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, FLORIDA

REPLY 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 circuit court denied Mr. Routly's claims following an evidentiary hearing. In this brief, the record on direct appeal is cited as "R. ___" with the appropriate page number following thereafter. The record on appeal of this Rule 3.850 proceeding is cited as "PC-R ___." Other references used in this brief are self-explanatory or otherwise explained.

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STATEMENT OF THE CASE

The State challenges the assertion in Mr. Routly's initial brief that at Mr. Routly's trial, the defense contended that Colleen O'Brien committed the murder. At trial, Mr. Routly testified:

> Q. All right. Do you know where you were when Colleen told you the man who owned the car was dead?
>
> A. No; we had stopped for gas once. We were going up I-75 which ran right into Michigan, and before we left Florida, and I had money and I filled the gas tank up and stopped at a rest area and that's when she told me because we were close to leaving Florida.
>
> Q. Okay, and is that when she told you she wanted to go to Arizona?
>
> A. Yeah.
>
> Q. Did she tell you how the man died?
>
> A. Said he was shot.
>
> Q. Did she tell you who shot him?
>
> A. No.

(R. 1082). After Ms. O'Brien told Mr. Routly that the owner of the car had been shot, Mr. Routly testified, "I just decided to help Colleen when she told me that." Id.

In closing argument, defense counsel argued:

> She gave one statement to the police officers that said he did it but I wasn't there. Well, apparently the police didn't go for that one just exactly right; so she stayed in custody, and then after that she said, well, okay; he did it and I was there and I helped him, and out the door she goes; the last custody, the last penalty, the last involvement or her participation, if you believe her testimony absolutely. At the time of this offense she needed money. She was jealous of Mary. She was mad at Dan. This gentleman had offered her help. He had offered her money, and he had made sexual advances towards her and she was frightened of him. So this man that she is frightened of for sexual advances, this man who has offered her money, who she may know to have money, she ends up at his house because he's going to give her a bus ticket home. The bus ticket never materializes. She keeps coming back to this guy's house for some unknown reason, never ends up with a bus ticket, never ends up with money, remains to be scared of him but still goes back there -- because she was mad at Dan. He promised to marry her one time before and it didn't work out just right and at that time she held a shotgun on him, and who was Dan with back then when she held a shotgun on him?

(R. 1116).

In response to this closing, the State argued:

> Now, Counsel for the Defendant makes quite a bit to-do with immunity for this woman. Well, you saw her like I did, Ladies and Gentlemen. Let's be very frank. She is not the most intelligent person in the world. She's quite meek. I'm sure she's afraid of him, although she loved him. There's no denying that, but she's -- she's not someone that's tough, not like him, but, anyway, take her as she is. He says, well, you gave her immunity; that's the reason she came up here. There's no need to give her immunity for murder. There's no evidence that she committed murder one bit.

(R. 1132). Mr. Routly's defense at trial was that Ms. O'Brien did the murder. And important and exculpatory evidence supporting that defense was suppressed by the State. Captain Hanna of Flint, Michigan Police Department prepared an affidavit prior to Mr. Routly's trial stating:

> 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 she 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</u>, and further that she does not intend to run for the rest of her life 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.

(PC-R. 1803)(emphasis added).

The State also challenges the statement in Mr. Routly's brief that he was arrested in Flint, Michigan, on a charge of second-degree murder. The State asserts that Thomas Forstick testified that Routly had been arrested on local Michigan charges. The State gives an erroneous record cite for this proposition; but in fact Officer Forstick so testified:

> Q. Do you know what offense Mr. Routly was under arrest for at the time of that advice?
>
> A. He was under arrest at that time on charges in Michigan.

(R. 1005). However, this testimony was false as was established at the Rule 3.850 hearing.

The Michigan extradition papers completed on the day of Mr. Routly's arrest were introduced at the Rule 3.850 hearing as Defense Exhibit 4. They provide in pertinent part:

> The above named Dan Edward Routley, [sic] having been brought before this Court <u>following his arrest on requisition of the State of Florida</u>, charged therein with having on the 17th day of June, 1979, committed the felony offense of <u>Second Degree Murder</u>, and thereafter having fled to the State of Michigan, and, having been informed by me of his right to the issuance and service of a warrant of extradition, and,

to a writ of habeas corpus to determine the validity of his arrest, and detention, and, having thereafter, in my presence, executed the waiver of extradition hereto attached and consented to return to the State of Florida, in custody of the agent thereof named in said requisition;

IT IS THEREFORE ORDERED that said Dan Edward Routley, be forthwith delivered to Larry Jerald and/or Frank Alito, the duly accredited agents of the State of Florida, or any one of their duly authorized agents, for return to said state, and at the same time there shall be delivered to said agents a certified copy of said waiver of extradition and of this order.

