? Who else was involved? Is there going to be a State of Florida vs. somebody else which you are going to testify in and, if so, who is that and what is her participation? Was it Mary Avrey who was out there with you? Is the State going to make a case against her and have you testify there and if there is no other case or no other proceeding, you know, why is that language there, which she may or may not be able to answer.

The second paragraph here says that she will state under oath that the testimony she gave Sergeant Jerald and Investigator Alioto on the 5th of December at 12:10 is substantially the -- is -- is the truth and she will give it again at trial, that's --

Q What could have been done with that?

A That's an expressed condition of that.

Well, the first thing that comes to my mind in reference to that paragraph is: Well, isn't it true? You have already given them a statement prior to December 5th, 1979, at 12:10; and I think her testimony at trial was: Yes, I did. And wasn't that different than the statement you gave them on the 5th at 12:10; yes, it is.

Okay. And you go from there, either way you want to go; well, were they -- which one is true --

Q And --

A -- or, better yet, you've got to give the one that you gave on the 5th; right? Right. and if you don't, you'll be charged with murder; right? Right. Okay. And your kid will be taken away from you; right? Right. And then you say: well, is the statement on the 5th the truth and she says: Yeah, or she says no. I don't care. If she says no, great. If she says: Yes, that is the truth; then you say: Well, you lied to the police before; right? It has to be one or the other.

* * *

And so whether or not your statement on the 5th is the truth or not, Colleen, you've got to give it; because if you don't, you're going to be charged with second degree murder and you're going to go right back to jail where you've been before until you gave your first statement.

So there I want to show that, whether or not she's intentionally misleading anybody, she's got no choice and maybe even present to her, you know, this is such a good deal, anybody would say anything.

You just had a baby. You've got these other pressures on you. You've got all this other consideration. You were in jail for this once. They told you in your agreement they're going to charge you with second unless you do what it says in here, so you've got to do it. You've got to do it.

* * *

A Well, here in paragraph 2, it also says real contract lawyer stuff here that the foregoing and all other conditions of this agreement are individually, severally and jointly conditions that must be entirely complied with by the witness before immunity is granted.

Now, I'd want to take her through that to see if she knew what individually, jointly and severally meant. I don't care whether she knows or not. I want to educate the jury as to what individually, jointly and severally meant.

Q Why?

A Legally they might even be a contradiction of terms; but that's really not important. What's important to bring out there is you have got to do all of these things it says in here just like they typed it up for you to sign and if you don't, if you just fail to do any one of these things, the whole deal is off, just to stress the importance of or the necessity of her having to give this testimony, the necessity of her not having any contact with the accused.

* * *

I would develop that with her and, where I would hope to end up by my questioning is: Well, it's like -- you're like under arrest; aren't you? I mean, you're in custody without bond?

She testified, I think, at trial she was free to leave if she wanted to, which is clearly wrong from this agreement. Had I asked her there at trial: Are you free to leave and she said: Yeah, I think so, I would have pulled this out and beat her over the head with it and said: What -- what does this mean? I mean, they brought you up here. They didn't just casually come by your lawyer's office? You were coming one way or the other, either under arrest for second degree murder or as a material, hostile witness? So you didn't have a whole lot of choice, understand; and this is to assure her attendance at trial.

Well, then you question her: Why would they have to do that to assure your attendance at trial? If you're a witness out there, you knew about this, you're a concerned citizen, you want to come here and testify, why is it you run away from the State Attorney and why was it they had to go all the way to Oregon to meet in your lawyer's office over a period of several days to get you here, you know, why is

that; and I don't really care what her answer is to that question.

Q. Would it matter what her answer is as far as undermining her credibility?

A. Well, it -- there's a lot of different ways -- there's a lot of different answers that might undermine it more or less; but, however she answers the question, it becomes apparent that she's compelled to be here. I mean, she's --

Q. Because of the agreement?

A. She's held without bond. She can't go anywhere. She's in as bad shape as if she were charged. She's in worse shape than if she were charged with second degree murder. Second degree murder, she could bond. Here she agrees to no bond and, really, that's -- if there is any State's side to this agreement, maybe it shows a little bit there; but, not only does she have to be taken into custody, but she has to come, she has to testify and, more importantly on this paragraph of the agreement, the thing that I feel was most significant and would have been a more fertile area for cross-examination is that she agrees to be taken into custody, is brought to Florida to testify at trial or any other proceeding which I would again hit that and try to find out what these could possibly be, and that she'll remain -- and that if she desires, this will be along with here minor -- minor child and, you know, that's -- that's one of the unique features of this immunity agreement, if you will, leave it up to the witness to decide what will be done with the child.

But, more important than that, further on in the paragraph, it says the witness may elect to have the child remain with her or not, subject to the approval of her custodian who is parenthetically referred to as the Sheriff. So -- so the sheriff is going to --

* * *

A. Well, it says the witness may elect to have the child remain with her or not, subject to the approval of the sheriff; so, there, you've got her desire to please the sheriff, let me say, or satisfy the custodian.

Then it goes on to say: However, the custodian may make any decision it deems appropriate to maintain custody over the witness and this sentence: Shall be controlling in clause number 3 of this contract, which is terrific cross-examination material. You will do what we say or the sheriff will decide what happens to your baby; isn't that true?

Now, if I got there directly or not may be subject to question; but I can assure you I'd get there; because whatever else came out on the limited cross that I did of her at the trial, was the importance of being with her baby.

Well, I think that's apparent to anybody who has ever had one or been associated with children, that that can be the strongest motivator involved.

So that would be something that just had to be brought out and maintained and say: Geez, Colleen, why would you agree to let the sheriff of Marion County decide the fate of your baby?

There again, I don't really care what she says; but she is bound to say: Because I had to, because this is part of my agreement, I had to give up those decisions in exchange for not being charged with murder. So I would develop that along the way.

Q. And the future of her baby was, in fact, being decided by the State, the same folks that were calling her as a witness?

A. Yeah. Absolutely. She was damned if she did and damned of she didn't, sort of.

I don't know this, but I would like to have been able to ask her: Well, what if you were charged with second degree murder and arrested, what was going to happen to your baby and didn't Mr. Fitos make you aware of that and wasn't it a matter of him saying to you: Well, your baby can be taken away from you one way or the other; if you get charged, the kid's gone; if you do this, maybe we'll let you keep him and maybe we won't; we'll let the sheriff of the county decide that, which is -- is, to me, great impeachment. It just -- or at least would certainly make the jury question whether or not what she says is true.

I would want to create -- I don't think I'm giving away any great secrets here -- in the mind of the jury that, if those jurors were Colleen O'Brien, they'd be saying the same thing and they weren't even there, you know. If they said: We're going to take your kids away from you unless you do this, what are you going to do. And she and most everybody is going to say they're going to do this.

Okay. Paragraph 4, we find out she's in Portland, Oregon.

Q. Did you know that at that time?

A. At the time of her testimony at trial, I may have known that that's where they ended up contacting her; but, here again: Well, how did they find you there? What were you doing there? Where did they meet you there? How were the arrangements made? Why did they come to you instead of coming to them?

And, there again, you would expect answers like: I was not going to come down here. I had my lawyer up there. If the authorities wanted to come to me, they should come up there so I'll be, you know, protected by my lawyer or in my own jurisdiction.

She also, here, waives any rights to a hearing, appearances in any Court of any jurisdiction to prevent her immediate return to Florida.

So there again she's sacrificing very significant rights which she had to come back here and, more importantly, it again refers that she will be in the custody of the State of Florida, she

understands that the pending arrest warrant for second degree maybe served upon her and this contract, upon service, would be null and void at the sole option of the State Attorney or his assistants; that is, if she didn't return as they say -- I should clarify that -- or she impeded the process of coming back.

So, here again, she has no choice but to come. She's either coming or she's coming. That's -- that's the questioning I would get: Well, what would happen if you didn't come, Colleen? I'd have been arrested for second degree murder; and then what would have happened? I would have come to Ocala. What other choice did you have? None.

Q. Were you aware at the time that there was a second degree warrant?

I think at the deposition she indicated that she wasn't in custody or something?

A. Right. I had asked her if she had been arrested for the murder, if she had ever been arrested for it and she said no or if she was in custody at the time. She said no; but I did become aware in that discovery that she had come to Florida in the presence of some State of Florida law enforcement officers; but I was not aware that there was a second degree warrant in existence or that there was a second degree charge pending against here.

I mean, I knew she had been arrested originally for murder; but, as far as pending charges, I was unaware that there were any.

Q. And what is the significance of that? What could be done with the issuance of the warrant that you weren't aware of or the pending charges that Colleen --

A. Well, it's just -- it's more pressure applied to her by the prosecution. They just have her coming and they have her going. You either go along with this agreement, which undoubtedly is very attractive to her and would be attractive to people who weren't even there, or we have got the second degree right here.

I mean, it just would show that this agreement is not voluntary or may not be voluntary because of all of the pressure that was exerted on her and the agreement itself spells it right out: You either do it or we're going to arrest you for second degree and the immunity is going to be off and you're going to be up against the wall, you've already given us a statement.

She's already given a statement, so I crossed her in that regard: Well, didn't you already say you were there and you did this and you did that? Yeah, yeah, she would say; and then you say: Yeah, but if you didn't do what they said, they have your statement to use against you, the immunity would be gone and the second degree would be filed on you, you'd be in Ocala and your baby would be gone, you'd be in jail; isn't that true? You know, all of that stuff.

Q. What about --

A. And --

Q. I'm sorry.

A. Go ahead.

Q. I was just going to ask with regard to her involvement in the case, would the second degree murder warrant also reflect on that?

A. Well, yeah. That's -- that's a curious angle, too.

If -- if she was involved to the extent she was in need of immunity, then she was involved to the extent of first degree murder, because she was either the responsible party or at least a principal, and if she's a principal to first degree murder, that does not make her chargeable with second degree murder. That makes her chargeable with first.

So if they're charging here with second, you say: Well, why did they charge you with second instead of first, if you know, which she knew. She may not know; but I would develop that through her and see if she knew, had anybody ever told her that, by being there and assisting, she was just as guilty as the person who committed the act.

Q. What about the statement you read to us a moment ago in the context of the second degree warrant referring to the discretion of the State?

* * *

A. Well, the importance of that is you've got to satisfy the State Attorney and, with all the due respect I can muster, you've got to jump through whatever hoops they put in front of you. I mean, it's totally discretionary whether or not to charge you with murder. It's up to Jeffrey Fitos whether or not you will be charged with second degree murder, which is a horrible position to be in. I mean, it's untenable. I mean, it's -- you -- you're on his string, there is no doubt and that would be made very clear to the jury, you know: Who is the State Attorney? Well, isn't it this guy right over here? Yes, it is, and if you don't do what he says, he's going to arrest you for murder; isn't he; and who is going to decide whether or not to do that? He is. While you are sitting here answering these questions?

It would be -- I'd love to have had it. I'd love to do it again.

Q. Keep going through it, if you can.

A. Okay. Number 5, it just says it can be recorded or her testimony can be recorded, which is not particularly significant; but that she agrees to submit to a polygraph examination, which one is significant, and then it goes on to say in the form and before the examiner specified by the State Attorney or his assistants.

So there I say: Well, you agreed to submit to a polygraph; isn't that true? Yeah. And the polygraph is going to be designed by

the State Attorney; wasn't it? Yes. And the examiner was going to be selected by the State Attorney; wasn't it? Yes. And did you ever submit to a polygraph examination? I don't know what the answer to that would be. I don't know if that would have been a proper question; but I can guarantee you it would have been asked and why would they want you to submit to a polygraph? Don't they believe you? What makes them doubt you? Any reason? Have you ever submitted to a polygraph or have you ever offered to and so on and so forth.

But, there again, the polygraph is important because I would hope to present to the jury that that shows that the State Attorney is not even sure if she is telling the truth because, if he was, why would he require the polygraph.

Q. And the questions on the polygraph would be selected by the State?

A. By him. By him.

That's the other thing. It's -- it's like at the sole option of the State Attorney in paragraph 4. Paragraph 5 says: We'll design the test and we'll pick the examiner. I think it's becoming rather common knowledge now that polygraph is not close to a science and it's very unreliable and it could be manipulated in any way that it needed to be.

But, here, for them to request it after granting the immunity is another thing that I would like to make much hay of and say: Well, if you were going to polygraph her, why didn't they give you a polygraph before they gave you the courthouse; meaning, before they gave you a -- let you walk free, why didn't they find out if what you said was the truth, first, rather than say: Well, here's the courthouse. Thank you very much.

Now, later on we may ask you if it's the truth. That's the way I would want to present it and that's where I'd be coming from, questioning in that area.

* * *

Okay. Then paragraph 6 deals with that she will personally appear without service of subpoena at trial or whatever requested by the State Attorney or his assistants to testify to all matters examined.

This is maybe a little redundant, but here again; you have to go anywhere the State Attorney tells you and give testimony anytime he tells you without being afforded those normal rights of service of process.

So, here again, we might go back and start talking about these other proceedings or other cases: Well, who are they? Where are they? Where might he be sending you? You know, when drafted this agreement and you read this over, what did that mean to you? Why did they want it in there? Why did you want it in there? What does it mean?

It's just -- again, I think the significance there is that they -- the prosecution, I mean -- have gained from her, in exchange for this agreement, the ability to just tell her where she must go and she must be there at their request.

And the thing about that is -- maybe there is nothing so earthshattering about that except that it just increases the domination that the State Attorney has over her. If they request: Well, why don't you go over here and talk to this investigator and it's inconvenient for her or some other problem why she can't do it, she has to realize that she runs the risk of this agreement being thrown out, her immunity gone, her statement admitted and charged with second degree murder.

So it's just a -- I would call it another -- facetiously, another subtle reminder that the State Attorney has a hold of your life and in a very discretionary way.

Paragraph 7 says she waives the right to speedy trial, just another constitutional right to which we are all entitled that you don't sacrifice. I would ask her about that: What is that for? Why did you give it up? What does it mean?

* * *

Q. How does that relate to the second degree murder warrant, the waiver of speedy trial?

A. Well, that keeps the second degree warrant alive and viable until the present time, I would think; and I would think she's also still under the constraints of this contract of immunity to the present time.

So, today, if one of the assistants here told her to go to Egypt and give testimony, I think she might have to go or run the risk of violating this agreement at the discretion of the prosecutor.

I'm not suggesting that they'd do that, but I think that they might have the ability from this agreement.

And, here again, it's just, if you don't waive speedy trial, you won't get immunity, you will be arrested and you will go to trial.

No, there -- in here it says, also: and trial of witness concerning witness' part, parenthetically then it says: if any in the alleged murder of Anthony Bockini.

Well, that has been curious to me, also. I'd say to her: Well, what does if any mean? Didn't you tell them what you did? Don't they know what you did or aren't they sure or don't they believe you? I mean, it seems so uncertain. They say that here's her statements, she told us what she did. Okay. Then why don't you grant her immunity for what she said she did rather than granting her immunity for her part, if any.

Again there, I would tie that in with the polygraph paragraph and say: See, the State doesn't even know for sure whether to believe her or not. She told the officers two different stories and now they want to polygraph her and then they'll try her if she breaks the agreement for whatever she might have done.

It also suggests to me that maybe they had some evidence that they were not revealing to us, as the defenders of Dan Routly, which may have been usable as leverage against Colleen; in other words, saying her part might be more than she's telling them and they are subtly reminding her of that by this parenthetical if any participation.

Paragraph 8, this is -- in real estate, I guess it would violate the rule against perpetuity, if I understood it; but is says: If a new trial should ever be required concerning the murder of Mr. Bockini and/or in the State of Florida vs. Dan Edward Routly, which first of all brings up the question are we talking about two different things? Is the trial of the murder of Anthony Bockini one case and the trial of State vs. Dan Routly another case and why do you refer to them separately. Who is the other guy? Who is the other person? Who is the other prosecution? Does than mean you, Colleen? Does that mean you and does that mean that you'll have to testify against yourself?

* * *

So she is still under -- under that and, there, I would bring out, also, from a legal end, sort of getting away from Colleen a little bit and say: Geez, a new trial. What does that mean, Colleen? Why would he need a new trial? Is something wrong with this one? Did they expect there to be some problems? do you think they're going to do it and do it all wrong and have to do it all over again or do they think there is somebody else? Who is this other case?

This paragraph of the agreement distinguishes the alleged murder of Anthony Bockini from State of Florida vs. Dan Edward Routly, which I find to be significant in that some-other-dude-did-it defense, as we used to facetiously refer to it in Public Defender work; but it's true. You get a circumstantial evidence instruction to the jury that says if you've got two reasonable theories and one indicates innocence, you must follow the one with innocence.

I start saying: Yeah. Here's a reasonable theory. Look at the State. They left an opening every place that it could be somebody else and Colleen might not be telling the truth. So it all -- it builds on itself as you go along.

Paragraph 9 says: The witness will not nor will her minor child have any contact with and then it says: including but not limited to physical, voice, letter or third party -- I don't know what that eliminates -- Dan Edward Routly until released from this clause by the assistant -- by the State Attorney or his assistants as directed by his assistants.

* * *

So any contact with Mr. Routly in this case would subject her to prosecution. So even if she, for some reason, had exculpatory information to give or to supply to Mr. Routly or needed to speak to him or otherwise participate, she could only do so on the threat of being prosecuted for the murder, herself, which she's not going to do; and the loss of her child and all of those other things that goes along with it.

Paragraph 10 talks about: That the witness has consulted with her privately-retained attorney who has reviewed this with her and the witness did and does voluntarily and knowingly execute this agreement.

All right. First of all, I would inquire of her about the lawyer: Where did you get one and why did you get one.

Q. What would be the significance of that, the fact that she retained an attorney?

A. Well, it creates, at least, the inference that perhaps she's more involved than the documents would agree -- appear, maybe more than her testimony would appear. She wants to make sure that she's off the hook.

Let's say that. She wants -- she knows it's important. She wants legal counsel. She's probably been scared to death by them, by law enforcement or the prosecuting authority; and I would just inquire of her: Why did you go to a lawyer? What was it all about? Well, didn't you have to pay him a lot of money and weren't you broke and so on and so forth and expect to elicit from her: Well, I wanted to make sure everything was right. I didn't know exactly how to do it and I don't understand all of this stuff, necessarily, so I went and retained him and he reviewed it with me and he really did a masterful job as far as getting her out from under the prosecution at the time.

Then what strikes me, maybe, as even more important there, it says that she did and does. I don't know how you did and does voluntarily do anything; but the agreement says: She did and does voluntarily and knowingly execute this agreement.

They wouldn't have had to pay her expenses down here and concede so much in the agreement and all of those other things. The free and voluntary thing, which I would argue is not elicited testimony, was something that the State put in there to try to bootstrap her credibility by saying: Yes, it's the truth and I really mean it, gives me more -- does the defense more good than it does the prosecution, I feel, her presentation to the jury; because you say: Is this what you call -- what do you call free and voluntary, Colleen? Was this free and voluntary?

And I -- quite frankly, I would expect her to say no. I would expect her to say no; because the whole thing smacks of being anything but free and voluntary. She's running away from Hanna. She's dodging the prosecutors. She's dodging the police. She can't be found and, when she is found, she retains counsel and says: If you

guys want to come talk to me, you come to see me. I'm -- I'm in Oregon; and, if you want me to talk, you're going to have to fly me down there. You're going to have to keep me there. You're going to have to let me bring my child and, when I get all done, you're going to have to take me back to where I came from.

* * *

Paragraph 12: Upon the completion of witness' testimony and satisfaction of this contract, witness shall be returned by the State of Florida to a destination within the continental United States selected by the witness excluding Alaska.

I'd probably start out by saying: What was wrong with Alaska and she'll probably say: They were too cheap to fly me to Alaska; and then I'll say: Well, who decides if you satisfactorily completed the contract and she'll say: Jeff Fitos or the State Attorney or she'll say: I don't know. Either answer, I'll take.

If she says Jeff Fitos, I mean, the impact is apparent or, if not, it will become apparent later on in argument. If she says: I don't know, then you go back through and you say: Who decides what happens to your baby? The sheriff. Well, who decides when you'll come here? The State. Well, who decides when you testify? The State. Well, who decides this, this, this, this; and then you'll say: Well, who decides if you satisfy the contract? She still says: I don't know. I don't care if she says I don't know. It's abundantly clear to anybody who listens who is going to decide; and where are you going to go if you satisfy the contract? You know, are you moving, relocate, new life, new place? Where are you going? How much is it going to cost? How could you get there otherwise; and from that, just develop again that that's another bone they have thrown her to undermine her credibility.

<u>Then paragraph 13, which is, from a defense standpoint if Colleen O'Brien was my client, I'd be very proud to have gotten this paragraph; because the immunity will also include criminal conduct which occurred on or before December 5th, 1979 in Marion County, State of Florida and for which criminal conduct the witness is considered a suspect</u>.

<u>All right. First of all, a grant of immunity for the preceding 1979 years is pretty broad and, to be granted immunity for anything you've ever done in your life in this area of the country is a broad brush; and then, of course, my question becomes: What is it you have done</u>? They don't grant you immunity for acts unless you have done something, so what is it that you did; and I don't -- again, I don't really care what she says; but we know that she was involved in some theft offenses up in Michigan. I'd just -- I'd just start right in. I'd get out the statute books and say: Well, were you raping anybody? Were you robbing anybody, murdering anybody, thieving from anybody, burglarizing anybody? What did you do? And she's got to say something or, if not, then you say: Why is this here? And then, if -- if that -- whatever you develop there has got to be favorable, even if it's a nonresponsive answer; and then you go -- it also talks about criminal conduct of witnesses considered a suspect by the sheriff's

department.

You say: Well, why do they consider you a suspect and what do they consider you a suspect for and when did they make you aware of that and isn't it true it was about right before you signed this agreement they made you aware that you were a suspect in all of these other cases or isn't it true they made you aware you were a suspect in all these other cases when you stopped having contact with the State Attorney's office like you had promised and, you know, what did they give you?

And if she says it's a burglary or it's this or it's that, I'll say: Well, isn't the penalty for burglary 15 years or isn't the penalty for this, whatever it is, the appropriate penalty, and then: Didn't they tell you that you could go to prison on these other charges and, by doing what you're doing, you eliminate all that? You could have been a mass murderer of school children on December 4th of 1979 in Marion County, State of Florida, and this prosecutor would let you walk out that door; isn't that true? Boom. That's true.

So that, again, is just indicative of her lack of credibility or the control of the State or her lack of free and voluntariness. I mean, it's -- to me, that -- I'd like to ask a lot of questions about that.

(T. 339-69).

At the evidentiary hearing, the judge cut off the defense attorney's discussion of the cross-examination which would have resulted from compliance with Brady and Rule 3.220 of the Florida Rules of Criminal Procedure:

THE COURT: Pardon me, just a moment.

Do we need to go on with this? I think maybe you made your point on this.

(T. 370). Nevertheless, the judge later ruled that Mr. Routly failed to show prejudice from the discovery violation.

Mr. Fox indicated that there was no question in his mind that with these documents in "addition to her appearance and the testimony she gave" (T. 373), O'Brien's credibility would have been undermined. The documents showed:

that she's under the domination and control of the State and she has not one choice other than run the risk of being prosecuted for murder other than to say exactly what she said on December 5, 1979, at 12:10 p.m. and at no other time. I mean, it specifically focused in on that testimony. In effect, the argument to the jury is: Yeah, she had no choice but to say that. . . . It was etched in stone.

(T. 372-73).

The State never made defense counsel aware prior to trial of how the agreement had come about, i.e., that prosecutor Fitos, Patti Lumpkin and Officer Jerald had met with Colleen and her priest and lawyer in Oregon (T. 373), and that there they had carefully negotiated her deal. Had defense counsel known of the extent of the State's efforts to negotiated this deal (indeed Officer Lumpkin had typed it), he would have used this information. Indeed, Mr. Fox would have used information from anyone who had been present when the agreements were prepared. He especially would have wanted to talk with Ms. O'Brien's attorney (T. 374). None of these facts, however, were made known to him.

Mr. Fox discussed the affidavit of Captain Michael Hanna and that he would have used that to impeach the State's star witness if he had been provided with it prior to trial (T. 377). It provided in part:

> That the last address for COLLEEN O'BRIEN in the State of Michigan is 127 Main Dr., Mr. Morris, a mobile home that was vacated by COLLEEN O'BRIEN in late May, according to Postal authorities, the landlord and neighbors,
>
> That I have been informed by her family and friends that she is in hiding and is not disclosing her whereabouts to anyone, but makes periodic phone calls to family and friends from an unknown location described by her as "another state", and that she has informed them that she gave birth to a baby boy, Kevin Justin O'Brien, on May 29, 1980,
>
> * * *
>
> That in the late evening hours of July 2, 1980, at approximately 11:55 P.M., I received a telephone call at my home from COLLEEN O'BRIEN who indicated that she was 2500 miles away and that <u>she</u> wants to come to Florida and testify but <u>is afraid that she will be charged with the murder and that DAN EDWARD ROUTLY will testify that she perpetrated the murder alone, and further that she does not intend to run for the rest of her life</u> and that she has contacted an attorney and that she would call back within a half hour; that she did not call back but that she expressed a great deal of concern for her future and is believed to be in touch with an attorney with reference to the matter,

(T. 1803)(emphasis added).

Obviously this police report detailing statements made by a material witness was discoverable under Rule 3.220(a)(ii). Mr. Fox had no reservations or doubt that he would have used the information contained in the affidavit if he had been provided it by the State (T.I 380). A witness' hiding from the State and fear of prosecution on the basis of Mr. Routly's testimony -- as was the case with Colleen O'Brien -- are, of course, classic impeachment matters. It constituted evidence of flight. Yet, these matters were not disclosed to the defense. As a result, the jury did not know that Ms. O'Brien was afraid that Mr. Routly would convince the State she committed the murder alone.

Defense counsel also explained that he would have used the undisclosed letter from Ms. O'Brien on her attorney's letterhead, and how valuable that would have been for impeachment purposes (T. 380). This document was never disclosed to the defense either in violation of Rule 3.220(a)(1)(ii). It provided:

> July 5, 1980
>
> TO WHOM IT MAY CONCERN:
>
> My name is Colleen O'Brien.
>
> My address is 2013 Thom Street, Flint, Michigan.
>
> I have been accused of activities which are said to have been in violation of the laws of the State of Florida and for which I am told I could be prosecuted.
>
> I claim my rights under the United States Constitution and the constitution of the State of Florida and of the State of Oregon against self-incrimination.
>
> I refuse to make any statement or give any information which could relate to a prosecution of me, EXCEPTING under a CONTRACT OF IMMUNITY which I have signed on the 5th day of July, 1980, in the offices of my attorney, Francis E. Harrington, in Portland, Oregon.
>
> I have agreed to waive extradition from the State of Oregon and other rights on the basis of that contract and I promise and agree to be bound by it so long as it is honored by the State of Florida. If not fully and exactly so honored, I declare that I shall assert my constitutional rights above described.

/s/ Colleen O'Brien

(T. 1793)(emphasis added).

Mr. Fox had no doubts that he would have used it had it been made available to him (T. 382). The letter reflected upon Ms. O'Brien's motives -- classically a subject of cross-examination. See Davis v. Alaska, 415 U.S. 308 (1974). Additionally, the out-of-state subpoena papers that went undisclosed would have provided valuable information to the defense, as Mr. Fox explained (T. 384).

Considering all the proceedings during the trial, and the fact that the jury returned a life sentence, Mr. Fox had no doubt that the results of the proceedings would have been different if he'd been provided the discovery of these exculpatory documents as required by law under Brady (T. 385). Mr. Fox explained:

> THE WITNESS: Your Honor, I think in this respect: She was the crux of the case and, with this additional information, I could have more extensively cross examined her and shown her interest, bias or prejudice as a witness of the case.
>
> THE COURT: Assuming -- you say it would have been different, how could it have been?
>
> THE WITNESS: It could have been this: They could have said: Colleen O'Brien, we don't believe you and we're not going to rely on the evidence you have provided and, based on the other -- other evidence that has been presented, first degree murder has not been proven to us beyond and to the exclusion of every reasonable doubt and they would have returned a verdict other than murder in the first degree.
>
> THE COURT: Such as?
>
> THE WITNESS: Such as second degree murder, third degree murder, manslaughter or not guilty.

(T. 385-86).

Ms. O'Brien claimed to be the only eyewitness who saw Mr. Routly commit the murder. Mr. Routly testified that no it was Ms. O'Brien who committed the murder and who asked Mr. Routly, her boyfriend, to help her get away from Florida. The circumstances are virtually identical to Smith v. Wainwright, 799

F.2d at 1444:

> The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

Jeffrey Fitos, the trial prosecutor, testified at the evidentiary hearing. Mr. Fitos was shown Defendant's exhibit 23 which was a file folder from the State Attorney's file. Contained in that folder were the following: motion for extension of speedy trial and continuance; affidavit in support; motion to secure out-of-state witness; handwritten description of Colleen O'Brien; the letter of O'Brien's on Mr. Harrington's stationary; a capias issued for Colleen O'Brien for an information on second degree murder, dated June 27, 1980; standard application for setting bail (T. 585-91). Nothing contained in this file was provided to the defense.

Mr. Fitos was asked if he provided the immunity agreement to Mr. Fox:

> Q. Did you ever hand that document to Ron Fox?
>
> A. I did -- no; I do not recall ever personally handing it to him.
>
> Q. Did you ever mail that document to Ron Fox?
>
> A. I did not.
>
> Q. Did you ever hand that document to Jim Burke?
>
> A. I don't believe so.
>
> Q. Did you ever mail that document to Jim Burke?
>
> A. I don't really recall ever having done that.
>
> Q. Did you ever hand that document to anybody in the Public Defender's office?
>
> A. I don't recall whether I had done that or not, specifically.
>
> Q. Did you ever mail that document to anybody in the Public Defender's office?
>
> A. I don't know.

* * *

Q. Mr. Fitos, did you ever pick up the phone and call Ron Fox and ask him to come over to your office and pick up that document?

A. No.

Q. Did you ever hand that document to any of Mr. Routly's attorneys, you yourself?

A. Not personally, no.

(T. 603-04).

Q. Okay. In terms, now, of those documents in that folder there, the various documents you just went through, did you ever give any of that to Mr. Fox; again, hand it to him, take it to him, mail it to him, call him and tell him it's in there, anything along those lines?

A. No.

(T. 608-09).[3] It was quite clear from the evidentiary hearing that Mr. Fitos did not comply with his statutory duty to provide continuing discovery in this case.[4]

There can be no doubt about Mr. Routly's entitlement to relief. Rule 3.220 of the Florida Rules of Criminal Procedure, clearly defines the prosecutor's obligation of disclosure. Failure to honor Rule 3.220 requires a reversal unless the State can prove that the error is harmless. Roman v. State, 528 So.

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[3]Again, the circuit court has found as a matter of fact the contract was not delivered to the defense.

[4]Unfortunately, this was not an uncommon pattern for the Fifth Circuit State Attorney's office during the late '70's and early '80's. As Mr. Gregory Tucci, a private practioner in Ocala, testified, he discovered only recently the State's failure to disclose evidence in State v. Taylor, a 1979 case. Mr. Taylor's conviction was reversed on appeal and it was then learned that the Assistant State Attorney involved in that action had also withheld exculpatory materials from the defense.

In Roman v. State, 528 So. 2d 1169 (Fla. 1988), another first-degree murder case prosecuted by the State Attorney's Office for the Fifth Judicial Circuit, the Florida Supreme Court granted a new trial in post-conviction proceedings because the prosecution there also withheld material evidence, and violated its discovery obligations by not fully providing the material to the defense. Id. at 1171.

2d 1169 (Fla. 1988). Here exculpatory evidence and statements (including a signed contract of immunity) material to the defendant's case were undisclosed. Clearly, the undisclosed evidence here negate the guilt of Mr. Routly by impeaching the State's star witness, and supported the testimony of Mr. Routly that she was lying. In United States v. Bagley, 473 U.S. 667, 676, the Supreme Court held:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interst. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is "evidenced favorable to an accused," Brady, 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such suble factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The prosecution's suppression of evidence favorable to the accused violated due process. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as occurred here renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, supra; United States v. Bagley, supra. Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated:

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987, cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that . . . the

> result of the proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987)(quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))(plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(in banc).

There can be little doubt that material evidence was withheld in Mr. Routly's case. The circuit court found nondisclosure. Further, trial counsel testified how he would have used the evidence during the guilt and penalty phases. The undisclosed evidence was favorable to the defense. The only question is whether the evidence was material. Material evidence is evidence of a favorable character for the defense which may have affected the outcome of the guilt-innocence and/or capital sentencing trial. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87.

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). Here, as trial counsel has stated, the withheld evidence was critical to the theory of defense -- Ms. O'Brien was lying to save herself. It is obviously constituted impeachment.

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. However, it is not the defendant's burden to show the nondisclosure. "More likely than not altered the

outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. Such a probability undeniably exists here. Had this evidence been disclosed, there would have been no conviction, and no death sentence. The State's case was premised upon Colleen O'Brien's credibility. The jury had to choose between Colleen O'Brien and Dan Routly. Which one was telling the truth. The undisclosed evidence dramatically impinges upon Ms. O'Brien's testimony and therefore undermines confidence in the outcome.

The fourteenth amendment's Due Process Clause further demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 105 S. Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150 (1972), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935), and to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial

process." United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976). The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 405 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667, 678 (1985), quoting United States v. Agurs, 427 U.S. at 102. Thisis in essence the Chapman v. California, 386 U.S. 18 (1967), harmless beyond a reasonable doubt standard. Bagley, 473 U.S. at 679 n.9. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is any reasonable likelihood, Bagley, supra, that the falsity affected the verdict. Here, knowingly, the State allowed false and misleading testimony to go uncorrected at trial. Relief under Giglio, Bagley, and Roman is more than proper.[5]

[5]Perhaps the fact that this case was handled by Jeffrey Fitos clarifies how these blatantly improper acts and/or omissions could have come about. Indeed, Mr. Fitos' reputation at the time of Mr. Routly's trial was questionable.Former prosecutor Fitos is now a disbarred federal narcotics law violator. See United States v. Fitos, No. 88-7-Cr-Oc-12 (M.D. Fla., Ocala Division, 1988)(plea of guilty entered in case involving indictment for violation of federal narcotics [cocaine] distribution laws). Mr. Fitos entered a plea of guilty to conspiracy to distribute cocaine and is currently serving a sentence in a federal penitentiary.

Promises and threats to witnesses are classically exculpatory, and thus material. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Any motivation for testifying and all the terms of official or unofficial agreements or understandings with witnesses must be disclosed to the defense. Giglio. Impeachment of prosecution witnesses is often critical to the defense case, as is especially true in Mr. Routly's case, since the case involved a credibility contest between Mr. Routly and O'Brien. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a cooperating accomplice witness:

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

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

"Cross-examination is the principal means by which the believability of a witness and the truth of [her] testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and here that star-witness was a cooperating accomplice regarding whom critical information was withheld. Additionally, O'Brien's testimony about her status was false. Her testimony was not corrected by the trial prosecutor, as former prosecutor Fitos himself admitted at the evidentiary hearing.

Mr. Routly was denied his right to a fair trial when the prosecutor

deliberately suppressed the evidence mentioned above. Each suppression, in and of itself, is prejudicial enough to warrant relief as is the failure to correct O'Brien's lies. The total prejudicial effect of all the non-disclosures, Chaney v. Brown, supra, and the false impression left on the jury unquestionably makes more evident the constitutional violations. Rule 3.850 relief is proper. See Roman, supra.

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing. The Court also noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair adversarial testing, and thus where counsel's performance is rendered ineffective.

Here, defense counsel did not know that the star witness was in hiding two weeks before trial and only agreed to testify upon signing the undisclosed contract of immunity. The prosecutor did not provide defense counsel with this information. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. However, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury.

The prosecution thwarted counsel and insured that Dan Routly was denied the effective assistance of counsel. Without full disclosure under Rule 3.220, counsel was denied the information necessary to a reasonable investigation of available impeachment and exculpatory evidence. As a result, no adversarial testing occurred. Dan Routly was convicted without the effective assistance of counsel. His trial was "a sacrifice of [an] unarmed prisoner [ ] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom.; Sielaff v. Williams, 423 U.S. 876 (1975).

Accordingly, Mr. Routly's conviction and sentence must be vacated and a new trial ordered.

ARGUMENT II

ASSISTANT STATE ATTORNEY FITOS KNOWINGLY ALLOWED ITS OWN KEY WITNESS TO COMMIT PERJURY AT DEPOSITION AND AT TRIAL, FAILED TO CORRECT THE MATERIAL FALSE STATEMENTS AND HIMSELF SUBOURNED PERJURY.

The State's failure here went far beyond withholding material evidence. The State failed to correct the false testimony given by its star witness. The lower court completely misunderstood the law with regard to this claim. In its order the court said:

> For a Prosecutor to act at trial or deposition in the manner suggested by the Defendant, i.e. to stand up and correct a witness, would amount to telling the witness what to say or to impeaching your own witness, both of which procedures would be improper. Therefore, the Court finds that the Prosecutor acted properly in the context of this case and further that the State did not use or allow introduction of perjured testimony.

(T. 1745).

<u>This is in error as a matter of law</u>. The State had an obligation to correct the witness' false statements but failed to do so. <u>Alcorta v. Texas</u>, 355 U.S. 78 (1957)(State's failure to correct false testimony violated due process). Ms. O'Brien had in fact been charged with second degree murder in June of 1980. Mr. Fitos testified as to the Capias and Capt. Hanna testified to his knowledge of that as well (R. 162). Yet, Mr. Fitos did not correct Ms. O'Brien's testimony to the contrary.

The evidentiary hearing record also reflects that Mr. Fitos did not correct Ms. O'Brien when she provided similar false testimony about her status and her agreements with the State <u>at the time of trial</u>. <u>Cf</u>. <u>Bagley</u>, <u>supra</u>; <u>Giglio</u>, <u>supra</u>. As former prosecutor Fitos testified at the evidentiary hearing:

> Q. If you could read to us the question and answer; and this is, again, Mr. Fox, from line 7 through line 9?
>
> A. It's beginning with line 7?
>
> Q. Yes.

A. QUESTION: You don't recall for sure. All right. Now, have you ever been formally charged with this murder?

ANSWER: No.

QUESTION: Are you sure of that?

Q. And then there is an objection by Mr. Oldham?

A. Do you want me to read that, as well?

Q. Sure.

A. BY MR. OLDHAM: Your Honor, I object. The witness has answered the question and now he's asking whether she's sure.

BY MR. FOX: I withdraw that one.

Q. Keep going, actually. Go to line 18. I think that's the --

A. 18?

Q. -- full quote on that.

Yeah.

A. I withdraw that one.

Isn't it true that you were just charged in July of 1980 with second degree murder of Anthony Bockini?

ANSWER: No.

Q. Okay. Now, that question and answer was not accurate; was it?

You had a capias for her, you just related to us --

A. Right.

Q. -- a moment ago that you had that?

Did you at that point stand up and correct Ms. O'Brien's misstatement?

A. Did I stand up and correct --

Q. Yes.

A. No.

Q. Did Mr. Oldham?

A. No.

Q. Okay. Now, if you could just skip down to line 22 and read to us lines 22 through 24, please?

A. 22 through 24?

Q. Yes.

A. Are you free to leave to go back to Michigan or whether it is you -- or wherever it is you reside now?

ANSWER: I don't know.

Q. Okay. Now, that wasn't accurate, as well; is it not?

The -- the immunity contract related that she had to testify that her child would be in the custody of the sheriff, various provisions indicating that she wasn't free to leave until she fulfilled her obligations and that if she didn't fulfill those obligations, she would be charged and prosecuted?

A. So what is your question, again? I'm sorry.

Q. My question is: So that statement on her part wasn't accurate?

A. It could have been, yes.

Q. Did you stand up and correct that inaccuracy at that point?

A. I did not.

Q. Did Mr. Oldham?

A. I don't recall; but I -- I imagine it would be reflected here. I don't know.

Q. Okay.

A. I don't recall about that.

Q. If you could please turn to the next page?

A. That's 923?

Q. That's 923, yes, and if you could please read us -- I'll just read it to you, because it's real short. Lines 10 and 11, regarding to what was promised and the question is:

And what would that be?

And she answers: Immunity.

Was that inaccurate? Isn't it, in fact, true that she was promised various other things as reflected in the contract?

A. She was promised immunity and contained in that immunity

were agreements.

Q. Various provisions?

Were there also provisions that are unrelated to immunity; such as travel and so on and so forth?

A. There were other provisions about traveling expenses, certainly.

Q. And there were other provisions --

Can we just let the agreement speak to itself --

A. Absolutely.

Q. -- as to what it related?

Did you at that point stand up and correct that inaccuracy on her part by relating what the other terms were?

A. I did not stand up at that time, no.

Q. Okay. Did Mr. Oldham?

A. I don't recall him doing that.

Q. Okay. And then if you could please read to us from lines 12 through 15, please, what the question and answer is there?

A. 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?

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

Q. Again, there were various other provisions in the agreement that answered that question; correct?

A. There were other interpretations that -- yes.

Q. Okay. And were -- isn't it fair to say that the agreement itself relates various other specific provisions?

A. It speaks for itself, whatever it had listed there.

Q. Okay. And, speaking for itself, that has certain specific provisions in there that we can all look at and see for ourselves?

A. Yes.

Q. Okay. Did you at that point stand up and relate those provisions?

A. Did I?

No.

Q. Did Mr. Oldham?

A. No.

(T. 643-47)(emphasis added).

At the evidentiary hearing, Mr. Fitos was then asked:

> Q. Okay. To your recollection in the various questions that Mr. Fox asked Miss O'Brien during the deposition and during the trial, did you ever, either at the deposition directly with Mr. Fox or during the trial with the Court, did you yourself ever stand up and relate what the provisions of the contract were?
>
> A. I did not.
>
> Q. Did you ever relate the other information in here regarding Colleen, her flight, the trip to Oregon, the fact that she had an attorney, all of the various things reflected in the file that you knew about her?
>
> A. I did not.

(T. 650)(emphasis added).

Jeffrey Fitos testified that he understood Brady v. Maryland and the ethical standards by which a prosecutor must abide to mean "Fairness and -- and impartiality" (T. 656). Those standards, however, were flouted in Mr. Routly's case, as the evidentiary hearing record in its entirety makes clear.

When a prosecutor knowingly allows false and misleading evidence to go to the jury uncorrected, relief is appropriate if there is any reasonable likelihood that the evidence may have affected the jury's verdict. Bagley, supra; Giglio, supra. According to Bagley this standard is virtually identical to the Chapman v. California, 386 U.S. 18 (1967), harmless beyond a reasonable doubt standard. Bagley, 473 U.S. at 679 n9. False and misleading testimony from Colleen O'Brien went to the jury, and former prosecutor Fitos never corrected it. Relief was denied in the circuit court because the circuit judge refused to accept Alcorta as controlling precedent. If the prosecutor's interest is that "justice shall be done," see Berger v. United States, then the

State must concede that Jeffrey Fitos' actions in this case not only violated Mr. Routly's rights to a fair trial, but were also an embarrassment to the State Attorney's Office for the Fifth Circuit. The falsity of Ms. O'Brien's testimony was established at the 3.850 hearing. Mr. Fitos conceded Ms. O'Brien's testimony regarding the charges pending against her immunity agreement were false. Yet, the jury did not know this, nor was the information available for this Court on direct appeal. It is, however, cognizable now in the 3.850 process. Relief must be granted.

ARGUMENT III

MR. ROUTLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE AND SENTENCING OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards. Counsel did not adequately investigate Mr. Routly'S background and mental health. Counsel had no valid reason for not doing so. Counsel had no valid reason for not

presenting to the jury or to the judge in support of the life recommendation the wealth of readily available mitigation. See Stevens v. State, 552 So. 2d, 1082 (Fla. 1989). Moreover counsel failed to know eighth amendment jurisprudence and object to the introduction of inadmissible evidence and improper argument.[6]

Effective assistance of counsel in any criminal case includes a thorough investigation by counsel into all matters relevant to guilt/innocence and to sentencing. A thorough investigation includes one into "information concerning the defendant's background . . . [I]n criminal litigation, as in other matters, information is the key guide to decisions and actions." ABA Standards Relating to the Defense Function, Standard 4-3.2, Commentary, 4.33 (1979). Mitigation at sentencing cannot be effectively presented without thorough and independent investigation. Information concerning "the defendant's background, education . . . mental and emotional stability, family relationships, and the like, will be relevant . . ." Id., 4.55.

Mr. Routly does not concede that there was no reasonable basis for the jury's recommendation. See Argument VI, infra. However, to the extent that this Court affirmed the override, it was because trial counsel unreasonably failed to provide an additional basis to sustain it, although the evidence which would have established such an additional basis was amply available. Had trial counsel undertaken any efforts to investigate, develop and present this evidence to the jury, their recommendation could not have been overridden -- as demonstrated below, this evidence would have compelled a sentence of life imprisonment, much less established a reasonable basis for such a sentence. Moreover, whether or not this evidence was presented to the jury, it could have been presented to the judge.

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[6]The circuit court denied relief because he would have imposed death anyway, regardless of whether counsel had presented the additional mitigation (T. 1747).

Prior to the penalty phase, Mr. Fox did little investigation "if at all" (T. 405)(testimony of Ronald Fox). "Zero" pretrial investigation went into the penalty phase of Mr. Routly's trial and there was no tactical or strategic reason for that (T. 406). Cf. State v. Michael, supra. Mr. Fox did, as an afterthought, present one of the psychiatric reports prior to penalty but it did not address mitigation (T. 407). Cf. Michael, supra. Mr. Fox testified that what he presented at the penalty phase was very insufficient (T. 408), and that his efforts at trial and sentencing were ineffective under established constitutional standards. Mr. Fox testified that the wealth of mitigating evidence presented by Mr. Routly at the Rule 3.850 hearing was available and should have been developed and presented at penalty phase at the time of trial. However, because of Mr. Fox's lack of investigation, such valuable evidence was not presented or was never heard by the jury or the court (T. 411). Mr. Fox made the point, in conjunction with applicable legal standards, that the mitigating information which the Rule 3.850 record reflects would have established mitigation for the judge's consideration (T. 411-12). See Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(jury recommendation of life cannot be overridden if reasonable basis exists in record); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Neither did the defense provide any background information regarding Mr. Routly to the mental health experts appointed pretrial (T. 413). Mr. Fox testified that his efforts were far from adequate to meet constitutional standards for effective assistance at the penalty phase (T. 413).

Counsel did no preparation for Mr. Routly's capital sentencing proceedings, and presented nothing at sentencing (T. 492). That counsel's failures were entirely unreasonable, and that he was ignorant of the significance of a jury recommendation of life in Florida's capital sentencing scheme, are evident from counsel's testimony at the Rule 3.850 hearing.

In Mr. Routly's case, as in Stevens, trial counsel "abandoned the

representation of his client during sentencing." Counsel did not even attempt to provide additional mitigating evidence to the judge (T. 492). Counsel had absolutely no understanding of the jury's critical function in sentencing and so did nothing to provide a reasonable basis for the life recommendation. Counsel failed to investigate and prepare and so was unaware of the value of the wealth of mitigating evidence available in this case or of the relevance of that evidence to the capital sentencing decision. Here, as in Stevens, "trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel." 552 So. 2d at 1087. Here, as in Stevens, Mr. Routly "has demonstrated a reasonable probability that trial counsel's inaction may have affected the sentence imposed." 552 So. 2d at 1088.[7]

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[7]As this Court has made clear in Stevens, and as the Eleventh Circuit has made clear in Douglas v. Wainwright, 714 F.2d 1532, 1553-58 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (11th Cir. 1984), and Porter v. Wainwright, 805 F.2d 930, 932-36 (11th Cir. 1986), an attorney's ineffectiveness in allowing a jury's life recommendation to be overturned demonstrates ineffective assistance to an even greater degree than cases wherein the jury recommends death. This is so because in cases where the jury recommends life all an effective attorney needs to do is place in the record a "reasonable basis" for that life recommendation. See Stevens, supra; see also Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987). An attorney who fails to meet that simple requirement of Florida law cannot but be deemed ineffective. This is especially so in a case such as Mr. Routly's, a case involving a wealth of mitigation which was available for presentation at the time of trial and which was never investigated or developed by defense counsel. There was no tactic here. There was no strategy here. This is plainly a case of ineffective assistance. Here, "counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989).

"It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). Here, counsel made no preparation for the penalty phase, had no reason for failing to prepare, and had no strategy at all. Counsel violated his primary duty -- the duty to investigate and prepare. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Harris, supra; Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). Here, as in Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), "[d]efense counsel either neglected or ignored critical matters in mitigation at the point where the jury was to decide whether to sentence [Dan Routly] to
(continued...)

Prejudice is apparent: a wealth of mitigating evidence was available at the time of trial and would have established much more than a reasonable basis for the jury's life recommendation. An extensively documented socio/psychological history of the Routly family during Dan's early years was easily available at the time of his trial from the various social service agencies which had on numerous occasions attempted to provide guidance to the troubled Routly family. This history reveals an extremely emotionally and psychologically debilitating home environment. Most of this information was compiled as a result of the reports of concerned elementary school teachers who recognized young Dan Routly's obvious impairment.

As early as the first grade it was recognized by all who came in contact with him that Dan Routly was a disturbed child. His first grade teacher reported:

> During classtime he talks out loud, waves his hands, and refuses to behave or to do his work -- even when spoken to. He frequently leaves his seat and wanders around the classroom and disturbs the other pupils. He destroys his own property as well as the property of others. He has broken new crayons, torn up papers which belong to others, written in his textbooks and on the walls. Several times he has taken things which do not belong to him such as money, toys, and candy and cookies from the lunches of other children. He leaves the classroom without permission.
>
> Often during the day Dan will sit for a few minutes seemingly withdrawn from the rest of the class while he talks to himself, makes faces, and scribbles on his schoolwork.

(School Records)(T. 1136). His fourth grade teacher reported incidents where Dan would crawl on the floor of the classroom, all the while crying or laughing uncontrollably, with no provocation and for no apparent reason:

> Danny cannot control himself or his emotions in the classroom. He makes excessive noises; shoots, whoops, and shrills. He cries or laughs without apparent reason. He crawls on the floor under desks, runs out of the room, and is continuously trying to draw attention to

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[7](...continued)
death." Id. at 1103. As a result, the judge deemed an override appropriate and reversed the jury's life recommendation; this is a clear example of ineffectiveness. See Stevens; Porter; Douglas.

> himself. He demands more attention than a classroom teacher can give. Even with all of these antics his grades are above average.

(Mott Children's Health Center Records)(T. 1148). Also reported were episodic "blackout" spells, where Dan would lose consciousness for brief periods for no obvious reasons. See Gennessee County Community Mental Health Services Records (T. 1151). One teacher still remembers Dan vividly:

> [W]hen a teacher identified a child as emotionally disturbed and recommended placement with our program, a psychiatric evaluation would be conducted to determine needs and eligibility.
>
> Dan Edward Routly was recommended to our program by the Holy Rosary School in Flint, and was a student in my class from March, 1965 to June, 1966 during his fourth and fifth grade years. I remember Danny so vividly that I can still picture him today as he looked and behaved as a fourth grader. Because of his special emotional disorders and reactions, he has always been unforgettable to me. In fact, just days prior to being contacted and asked to make this statement, I was thinking about Danny because of a student of mine who is very much like Danny.
>
> Danny was a very hyperactive child who always acted nervous. His movements were quick and he constantly batted his eyes. It was very hard to build a relationship with Danny because he could not respond appropriately to expressions of friendship. I remember being especially concerned about his reaction to physical contact -- Danny would dodge any sensation of touch and react in a very threatened manner.
>
> When Danny would get frustrated or angry, he would become incredibly belligerent. His outbursts were intense but unfocused. Danny acted out by tipping desks over or bullying others. His frustration tolerance level was so low that it became clear to me that Danny was simply unable to meet the expectations of a normal teaching environment.
>
> Danny's spontaneous reactions to various situations indicated to me that he was a child from a harsh home environment that offered him no nurturing or affection. His behavior clearly showed that Danny was a child who was suffering from severe emotional deprivation.

(Affidavit of Sharon Fouts)(T. 1165-66).

Mrs. Fouts testified at the evidentiary hearing about Mr. Routly's psychological/emotional impairments:

> A Well, in the educational setting, we consider an emotional impairment to be a behavior disorder that is manifested primarily in the affective or feeling domain and it has to be evident over an extended period of time and it adversely affects a child's functioning in a regular classroom.

Q Are there specific things that cause an emotional impairment or has that been determined?

A Well, there are a variety of causes. Often it's a situation that happened within the family. It could be a catastrophic experience that the child might have had somewhere along the line.

Probably in the various students that I have had over the years, there have been several causes. Generally, however, there is a breakdown in the family situation.

(T. 522).

Mrs. Fouts discussed her classroom for emotionally impaired children that had begun in 1965 (R. 527-31) and remembered Dan Routly as one of her students:

Q You said you started your program in March of '65.

Does that mean you were in a classroom setting then?

A Yes. We were in a classroom setting.

Q And you did have students at that time?

A That's right.

Q Was Dan Routly one of those students?

A That's right.

Q That, I guess, assumes then that he did, in fact, meet that criteria that a psychiatrist or someone certified that he was emotionally impaired?

A That's right. That was a stipulation and we followed that very closely.

Q Do you recall Dan being in your classroom?

A Yes, I do.

Q And would you tell us why he was in your classroom?

A Okay. The initial referral came to us that there was acting-out behavior in the regular classroom and --

Q When you say acting-out behavior, can you give us a few examples of that?

A All right. It could be outbursts, verbal outbursts of talking, laughter, inappropriate kinds of things that would disrupt the instructional setting of the classroom.

It could be out of the seat, tipping over chairs or desks,

those kinds of things are considered; outbursts in the classroom.

With Dan, it was a -- there was a lot of restlessness in the -- in the classroom. He was unable to follow the teacher's requests as far as staying in the seat, staying on task, not being disruptive to the classroom or disturbing others; and there were some occasional situations of tipping the chairs or the desks.

Q Okay. When you had him in the class, in your class, what were some of your observations of -- of him at that time?

A Okay. I recall that Dan was a very capable student and, when he so desired, could do very nice work. He was very active. We don't really say hyperactive at this point; but -- but there was a high-activity level.

He had a difficult time building relationships with other students. He had a difficult time responding to me, as I worked very closely individually with the children trying to build a strong relationship with them. I didn't feel a responsiveness in that situation.

There were some difficulties with peers on the playground and behaving appropriately in a play situation, a give and take situation. It was difficult for me to be involved in the play activities. Within the classroom he was quite responsive to the control of the classroom and I don't recall as many acting-out situations within the classroom as he had in nonstructured times; for instance, the bus ride, the playground, the cafeteria, those times in which there was not the authority figure there.

I recall, also, probably my most vivid recollection of Dan is the fact that he really avoided any kind of physical contact. As a teacher, we often touch the children. As you walk down the hall, you put your arm on their shoulder as encouragement or as a method of reminding them that that behavior is not appropriate.

He avoided that, would duck and flee.

(T. 531-33).

When asked about her contact with Mr. Routly's family, Mrs. Fouts stated that the program encouraged family involvement but despite her efforts, she never had contact with the Routlys (T. 533-34).

A Well, it is very unusual. I mean, it probably only happened just a very few times that I had no -- no meetings with the parents. Generally the parents are concerned about what's happening in the classroom and at least they want to see what the program is like, you know, if they come out of curiosity or wanting more information; but I generally meet very regularly with the parents.

> So it is unusual for the parents not to be interested in what's happening in the classroom within the program.

(T. 534). Mrs. Fouts stated she had never been contacted about Mr. Routly's case during the time of trial. Had she been contacted, she would have gladly testified for Mr. Routly (T. 538, 542).

Other matters were also available at the time of trial to present to the judge and jury. Social service agencies acting on the reports of concerned teachers made repeated and continuous attempts to discover the source of Dan's problems and provide the help he so desperately needed. Several counselors suspected that the boy suffered from an organic brain disorder, but the recommended neurological testing and treatment was frustrated by the inaction and indifference of his parents.

> Mr. and Mrs. R. came to the office on 4-9-63 seeking help for their son, Danny, who was presenting behavior problems at home and at school. After observing this boy in several interviews, this worker felt that he was brain damaged, or had some neurological difficulties, and referred Mrs. R. to either the Flint Mental Health Clinic or to a neurologist for a complete physical checkup. This worker's suspicions that there might be some difficulties with the parents because they were so extremely different in their actions and appearance. However, Mrs. R. assured worker that there were no other family problems and that she was getting along fine with all the other children except for Dan. Whether Mrs. R. took this as a rejection because she was referred to another agency for help, or just what happened, worker does not know, but she heard nothing further from Mrs. R. Worker presumed that she was getting help elsewhere, and that they no longer wished for further service. Therefore, THE CASE IS CLOSED.

(Catholic Social Services Records)(T. 1177).

> The last contact worker had with this family was in June of 1963 when worker suggested that since she was getting nowhere with this boy, she felt that they should make arrangements for him to be seen at the Mental Health Clinic, or have a complete physical checkup at Mott Child Health Clinic, if they could not afford to take him to a neurologist. Worker also requested that they let her know what they had done, and if they were able to get any help for this boy elsewhere. Worker never heard anything more from Mrs. R. and inasmuch as they did not have a telephone at that time, worker had planned to make another home visit. However, she was unable to find the home on one occasion, and it seems that worker never did have an opportunity to look for the family the second time. Since worker heard nothing more from the R's, this family remained on her list of cases to be closed.

(T. 1176).

Agency reports uniformly indicate that young Dan Routly was a desperately troubled boy in dire need of professional help. He was placed in a school for emotionally handicapped children in the fourth grade, and seemed to benefit temporarily from the structured and caring environment provided there, but any progress made was again frustrated by the indifference of his parents. Although the frequent attempts by various social service agencies to provide Dan Routly with the help he so obviously needed were largely unsuccessful because of the refusal of his parents to meaningfully participate and assist, the records compiled by those agencies reveal in startlingly clear detail the sources of young Dan Routly's difficulties. Dan's mother, the overwhelmingly dominant parent figure in the Routly household, was at times quite candid with the various psychological counselors who attempted to intervene on the behalf of Dan. Reports of these interviews with Mrs. Routly plainly reveal that she had a vehement dislike for the boy, an attitude which she expressed to him at every opportunity (See supra, T. 1143, 1151).

Dan's siblings (there were eight children in the Routly family) confirm their mother's extreme dislike for Dan, especially when compared to her relationship with other of her children. Counselors who dealt with the family during that period all report that young Dan appeared as if he had never experienced any normal parental affection -- Dan's siblings report that their mother would consciously avoid showing Dan any affection whatsoever, and would never touch him except to hit him. Professionals report that Mrs. Routly freely admitted resenting Dan from the very beginning of his life, relating her frustration with the unplanned pregnancy that resulted in his birth and the difficulties engendered by the fact that she already had a ten-month-old child when he was born (T. 1143, 1151).

Noting that Dan appeared undernourished and that he was always ravenously

hungry while at school, counselors surmised that the boy was not being fed at home. Id. Dan's sister related that Dan was indeed often refused food by his mother as a form of punishment, frequently sent to bed without supper while the favored children were lavishly fed (T. 1182).

Most of those familiar with the Routly family during this period of time attribute this highly unnatural and destructive mother/son relationship to an incident that occurred when Dan was two years old. Dan, his sister Roberta who was only three years old, and their younger brother Michael, eight months old at the time, were left alone in the house by their mother. While she was away, the infant Michael, whom she had left in his high chair, slipped down in the chair and strangled to death when his neck was caught between the back of the chair and its tray. Mrs. Routly blamed Dan for the death. From that moment on, report the Routly siblings, their mother displayed a visible aversion to young Dan. Dan's sister related:

> Danny had severe emotional and psychological problems from the time he was a baby. As far back as I can remember, our mother always hated Danny - he was rejected, despised, and singled out from the rest of the family for cruel punishment that can only be described as torturous. In fact, just thinking about all that our family was and did is a very painful thing for me.
>
> Danny was born when I was only 13 months old. My mother has often talked about how she never wanted Danny from the time she first became pregnant with him. She would even say this in front of Danny when he was little.
>
> In 1957, when I was three years old and Danny was two, my mother left us alone at home with our infant brother Michael, who was sitting in the high chair. Mom went across the street to use the neighbor's phone and left us alone for a long time. While she was gone, Michael slipped down in the high chair, caught his neck in the tray and strangled to death. I remember that Danny and I knew something was wrong but we didn't know what to do. When our mother came back she found Danny and me trying to feed the dead baby because we thought he was hungry.
>
> My mother always blamed Danny for Michael's death. From that moment on, she never touched, embraced or showed any affection to Danny again.

* * *

My mother always played cruel tricks on Danny that were designed to make him feel different or bad. She would say I wonder where the tape is, or where something else is, and Danny would always know and jump to get whatever it was for her. Then she would tell him he was just like a rat - he could find anything because he was always looking around in places he didn't belong and then she would punish him. Often she would tell Danny she hated him and wished he would leave forever and then she would pack his bags for him. Then if he did run away he would be beaten when he came home. Once when she got on a numerology kick she compared all the digits in our birthdates and talked about how Dan's date of birth showed that he was evil. My mother gave everyone except John a nasty nickname. She called Rita "pig" because she was overweight, I was "queenie" because I was so ugly, Bob was "pee wart" because he wet the bed, she made fun of Renee because she was crosseyed and had to wear a eyepatch, Jimmy was "alfalfa" and she always called Danny "thief".

(T. 1189).

Dan's brother, James, recalled:

The year before I was born, our baby brother Michael died when my mother left Roberta, Danny and Michael alone in the house. Michael choked to death in the high chair and my mother never got over it. Because it was too painful for my mother to admit that she had been visiting her friend when she should have been taking care of her children, she blamed Michael's death on Danny and never let him forget it. I can count on one hand the times my mother showed any sort of kindness or affection toward Danny.

Even as a baby, Danny would do anything to get my mother's attention. Often Danny would run up and kneel in front of my mother and lay his head on her belly but she would just ignore him or push him away.

(T. 1198).

Dan's brother, John, recalled:

Because my mother hated her life, she lashed out at Danny and used him like a punching bag. My mother always talked about how much she hated Danny and would say this right in front of him. She would talk in front of Danny about how he was the devil and that Satan lived inside of him. Whenever we were in church, Danny and I became so terrified that we would faint. My mother took us to the doctor, but it never helped. Going to Mass always made us pass out.

The only time my mother ever paid any attention to Danny was when she beat him.

(T. 1205-06). Dan Routly was only two years old when the incident with Michael occurred, and has no current memory of it -- it is highly improbable that he was even aware of what had happened. Nevertheless, his mother continued to hold him

responsible for the death of his brother for the remainder of his life with the family, and was not hesitant about expressing her views to the boy's face. Mrs. Routly has now acknowledged the emotional and psychological damage she inflicted on Dan from an early age:

> Our daughter, Roberta, was born when John was four years old. When Roberta was only three months old, I was pregnant again and more miserable than ever. I didn't want another baby because Bob was drinking and staying out all the time and all I had to do was take care of the kids. When Danny was born, I didn't want him because I hated having so many kids.
>
> . . .
>
> In 1957, when my son Michael died, my entire life fell apart. Michael was only an infant then and my daughter Roberta was three and my son Danny was two. Because we didn't have a phone, I had to leave them at home alone to go to the neighbor's house to make a call. When I came back, Michael had slipped down in the high chair and strangled to death. I suffered a nervous breakdown that left me and my entire family irreparably damaged.
>
> The horror of Michael's death was more than I could bear. I blamed Danny for Michael's death even though he was only two years old. It wasn't even until a few years ago when I saw a psychologist that I came to grips with how I tortured Danny all his life for something that was just a tragic accident. I remember screaming at Danny and accusing him of killing Michael. I was so distraught that I was not in my right mind and believed that Danny had done this to punish me. I became afraid of Danny and tried to get back at him for taking Michael away from me.

(T. 1211-13).

Completely rejected by his mother, young Dan turned to his father for the parental affection that was not forthcoming. Unfortunately, Mr. Routly drank excessive amounts of alcohol to escape from the realities of his domineering and emasculating wife. Professionals who had counseled the family in the past discussed this situation:

> When Mr. R. came in for his initial interview . . . worker detected alcohol on his breath. . . . He was somewhat defensive about his drinking by stating that his wife sees it as all the problem. However, he feels that he does not drink that much. As he went on, he began to relate some of the reasons why he does the amount of drinking he thinks is involved. He described his wife as a "nag". He used some very frank terms in pointing out why he does not feel a part of his family. . . . He seemed to be projecting almost all of the blame upon her as she did on him. He never really could talk about himself

too much in terms of how he feels about it. He did state that he feels left out and whenever he makes family decisions they seem to be contradicted by his wife. He gave several examples verifying this, most of which centered around such things as disciplining the children, or spending money. He will suggest one thing, or take disciplinary action against the children only to have it reversed.

. . .

In terms of their marital interaction, Mrs. R. saw herself as taking over more in family decisions. Worker should point out that it was his observation that Mrs. R. is a very masculine appearing woman and very aggressive in speech and manner. She is certainly unattractive and does not offer too much in the way of personality to compensate for this. Worker could see in his own mind that Mrs. R. very possibly could be instrumental in some of the drinking problem, primarily because of her aggressive tendencies.

. . .

[Mrs. Routly] still had many complaints to offer much of which was the amount of drinking that he did. Worker did attempt to help her see that maybe some of this drinking could be a result of the family roles being played by all. The lack of respect felt by the children for him might be sensed by Mr. R. as well as the feeling that he is not a part of the decision-making in the family. Mrs. R. recognized that this might be a contributing factor but at the same time thought that Mr. R. should be "grown up" enough not to let these things bother him. She felt that she has had to take over because he would not in the past. That is why she has sometimes contradicted his decisions.

. . .

In an interview on June 1, I informed them that in good conscience that I had to let them know that their behavior was destructive to their children. Mrs. R.'s comment was that she was pregnant again. They then proceeded to fight about the coming child.

(Catholic Social Services Records)(T. 1177-81). The Routly children have stated that the only personal interaction they ever experienced with their father were as the frequent recipients of his violent and drunken wrath. Dan's sister related:

My father was an alcoholic. He and my mother fought all the time and often he would leave the house after they argued. Dad only hugged us when he was drunk and other times he acted cold and depressed. He would beat us with belt or a paddle whenever he was mad about something, or he would make us box until someone got hurt. Dad was very strict and even talking too loud could set him off. One of his rules was absolutely no talking in the car -- if we even whispered, he would beat us. With the girls, he would pull our pants down in front of our brothers to humiliate us, and then beat us. Sometimes we would

have to stand in the corner for hours or go to bed without supper. (T. 1186).

Dan's father frequently abused Dan by beating him severely with sticks or rulers while he was held down by his older brother, John. Despite the severity and brutality of the man, young Dan remained loyal to his father, no doubt as a reaction to the enmity displayed toward him by his mother. According to Dan's sister, when the rest of the children would express their hatred for the man, Dan would always come to his defense. She remembered one incident when she and her siblings concocted an adolescent plot to kill their father -- when Dan reported the plan to their father, Mr. Routly disappeared from the home for a month with no explanation for his absence (T. 1122).

The eldest Routly child, John, was even more physically abusive to the children than was their father. Dan's sister recalled that when Dan was a young boy, John kicked Dan in the face while he was sleeping, breaking his nose. She also told of her own experiences with John -- on one occasion when she was quite young, John blindfolded her, tied her hands behind her back, and attempted to stuff her head-first into a water-filled barrel. Their parents returned home unexpectedly just as she was going into the barrel, and John forced her to tell them that they were playing. As she grew older, she relates, starting around the age of twelve, John began sexually molesting her. When she would try to tell her mother about John's behavior, her mother would dismiss her stories as lies -- ever protective of her oldest son (T. 1187-88).

Such a violent and deranged environment could not but have a damaging effect on an already damaged boy. Dan's sister discussed how obviously disturbed Dan was:

> When Danny was a teenager, he would tell me about his hallucinations. At that time I thought it was just from all the drugs he was using. Voices would tell Danny to do things and this confused him. I didn't know what to think when Danny would tell me this because he had always acted weird. Once when he was in the ninth grade, a voice told him to go home so he just left class and walked

> about 8 to 9 miles home from school in the middle of the day. Whenever Danny would act weird or bizarre or misbehave, my mother would say it was because Satan lived inside of him.

(T. 1188).

Dan Routly quite understandably began running away from home at quite an early age, his first attempt occurring at age ten after his father smashed a 2 x 4 board into him from behind. (See Report of Dr. Harry Krop, R. 1218.) Despite his numerous problems, Dan graduated from high school at the age of seventeen. The day after his graduation, his mother ordered him out of the house (T. 1190).

No one could have escaped emotionally unscathed from the environment in which the Routly children were forced to grow up. Dan Routly's sister explained that all the children were somehow damaged and scarred by their family life:

> It wasn't until a few years ago when I required psychiatric care that I began to understand and deal with what all these problems had done to me and my brothers and sisters on a personal level. For a long time I separated myself from my family because of how destructive all of our relationships with each other were. While I was growing up I felt ugly, dirty, sinful and bad. Like Danny, I would run away from home, but not until I was a teenager. I would leave once or twice a month. One time I just stayed with some strangers that picked me up while I was hitchhiking and I didn't really much care what happened to me as long as I was away from my family. I moved out of my parents house the day I turned 18 and got married five days later. A month after my wedding, I graduated from high school.
>
> After we got married, my husband and I moved to a small town outside of Flint, Michigan. Danny would come and visit me here to talk and get away from our family. We were both so damaged by our home environment that we couldn't do much for each other except be miserable together. I became an alcoholic and suffered a nervous breakdown that left me under psychiatric care.
>
> After my father died, my brother Jimmy was afraid to leave the house - he never left until he finally joined the Marines. My sister Renee still lives at home and just sits there and stares blankly. Renee never got over when Jimmy raped her when she was only 6 years old and he was 14. She could never even talk about it until last summer when she moved in with me and started seeing a psychologist. Renee was always the smartest one in the family - she got straight A's in school. When Renee was in high school, Jimmy would always act like she was his girlfriend and touch her and fondle her in front of everyone. When Renee's friends found out that Jimmy made Renee sleep with him, she was so humiliated that she had to drop out of school and her dreams of college were dashed. When Renee would try to have normal relationships with young men from her school, Jimmy would hide and wait for them to come home from their date and he beat up one of

Renee's date with a baseball bat so severely that he had to be hospitalized. Renee was always afraid of Jimmy because he often tortured and killed young animals for fun. When my mother found out what Jimmy was doing to Renee, she accused her of enjoying Jimmy's attention.

> The youngest child in our family, Paul, is fifteen years old and is also profoundly disturbed. He beats on the family dog for fun and is failing miserably in school. Just last summer he went crazy and beat up our grandmother who was staying at my mother's house. She was so badly injured that she had to be hospitalized. Paul would enjoy torturing our grandmother by throwing her glasses on the floor and kicking them away from her reach. He would also make fun of our grandmother because she doesn't speak English very well. Paul learned this from my mother, who often makes fun of her own mother in front of everyone. I was so afraid for my grandmother's safety that I called one of my mother's brothers to make arrangements for her so she wouldn't have to go back to my mother's house.

> My sister Rita also has many psychological problems. She is an alcoholic and is afraid of being promoted at work. Rita has been offered supervisory positions but refuses to try to make things better for herself. My brothers have also forced Rita to have sex with them as well. My mother would always say that she was much too embarrassed to talk about our family because we were too sick for her to admit it to anyone.

(T. 1192-95).

The death of Mr. Routly in 1978 completed the process of destruction which had been in progress within the family for some time. According to Dan's sister, Dan was the most affected of all the Routly children by his father's death and in his grief turned to Colleen O'Brien:

> In 1978, my father died during triple bypass heart surgery. Shortly before he went into the hospital he decided that after the operation, he was finally going to go to Florida for a vacation. This had always been my father's dream - to go to Florida. He talked about it all his life and it made a big impression on all of us. To us, Florida became like a magical place where only good things happened to you. All of us saw Dad before he went into surgery except for Danny - that morning he had slept in and he got to the hospital too late to see Dad before he died.

> When the doctor told us that Dad had died during surgery, Danny flipped out. He ran screaming down the hall and was uncontrollable. I went into shock and they gave me a shot. We were all devastated when we lost our father, but no one took it as hard as Danny. I was not surprised when Danny tried to commit suicide right after our father died. . . .

> At Dad's funeral, Danny cried hysterically the entire time. John harassed Danny because he was such a wreck he could barely stand up

and so couldn't be a pall bearer. Danny refused to ride in the family car during the funeral and came in his own car with his girlfriend, Colleen O'Brien. They didn't come to the dinner at the church after the service because Danny was convinced that we were having a party to celebrate Dad's death. Colleen meant the world to Danny. To him, nothing was more important than her loving him. Danny put all his hopes for the future in their relationship. A few months after the funeral, Danny and Colleen moved to Florida. Danny desperately wanted to find the happiness that my father believed was in Florida.

(T. 1191-92).

Robert Routly explained:

Our father died in 1978, when I was 16 years old and Danny was 23. Danny went crazy after Dad died - he just couldn't handle it. He was never the same after that. Danny took off and we hardly saw him at all after that - and when we did he acted bizarre and paranoid, as if he didn't know what was going on at all or where he was going or what he was doing. We all missed Dad but it was different for Danny - he couldn't handle anything after Dad passed away.

. . .

Roberta and Danny were very close and only one year apart in age. Danny depended on Roberta to help him when he had problems, because she understood Danny the best. But when Dad died, even Roberta couldn't help Danny - he just went nuts.

Right after Dad died, Danny started living with Colleen O'Brien. Danny clung to Colleen and his whole life depended on her. Danny and Colleen took off for Florida because that was my father's dream - he always talked about going to Florida one day.

(T. 1231-32).

James Routly reported:

In 1978, when my father died, Danny went completely crazy. I was very frightened because I thought Danny was going to hurt himself. Danny was acting so nuts I thought he had taken a lot of drugs. He was uncontrollable. Danny suddenly just left and I never heard from him again. It hurts me deeply to think of how damaged Danny was and how no one helped him. Danny never had a chance to really live, he just existed.

Everything got worse for all of us after my father died. My mother gave up and didn't even try to supervise the kids anymore. I bought a gun and stayed at home to protect the family after my Dad died, but everything just seemed to fall apart. No one in our family has graduated from high school since my father died. Danny went insane and ran away with Colleen O'Brien to escape all the pain.

(T. 1201-02).

John Routly commented:

> When my father died in 1978, Danny "died", too. Danny's entire world fell apart and he just gave up. When Danny lost my father, he lost the only person he had to succeed for. After that, Danny became completely irrational - it was like he turned his own internal switch to self-destruct. Losing Dad was hard for all of us, but Danny never got over it. We all tried to commit suicide when our father died, but Danny became so insane that I was afraid that he would actually kill himself.
>
> The only thing that Danny had after he lost my father was his girlfriend, Colleen O'Brien. Her love was more important to Danny than life itself. Danny tried to escape all of his pain by running away with Colleen.

(T. 1207).

Dan's mother recognized the effect of the death of Dan's father on Dan and his relationship with Colleen O'Brien:

> When Danny heard that his father died, he went absolutely crazy and lost his mind. Even though Danny has always had a stinking life, I don't think he would have gone nuts if Bob was still here. I was never the mother that Danny wanted or needed and I couldn't do anything for him - whenever I tried, everything got worse.

(T. 1216). Dan attempted to hang himself shortly after the death of his father (T. 1222).

The emotional scars inflicted by Dan Routly's early home environment are still very much evident as Dr. Harry Krop has noted:

> Mr. Routly has been suffering with psychological problems from an early age, as he derives from an extremely pathological family in which there was minimal affection, love and understanding. According to psychiatric records, his parents showed little motivation for change and the client was subjected to physical abuse. His involvement with the criminal justice system began when he ran away from home to escape the emotional and physical abuse. There are indications that Mr. Routly suffered from psychotic experiences when he was younger, but did not receive appropriate treatment. Although a neurological examination was suggested, there was no apparent follow-up to this recommendation. The current evaluation is suggestive of some cognitive and behavior deficits indicative of Mild Left Cortical Hemisphere damage. The evaluation also suggests that, although Mr. Routly exhibits a pattern of behavior consistent with a chronic characterological disorder, there was some evidence to suggest paranoia schizophrenia, which may have contributed to the defendant's tendencies toward suspiciousness and interpersonal difficulties.

(T. 1224-25).

Defense counsel Fox testified that his performance at penalty phase and sentencing was deficient in that he failed to present to the judge and the jury mitigating evidence that was available at the time (T. 421). Mr. Fox recognized that the mitigation presented in the 3.850 proceedings was mitigation which he could have and should have presented very effectively. Obviously the family members provided invaluable insight into the hold Colleen O'Brien had over Mr. Routly. The judge at sentencing and this Court on appeal needed to know this in determining whether a reasonable basis existed for the life recommendation.

A defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). This right is a right to a confidential expert who assists the defense. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). Florida's capital sentencing statute, by its very nature makes the capital defendant's mental state relevant to the sentencing decision. What is required is an "adequate evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). However, trial counsel failed to seek this assistance of a mental health expert. Counsel's performance was deficient. As Dr. Krop's report makes clear, a mental health expert's testimony would have established a reasonable basis for the life recommendation had the confidential expert been provided with the background information.

Mr. Routly's lawyers knew nothing of their client's background and history. They did nothing with the overwhelming mitigation available from his client's mental health background. They ignored all of that evidence -- evidence which would have made a difference, as it would have precluded an override of the jury's recommendation of life. They therefore failed to present the tribunal charged with deciding whether their client should live or die with the incredibly tragic story of Dan Routly's life and of his mental deficits. They thus deprived their client not only of a meaningful and individualized

sentencing determination, but also of a life sentence. Moreover counsel failed to know eighth amendment jurisprudence and actively oppose the presentation of inadmissible evidence and improper argument.

Counsel admitted their performance was deficient. The record bears this out. The circuit court ruled "any alleged failure to present this evidence at the sentencing phase had no effect on the sentence." (T. 1745). This ruling is in error as a matter of law. The question is not whether Judge Angel would still have imposed death even if the overwhelming mitigation had been presented. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation.") Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989)("A trial judge is permitted to determine the weight to be given the mitigating evidence, but a judge may not refuse to consider any relevant mitigating evidence.") The mitigation which effective counsel would have presented would have precluded the affirmance by this Court of an override. Under the correct standard, prejudice was shown; 3.850 relief must be granted.

ARGUMENT IV

MR. ROUTLY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon defense counsel. Defense counsel is obligated "to bring to bear

such skill and knowledge as will render the trial a reliance adversarial testing process." Strickland, 466 U.S. at 688. Here, Mr. Routly was denied a reliable adversarial testing. Mr. Routly's attorney, failed his client. Defense counsel Fox testified at the evidentiary hearing and acknowledged that he committed serious errors in Mr. Routly's case. As a result of Mr. Fox's critical errors an adversarial testing did not occur.

A. DEFENSE COUNSEL FAILED TO PROTECT MR. ROUTLY'S RIGHTS BY FAILING TO ADEQUATELY INVESTIGATE THE CIRCUMSTANCES BEHIND THE CONFESSION AND EXTRADITION, THUS RENDERING HIS ASSISTANCE INEFFECTIVE

Although this Court previously rejected Mr. Routly's argument that his confession and extradition were both illegally obtained, the issue of counsel's ineffectiveness on the point was not entertained. Routly v. State, 440 So. 2d 1252, 1260 (Fla. 1983). Mr. Routly maintains that his confession was illegally obtained by way of promising him that in exchange for the confession he would be prosecuted for second degree murder and that he would likely serve fifteen to twenty years in jail. The fact that the State made the promise to Mr. Routly -- as well as to Flint, Michigan, law enforcement officers and to the court in Flint, Michigan -- and then violated its own promise strikes at the heart of the fourteeth amendment's requirement, inter alia, of fundamental fairness. It is therefore incredible that defense counsel did not adequately investigate the issue further.

Defense counsel, who had and could have obtained the tools with which to adequately present the issue, ineffectively failed to do so. No tactical or strategic reason supported counsel's omission in this regard. Indeed; defense counsel Fox testified:

Q. Let me show you a document that's been marked as Defendant's Exhibit 13 and ask you if you can identify that for us, please?

A. Yes. This is a transcript of the extradition hearing held in Dan Routly's case in Flint, Michigan, Wednesday, December 5th, 1979.

Q. And appended to that is -- there is also some information

regarding the extradition proceeding itself?

A. I'm sorry. Yes.

Q. Is there not?

A. Yes. There is a waiver of extradition, signed by Dan Routly and Judge Baker, I think it is, as well as -- it has a prosecutingattorney's [sic] signature on there and then there is an order directing delivery of the fugitive which is really, I guess, the order of extradition committing Mr. Routly to Larry Jerald and Frank Alioto's custody for return to Florida, signed by the judge and the prosecuting attorney.

Q. Now, that provided to you, as you indicated, at some point after the suppression hearing?

A. Yes.

Q. But that was prior to Mr. Routly's trial; was it not?

A. Yes. I -- I believe it was prior to the trial. It was very close before the commencement of the trial.

* * *

Q. <u>If the transcript reflects that [a second motion to suppress] was not done at that point</u> --

A. <u>Right</u>.

Q. -- <u>was there any tactical or strategic reason for not doing it at that point</u>?

A. <u>No; because these documents supported what Dan Routly had testified to. I mean, they don't make it or break it; but they certainly support his position. He was contradicted by the officers</u>.

Q. Of what transpired in Michigan?

A. Absolutely.

Q. Did they undermine the officer's account --

A. Absolutely.

Q. -- of what transpired in Michigan?

A. Yes.

Q. Would they be -- would it be expected that those type of documents should have been used?

A. Yes.

Q. -- at the trial?

A. Definitely.

* * *

Q. And that would have undermined the weight of the confession, so to speak, at the trial; would it not?

A. It would be a circumstance that the jury should consider surrounding the time that he gave the statement.

Q. Supporting --

A. Whether or not --

Q. -- Mr. Routly's --

A. -- it's free and voluntary.

(T. 416-19)(emphasis added). In fact, the law is well settled that the defense has a right to present the question of voluntariness to a jury. Crane v. Kentucky, 476 U.S. 683 (1986). Certainly, this evidence should have been presented on the voluntariness of Mr. Routly's waiver of extradition and confession to second degree murder. In fact, Mr. Routly testified at trial he confessed in order to save his pregnant girlfriend, Colleen O'Brien. The police's efforts to mislead as to the nature of the charges (first degree or second degree) furthers Mr. Routly's testimony that his confession was false and not voluntary.

Counsel also ineffectively failed to properly contemporaneously object at the time of trial. That was made clear by this Court on direct appeal:

> At the outset and dispositive on this issue is the fact that the defendant failed to make a contemporaneous specific objection at trial. Not having done so, he cannot now raise this issue on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982); Jones v. State, 360 So.2d 1293, 1296 (Fla. 3rd DCA 1978).

Routly v. State, 440 So. 2d 1257, 1260 (Fla. 1983).

The circuit court found this claim to be without merit because this Court had rejected the argument on direct appeal. However, neither court addressed the real question of counsel's omission to investigate and object at trial.

Clearly, counsel's performance with regard to the arrest and the suppression of the statements was ineffective. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Just as clearly, the deficient performance prejudiced Mr. Routly's rights under the fourth, fifth, sixth, eighth and fourteenth amendments. See Kimmelman v. Morrison, 477 U.S. 365 (1986). Because of counsel's deficient performance, the issue must be readdressed at this juncture.

Miranda requires that an effective waiver of a defendant's constitutional rights must be made knowingly, voluntarily and intelligently. Miranda v. Arizona, 384 U.S. 436, 444, 475 (1966). The record before this Court clearly shows that Mr. Routly was lured into a waiver of extradition and into a confession by police officers who deliberately misled him on critical aspects of this case.

On December 5, 1979, Dan Routly was arrested in Flint, Michigan, after having been under surveillance by Michigan police at the request of Florida law enforcement. Officers that testified at trial mumbled vaguely about "Michigan charges" although none were ever disclosed. At the evidentiary hearing, Captain Michael Hanna of the Flint, Michigan, Police Department testified that the booking card on Mr. Routly (T. 1786) showed Mr. Routly was arrested as a "Fugitive from Marion County Florida" for "homicide" (T. 178). "Ordinarily a booking card would indicate whatever the person was arrested for after that had been formalized or sorted out at the time" (T. 177). Captain Hanna clearly recalled that Mr. Routly was extradited on "second degree murder" (T. 169).

Sergeant James V. Harris, also with the Flint Police Department, testified that when he arrived at work on December 5, 1979, at 8:30 a.m. he was asked to prepare extradition papers on Dan E. Routly. Sgt. Harris said that he knew some officers from Marion County, Florida, had talked with Mr. Routly during the night and that Mr. Routly now wanted to waive extradition to Florida (T. 109-

10). Sgt. Harris prepared the appropriate paperwork (T. 1779, 1780, 1781) and also attended the extradition hearing. Mr. Routly was extradited on a charge of second degree murder (T. 110-12). The waiver of extradition read:

> A state warrant having been issued from the County of Marion, State of Florida, for the arrest of Dan Edward Routly for second degree murder in said state and the Defendant desiring to willingly return to the State of Florida . . .

(T. 112-13)(emphasis added). In fact, no warrant existed at the time Mr. Routly waived extradition (T. 307).

Defense counsel Burke testified that when he looked into the issue, he noted from the Court file the dates and times of the arrest and extradition. He then discovered that the transcript of that hearing had been lost and stated "we were highly suspicious" (T. 307). Mr. Burke remembered specifically "trying to find a --theory under which the confession in Michigan would be suppressed and I was chasing the illegal arrest aspect" (R. 279). Mr. Burke became aware of the fact that Mr. Routly had waived extradition on a second degree murder charge (T. 280) and there existed a question as to whether any arrest warrant or extradition papers were in effect at the time Mr. Routly actually waived extradition (T. 280-81). Counsel finally received the transcript of the extradition hearing just prior to trial and noted that the waiver of extradition was several hours before any charges were filed "and I thought that significant in terms of the legality of the arrest and in the suppression but the hearing had already been held" (T. 307).

It was clear from the evidence presented at the Rule 3.850 evidentiary hearing that Mr. Routly's version of the entire arrest and extradition proceedings were correct from the beginning. The testimony and the files and records verify that Mr. Routly was arrested in Michigan for a Florida homicide and that he waived extradition on a charge of second degree murder (T. 1767-81). The documentary evidence therefore clearly supported Mr. Routly's account of

what had occurred in Michigan and undermined the account given by law enforcement officers during the suppression hearing conducted prior to trial (T. 282-83). He waived extradition prior to any warrant having been issued which in and of itself should have invalidated the arrest.

Officers Alioti and Jerald promised Mr. Routly that he would only be charged with second degree murder. In addition, they promised that (1) O'Brien would not be prosecuted and (2) Ms. O'Brien and Mr. Routly's baby would be protected (T. 1017). This evidence would certainly have furthered and supported Mr. Routly's claim he confessed to second degree murder to save Colleen and their baby.

Police officers are sophisticated enough today to know that statements obtained under certain promises are invalid. Therefore, no defendant has the burden of proving, through the testimony of the law enforcement officers whose conduct is at issue, that promises were made. The record here, however, supports the truth of what Dan Routly has been saying for the past ten years: Dan Routly provided statements because of inducements (the second degree promise), under the promise that Colleen O'Brien would go free, his baby would be protected, and under the promise that he would be allowed to plead guilty to second degree murder and serve 15 to 20 years. The State carries the burden of establishing voluntariness and the validity of any asserted waiver by a preponderance of the evidence. Given the circumstances of Mr. Routly's statements, the State could not and cannot meet that burden.

In Moran v. Burbine, 106 S. Ct. 1135, 1141 (1986), the Court held:

> Echoing the standard first articulated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), Miranda holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S., at 444, 475, 86 S.Ct., at 1612, 1628. The inquiry has two distinct dimensions. Edwards v. Arizona, supra, 451 U.S., at 482, 101 S.Ct., at 1883; Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and

deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). See also North Carolina v. Butler, 441 U.S. 369, 374-375, 99 S.Ct. 1755, 1758, 60 L.Ed.2d 286 (1979).

Clearly Mr. Routly could not have made a knowing and voluntary admission to a crime (first degree murder) for which he was not even charged, and about which he was misled -- second degree murder/15-20 years. Clearly, Mr. Routly's statements were not knowingly, voluntarily, or intelligently made: he was misled by promises from the State. Cf. Brewer v. Williams, 430 U.S. 387 (1977). His extradition was illegal and the statements made should have been suppressed and would have been best for counsel's failure to present all the facts. At the very least, counsel should have, as he conceded at the evidentiary hearing, presented this evidence corroborating Mr. Routly's testimony to the jury. The situation here is virtually identical to Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Thus, counsel's deficient performance prejudiced Mr. Routly because it undermines confidence in the outcome.

B. TRIAL COUNSEL'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS WAS INEFFECTIVE

Defense counsel Fox also testified that his cross-examination of Colleen O'Brien was rendered ineffective, in part, because the State withheld evidence:

Q. The failure of the State to provide you with these agreements, did that render your cross examination ineffective?

A. Without any doubt.

(T. 390). Even without the withheld agreements and other documents discussed in Argument I, supra, Mr. Fox testified that his cross-examination of Ms. O'Brien was deficient and not complete. Moreover, Mr. Fox explained in detail why the State's failure to provide the documents discussed in Argument I,

supra, rendered his cross-examination absolutely ineffective:

> Q. Was the issue important, her immunity, her status as an accomplice and --
>
> A. Oh, absolutely. Yeah. I think that's the issue. Well, certainly one of the very major issues is her complicity, her participation, her circumstances under which she's present in the courtroom as the State's main witness.

(T. 391).

However, there was also no tactical or strategic reason for his failure to effectively cross-examine O'Brien on the basis of what he did have available:

> Q. Now, assuming hypothetically that you had the first agreement and you reviewed the questions that you specifically asked, hypothetically, if you had; that first agreement, did you effectively use it?
>
> A. No.
>
> Q. Any question about that?
>
> A. No.
>
> Q. And then the question I started to get to the moment ago: Assuming these agreements did not exist, as I read the deposition and the trial cross examination, there was very, very limited questioning on the issue of immunity?
>
> A. Yes.
>
> Q. Was there a tactical reason for that limited questioning?
>
> A. No.
>
> Q. Was there a strategic reasons?
>
> A. No.

(T. 391)(emphasis added).

Mr. Fox testified that he had reviewed the trial transcript prior to his testimony at the evidentiary hearing and he firmly understood, that even from his perspective at the time, he failed to properly present the numerous conflicts in O'Brien's testimony to the jury:

> What weaknesses do you see? What errors do you see in there that you can relate to us?
>
> A. Okay. for example, during the trial there was several

conflicts that would come up, either between her testimony and the testimony of other witnesses or her testimony and her pretrial deposition and some of them I touched on with her, some of the conflicts; but they were not -- it was not effectively presented to the jury.

In other words, these conflicts should have been -- her nose should have been rubbed in the conflicts. They should have been significantly emphasized and any contained -- evidence contradicting it,she [sic] should have been confronted with to see if her memory could be refreshed, all of the sort of impeachment kind of process.

Additionally, she had indicated that -- I believed in the deposition that she had previously received psychiatric or psychological counseling.

(T. 392).

He also failed to explore the nature of her psychiatric counseling:

That should be explored. I mean, you've got a witness on the stand whose credibility is determinative of the case and she tells you that she's got a mental condition and you go on and ask the next question. That's -- I mean, that's an area that needed to be explored.

(T. 393).

Mr. Routly had specifically requested that Mr. Fox challenge O'Brien's competency "mentally." "She has a record of mental disorders at St. Joseph's or Hurley's hospital." (T. 394). Mr. Fox testified that he read the letter but did not investigate or follow up; there was no tactical or strategic reason why he failed to do so (T. 394).

He also failed to follow up on the pending charges against Colleen O'Brien for stealing money from her mother and stated there was no strategic or tactical reason for this failure (T. 395). Nor did he pursue questions of her whereabouts (T. 401) and had no tactical reason for that.

At the Rule 3.850 hearing, Mr. Gregory Tucci was admitted as an expert witness for the defense (T. 737) and testified as to the ineffectiveness of Mr. Routly's trial defense counsel.

Q <u>In other words, putting aside the issue of non-disclosure, Mr. Fox's cross examination was ineffective aside from that issue in your opinion</u>?

A Yes.

Q Assuming that there was no second agreement, would your opinion nevertheless be that there were additional areas there that should have been pursued, that Mr. Fox's cross examination was nevertheless ineffective?

A I still think it fell short as to the immunity issue. . . .

And, again, the testimony that concerned the cross examination of Ms. O'Brien concerning immunity is quite limited and merely elicits there was an agreement and she would have a life with her baby. And under either agreement you just can't leave it at that, not with a critical witness, in my opinion.

(T. 738-43)(emphasis added).

In Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989), deficient performance was found where counsel failed to adequately cross-examine and impeach the State's star witness. Mr. Fox's failure is nearly identical. Relief must be granted. But for this failure as in Nixon, there is a reasonable likelihood of a different outcome. See Smith v. Wainwright, supra.

C. DEFENSE COUNSEL FAILED TO MOVE FOR A MISTRIAL WHEN THE JURY REVEALED THEY WERE UNABLE TO HEAR THE TESTIMONY OF THE STATE'S KEY WITNESS

Clearly one of the fundamental requisites to the jury's ability to render a verdict is its ability to hear the witnesses. Nevertheless, defense counsel failed to move for a mistrial when the jury revealed -- after it had begun deliberations -- that it wanted a transcript of O'Brien's testimony because they had been unable to hear her! Instead, defense counsel for no reason whatsoever allowed the jury to decide his client's fate in a vacuum.

Five minutes after they retired to deliberate their guilt-innocence decision, Mr. Routly's jurors notified the Court that they had several questions. They were returned to the courtroom, where the foreman informed the trial judge that "we weren't able to hear the testimony of Miss O'Brien and we would like to see a transcript of her testimony given here in court" (R. 1177). The Court refused their request, instructing them that "a transcript of the

testimony of any witness cannot be provided. The evidence has not been completed. You must base your verdict upon the evidence and rely upon your recollection of the testimony of the witness." (R. 1178). The jury thus retired to deliberate without even having heard the testimony of O'Brien, the key witness for the State. Counsel, ineffectively, failed to properly object and properly litigate this issue.

Mr. Tucci was asked to formulate an opinion regarding defense counsel . Fox's failure to request a mistrial when the jury came back with questions regarding O'Brien's testimony:

> Q Now, with regard -- let me just phrase it this way. With regard to that, those circumstances, in your view was Mr. Fox's representation effective under those circumstances?
>
> A I think not. I think a motion for a mistrial should have been made on the record for purposes of preserving a significant issue on appeal, again, because, as I read the transcript and the document, Ms. O'Brien was a critical witness and if a jury could not hear her, I just feel it was not effective to not make that motion and preserve it.

(T. 744). Certainly, case law supports Mr. Tucci's analysis. A failure to object to basic and fundamental error is deficient performance. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Mr. Fox recalled the incident and believed his performance had been deficient:

> Q At that point in time, you didn't interpose any objection or request a mistrial?
>
> A I did not.
>
> Q You then presented that in a motion for new trial --
>
> A I did.
>
> Q -- afterwards?
>
> Was there any tactical, strategic reason for not asking for a mistrial at that point?
>
> A No. No. That was -- there was no reason for it.
>
> Q Could we say that that was based on -- on ignorance of the

appropriate grounds or --

A   Yes. I think that I felt that the issue was preserved for later review and not being aware that really the more appropriate procedural move at that point would be to move for a mistrial.

After the jury tells you they haven't heard the case, that seems quite elementary to move for a mistrial.

* * *

Q   Would it be fair to say you were just unaware of the fact that it has to be presented at that point?

A   Yes.

(T. 414-45). Counsel's failure was thus premised upon ignorance of the law.

In Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), deficient performance was found where counsel's ignorance of the law caused him to fail to object. This situation here is virtually identical, as Mr. Fox has testified.

As has been stated throughout the post-conviction pleadings filed in this Court on Mr. Routly's behalf, O'Brien was the State's case. The State went to incredible lengths to assure her presence and her testimony. She was the only eyewitness to the events leading up to the alleged offense. The fact that the jury was unable to hear her testimony means that their verdict was based on unsupported and unsupportable evidence -- on evidence they could not even hear. This violated Mr. Routly's most fundamental constitutional rights.

A capital trial at which the jury could not, or was not allowed to hear, the only evidence sufficient to overcome the presumption of Mr. Routly's innocence violated his fundamental constitutional right to a full and fair trial by jury. Cf. Duncan v. Louisiana, 391 U.S. 145 (1980). The error here "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case," and thus also violated Mr. Routly's due process rights. See Beck v. Alabama, 447 U.S. 625, 644 (1980). Mr. Routly's most fundamental rights under the sixth, eighth, and fourteenth amendments were violated; he was denied a fundamentally fair and reliable

capital trial and sentencing determination. Confidence is undermined in the outcome. He is therefore entitled to 3.850 relief.

ARGUMENT V

MR. ROUTLY'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE TRIAL COURT'S RELIANCE ON THE PERSONAL CHARACTERISTICS OF THE VICTIM, CONTRARY TO BOOTH V. MARYLAND, 107 S. Ct. 2529 (1987).

In his written Findings of Fact in Support of the Death Sentence, the trial judge erroneously and improperly relied on his personal views regarding the victim's "good" traits and lifestyle to support his finding of two aggravating circumstances. The trial judge, for instance, made repeated and specific references to the alleged victim as "a widower who lived at home alone and devoted his retirement years to community volunteer service," (R. 181), in support of his findings with respect to the first aggravating circumstance. In fact, the override was premised upon the judge's consideration of this "victim impact," i.e., consideration of the victim's personal characteristics.

A victim's relative virtuosity is not an element of the offense. The victim's virtues or lifestyle therefore had no material bearing as to the aggravating circumstances found. The trial court's reliance on its subjective beliefs thereon was consequently erroneous and impermissible with respect to the aggravating circumstances.

The trial judge interjected similar immaterial, personal beliefs almost exclusively to justify the finding that petitioner's alleged conduct was especially heinous, atrocious or cruel. The finding included the following:

> FACTS: The victim was retired, a widower, who devoted his retirement years to community service. He lived at home alone. Upon returning home one Sunday evening, after working at the hospital followed by dinner with friends, he was assaulted with a firearm in the sanctity of his home in his own bedroom, bound hand and foot, and gagged.

(R. 183). Those extensive references were clearly improper because the Florida capital sentencing statute does not recognize a victim's "goodness" or lifestyle

as a basis for deciding an appropriate penalty for a capital felony. See Sec. 921.141, Fla. Stat. (1985). Moreover, reliance on such violated the eighth amendment as was recognized in Booth.

Moreover the claim is cognizible now in a Rule 3.850 motion. Here, the Booth error occurred when the judge overrode the life recommendation because of the victim's personal characteristics and the judge's sympathy for the victim. This Court does not require a capital defendant to object to a sentencing court's reasoning for overriding a life recommendation in order to preserve a challenge for review. The purpose of the contemporaneous objections rule is to require errors that can be fixed at trial to be brought to the attention of the trial court so that the proper remedial action can be taken. In State v. Whitfield, 487 So. 2d 1045 (Fla. 1986), this Court ruled that a "contemporaneous objection" is not required where the sentence on its face is illegal. Sentencing errors apparent on the face of the record are cognizable and preserved. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985). No contemporaneous objection is necessary so long as the claim involves factual matters that are apparent or determinable from the record on appeal. Dailey v. State, 488 So. 2d 532 (Fla. 1986); Forehand v. State, 537 So. 2d 103 (Fla. 1989). Here, the trial court in overriding the jury's life recommendation relied upon its sympathy for the victim. This Court has never held an objection to an override is necessary to preserve a challenge to the override for appeal. A judge's erroneous decision to override a life recommendation is reviewable on direct appeal. At the time of this direct appeal, this Court had erroneously believed victim impact could be properly considered as a basis for a death sentence. Under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the error is thus cognizible now in 3.850 proceedings. Accordingly, the rule of Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), applies; a resentencing is required.

ARGUMENT VI

THE AFFIRMANCE OF THE OVERRIDE WAS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE EIGHTH AMENDMENT PRINCIPLES DISCUSSED IN PARKER V. DUGGER.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 465 (1984). The override in Mr. Routly's case violated this principle. It was permeated with and resulted from Hitchcock error. The override in this case would not be allowed to stand today, thus demonstrating the unreliability and arbitrariness of Mr. Routly's sentence of death.

The United States Supreme Court has recently held that an arbitrary affirmance of an override violates the eighth amendment and constitutes a claim for relief. In Parker v. Dugger, 111 S. Ct. ___, Case No. 89-5961 (decided Jan. 22, 1991), that Court held:

> The Constitution prohibits the arbitrary or irrational imposition of the death penalty. Id., at 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, e.g., Clemons, supra, at ___ (citing cases); Gregg v. Georgia, 428 U.S. 153 (1976). We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the "crucial protection" afforded by such review in jury override cases. Dobbert v. Florida, 432 U.S. 282, 295 (1977). See also Proffitt v. Florida, 428 U.S. 242, 253 (1976); Spaziano, supra, at 447, 465 (1984). The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

Slip op. at 12.

The circuit court overrode the life recommendation in this case saying:

> The jury has recommended a life sentence. The Court finds two compelling reasons to reject that recommendation.
>
> 1) That this is an aggravated capital felony in which the law of this State presumes that death is the appropriate penalty unless outweighed by mitigating circumstances of which there are absolutely none in this case, and

2) That in comparison to the facts of other capital cases in Florida in which the death penalty has been upheld, equal justice under law would have a hollow ring if death were not imposed in this case.

(R. 186-87).

The presentence investigation contained the following:

III. SOCIAL HISTORY

Family: Defendant's father, Robert Leonard Routly DOB 01/08/28 reportedly died July 1978 as a result of a heart attack. Subject described his father as a strong disciplinarian who abused alcohol to the point of being a "drunk" however allegedly had no arrest history and reportedly enjoyed a good relationship with him. Subject's mother, Magdeline Mauti Routly DOB 02/28/30 resides at 7035 Normandy Court, Flint, Michigan. Subject claims his mother is a nurse at the Briarwood Manor Convalescent Home in Flint, Michigan and enjoys a "fair" relationship with her.

Subject is reportedly the third born of eight siblings. He has four brothers and three sisters with ages ranging from age 32 to age 10.

Subject's oldest brother, John Routly DOB 5/5/50 is the only known member of his family to have received state incarceration and was housed within the Michigan Department of Corrections serving four years eight months to ten year sentence for breaking and entering.

Subject describes his childhood as an unhappy time caused by his father abusing alcohol and subsequent abuse of his father to both subject and his family. Subject also indicated that his childhood was an unpleasant time of life as he was required to attend a strick Catholic School at an early age.

Education: Records from the Department of Corrections from Flint, Michigan verified that subject completed his high school requirements for diploma certification at Kearsley High School in Flint, Michigan where he graduated in 1973. Subject denied any disciplinary problems however admitted to be referred to the school psychologist for his disruptive behavior.

Marital: Subject claims to have married Judy Ann Ray on 9/3/73 in Genesse County, Flint, Michigan which marriage resulted in a divorce circa 1977 while subject was in prison. Prison records verify subject's marriage but make no mention of his reported divorce. Subject claims to have one son, Mark Edward who is seven years old and has not supported him.

Residence: Subject reports his legal address as 7035 Normandy Court, Flint, Michigan which has been verified as his mother's home. This residence can be described as a four bedroom two bath frame house constructed by subject's father. Residences in Marion County have been verified in Reddick, Florida. During the months of April and May subject and Colleen O'Brian rented a one bedroom trailer from employer

Phil Morris (address: General Delivery, Reddick, Florida). This residence was provided without charge in connections with subject's employment with Mr. Morris.

It is been verified that subject rented a garage apartment from Bob Gibson (General Delivery, Reddick) during the month of June 1979. Rent was provided free in exchange of employment duties. This residence can be described as a small one bedroom garage apartment located behind the residence of Mr. Gibson.

Subject claims since his prison commitments he has lived a transitory life style throughout numerous states.

Religion: Subject claims to believe in God, prays daily, does not believe in organized religion.

Interests and Activities: Subject claims to spend his spare time working on cars and motorcycles. Claims while incarcerated he spends most of his time reading the Bible. Subject claims to smoke approximately one package of cigarettes per day and classifies himself as a moderate drinker however when he drinks he does so to "get high". He admits experimentation with most illegal drugs since being an senior in high school. He denies any current drug addiction.

Military: He has no military history.

Health: Defendant is 6' tall and weighs 185 pounds with black hair and brown eyes. At the time of the interview he had a full beard. On his left forearm he has a tattoo of a rose and the name Judy Ann. He denies any serious illnesses or accidents and claims to be in good physical health. Subject admits psychiatric evaluations since being a student in the third grade.

Employment: It has been verified that subject has developed a record of employment instability. Subject's employment in Marion County has been verified through Phil Morris, of Reddick, Florida. Subject was hired 04/31/80 under the name of Keith Rosencrants. Subject averaged $100 per week plus the use of free residence and utilities. Subject was employed doing miscellaneous mechanical and labor work at an automobile salvage yard own by Mr. Morris. Employment was terminated 06/15/80 at which time subject was fired due to a lack of productivity.

It is also been verified that subject was employed during June 1980 operating a wrecker for Bob Gibson in Reddick, Florida. Subject was employed on a part time basis in return for free lodging in a small garage apartment owned by Mr. Gibson.

Previous employment have been of short term duration of general type labor and service station attendants. Subject claims to be skilled as a mechanic and welder.

Despite the non-statutory mitigation contained in the presentence report which has precluded an override in other cases, this Court affirmed on direct

appeal. This action was arbitrary. This Court failed to review the override under the proper standards. "[T]here is a sense in which the court did not review [Routly's] sentence at all." Parker, supra, slip op. at 12.

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988), representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). The standard established under Florida law is thus that if a jury recommendation of life is supported by any reasonable basis in the record -- such as a valid mitigating factor, albeit nonstatutory -- that jury recommendation cannot be overridden. This Court has reversed overrides because of mitigating evidence virtually identical to that contained in Mr. Routly's presentence report. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating factor" and precluded override); DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988)("deprived family background,"precluded override); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)("family history of physical and drug abuse," precluded override); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history"precluded override).

Mr. Routly's jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there was a reasonable basis for the jury's recommendation, the trial judge imposed death. Here, Mr. Routly was denied his eighth amendment rights to a capital sentencing determination in accord with Florida's settled standards. Parker requires review of an affirmance of an override in order to determine whether it was

arbitrary and in violation of the established standards. This was a reversal of this Court's prior holdings that an affirmance of an override in law of the case and not subject to collateral review. Parker constitutes new law for eighth amendment purposes. See Demps v. Dugger, 514 So. 2d 1092 (Fla. 1987).

The trial judge refused to provide Mr. Routly with the right which the law clearly afforded him: the right not to have a reasonable jury verdict overturned. In fact, the trial judge failed to even explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, cf. Hitchcock v. Dugger, 481 U.S. 393 (1987), because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980). The judge considering an override must weigh aggravating circumstances "against the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Tedder, supra. Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in this case. The Court's Findings of Fact recited only that there were "two compelling reasons to reject that recommendation: 1) That this is an aggravated capital felony in which the law of this State presumes that death is the appropriate penalty unless outweighed by mitigation (circumstances of which there are absolutely none in this case), and 2) That in comparison to the facts of other capital cases in Florida in which the death penalty has been upheld, equal justice under law would have a hollow ring if death were not imposed in this case (R. 185-86). The Tedder standard was not mentioned, and, in fact, the jury was not again mentioned. The judge

found five statutory aggravating circumstances, of which only three were sustained by a majority of the Florida Supreme Court on direct appeal. The judge then considered only statutory mitigation, weighed statutory aggravation and mitigation, and imposed death. The judge made no findings regarding the unreasonableness of the jury, and did not explain why the jury's recommendation was not entitled to great weight. 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. The court's sentencing order also improperly presumed death to be appropriate, in violation of the eighth amendment. Jackson v. Dugger, 837 F.2d 1469, 1473-74 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988). In Mr. Routly's case, the sentencing judge "presumed" that death was appropriate unless the mitigating circumstances outweighed the aggravating circumstances (R. 185). This was fundamental constitutional error, and relief is appropriate. Yet on appeal to this Court, the established standards were arbitrarily not applied, and the override was affirmed.

It is manifestly apparent that the override in this case makes the death sentence arbitrary. If the established standards had been applied this Court would have reduce the death sentence to life imprisonment. Under Parker v. Dugger, this is arbitrary and requires relief to be granted. The affirmance of the override was arbitrary, capricious, wanton, and freakish, and thus the death sentence constitutes cruel and unusual punishment.

In Fuente v. State, 549 So. 2d 652 (Fla. 1989), a contract killing hired by the victim's wife, this Court found that the jury could consider in mitigation the fact that the victim's wife and possibly Salerno, a co-perpetrator, had both been granted immunity from prosecution.

> Because the jury in this case could have reasonably based its recommendation on the fact that Salerno and the victim's wife would likely not be prosecuted for their participation in the murder, the

override was improper.

Fuente, 549 So. 2d at 659 (emphasis added). In this regard, Mr. Routly's case is no different. O'Brien's testimony at trial had been that she accompanied Mr. Routly when they took Brockini's car with Brockini in the trunk. According to O'Brien, Mr. Routly shot Brockini and she helped him drag the body into a field (R. 895). According to Mr. Routly, he had confessed to the crime to save O'Brien from prosecution and from losing their child (R. 1080). While the full import of the grant of immunity to O'Brien went undisclosed and uncorrected by the state (See Argument I), the jury did know that O'Brien had received "immunity" (R. 934, 935-936) for her participation in Bockini's murder. Even if the jury was never told the extent of that immunity, it is possible that their knowledge of O'Brien's involvement and the fact that she had been completely exonerated was enough to convince the jury that Mr. Routly should at the most, be sentenced to life imprisonment. Again in affirming Mr. Routly's override this Court arbitrarily ignored its own standards.

Certainly that factor in combination with the overwhelming evidence that should have been presented was a reasonable basis for a life recommendation and the court's override was improper. Parker v. Dugger establishes that the death sentence here is arbitrary and capricious. On the basis of this new decisions, Rule 3.850 relief must now be granted.

ARGUMENT VII

MR. ROUTLY'S RIGHT TO A FAIR AND RELIABLE CAPITAL GUILT-INNOCENCE VERDICT DETERMINATION WAS VIOLATED BY THE PRESENCE OF A COURT OFFICIAL IN THE JURY ROOM FOR A SUBSTANTIAL PORTION OF THE JURY DELIBERATIONS.

Although the court denied the jury's request for transcripts of witness testimony, it did allow a tape of Mr. Routly's pre-trial statement and a tape recorder to be sent to the jury room (R. 1179). The court also sent the court reporter to the jury room to operate the recorder (Id.).

The court reporter entered the jury room and remained there for 20 minutes,

(R. 1179), although the length of Mr. Routly's tape statement was only 12 minutes. The entire guilt-innocence jury deliberations took 75 minutes. Thus, a non-juror was present in the jury room without any proper precautionary measures having been taken, or without any supervision for more than one-quarter of the deliberations.

Again, the improprieties discussed herein introduced extraneous factors into this capital guilt-innocence determination which created a "level of uncertainty and unreliability in the factfinding process that cannot be tolerated in a capital case." See Beck, supra. Mr. Routly is entitled to relief on these claims of fundamental fifth, sixth, eighth, and fourteenth amendment error.

CONCLUSION

Mr. Routly respectfully requests that his conviction and sentence of death be vacated and a new trial ordered for all of the reasons presented to this Court in this brief.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Richard Martell, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 28 day of January, 1991.

Martin J. McClain By LHS

Attorney