(PC-R. 1776)(emphasis added).

Now Comes James Harris and states unto this Honorable Court as follows:

1. That he is a Sergeant with the Flint Police Department.

2. That he received information via telephone from Marion County Sheriff's Department, Ocala, Florida, that one Dan Edward Routley now held in the jail of the City of Flint, Michigan, is wanted in the State of Florida for Second Degree Murder;

3. That subsequent to receiving that information he talked to Dan Edward Routley who confirmed that he was Dan Edward Routley and was willing and return to the State of Florida to answer said warrant and would waive extradition;

4. That he, James Harris, ordered the said Dan Edward Routley held to make answer to said Florida warrant.

(PC-R. 1778).

The booking card, Defense Exhibit 10, reflecting Mr. Routly's arrest noted "Complainant - Marion Co. Fla.," "Charge Fugitive (Homocide) [sic] Marion Co. Fla" "Date of Arrest 12-5-79" "time 2:35 AM" "Where arrested 2000 Blk. N. Averill" (PC-R. 1785).

Captain Hanna with the Flint, Michigan Police Department testified at the Rule 3.850 hearing:

Q. Dan Routly was not free to go when he was taken into custody; is that correct?

A. Yes.

Q. Is that accurate?

A. Yes, yes.

Q. Okay. And the Florida officers were there at the time?

A. Yes.

Q. I mean, my understanding is that they talked with him almost right away; is that accurate?

A. Yes.

Q. Okay. So you turned him -- sort of turned him over to them --

A. Yes.

Q. -- immediately?

A. (Nodding head.)

Q. Was there any question at that time in your mind that, in fact, they wanted him?

A. No.

(PC-R. 171).

The prosecution never disclosed and trial counsel never discovered the wealth of available evidence corroborating Mr. Routly's testimony that he was arrested on the Florida second- degree murder charge. This evidence not only established Mr. Routly was truthful; it established that the State's witnesses were untruthful in their testimony at trial.

In fact, Deputy Sheriff Jerald of the Marion County Sheriff's Department testified at the Rule 3.850 hearing as follows: "Q. [W]ho determined that it would be second degree murder? A. Burt Williams with the State Attorney's Office" (PC-R. 234). Deputy Jerald, who had traveled to Michigan and was there when Mr. Routly was arrested, testified that "I called [Mr. Williams] on the phone" and "[h]e told me that the warrant was being signed as we spoke for second degree murder and that would be the charge, and that's what we passed on" (PC-R. 235).

Clearly, Mr. Routly was told that the charge he was being extradited on was second-degree murder. And as he testified, based on that information, he talked to the police and waived extradition.

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.

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, 373 U.S. 83 (1963). 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, 904 F.2d 898, 899 (11th Cir. 1990)(in banc).

The circuit court found nondisclosure in this case. Ms. O'Brien's contract of immunity was not disclosed. The circuit court found "the State never delivered the contract of immunity, dated July 5, 1980, Defendant's Exhibit #11, to Defense counsel. The State never told counsel about the contract" (PC-R. 1744). According to the circuit court, also not disclosed were Defense Exhibits 12, 14, 16 and 23 (PC-R. 1744).[1] Thus, it is clear that the first prong of the Stano test was found to have been met by the circuit court.

Mr. Routly's trial counsel testified he would have used the undisclosed evidence at trial because it was favorable to Mr. Routly (PC-R. 339-69). At the evidentiary hearing, the judge cut off trial counsel's discussion of how he would have used the undisclosed evidence: "THE COURT: Pardon me, just a moment. Do we

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[1]Defense Exhibit 12 contained a statement by Ms. O'Brien to a police officer. Ms. O'Brien explicitly expressed her fear that Dan Routly could tell the police that she did the murder alone and cause her to be imprisoned for murder. This gives Ms. O'Brien a tremendous motive to lie and testify that Dan Routly did the murder. The jury did not hear about Ms. O'Brien's statement to Captain Hanna because the prosecution never disclosed its existence to defense counsel. The State in its brief tries to mislead this Court at the bottom of page 10, top of page 11, by contending that an obscure reference to a conversation between Captain Hanna and Ms. O'Brien in an unfiled motion for continuance constituted disclosure of Ms. O'Brien's statement to Captain Hanna. However, defense counsel was in fact not provided with the statement as the circuit court found. Moreover, the jury did not hear this important evidence; whether the State blames the defense attorney or the prosecutor, an adversarial testing did not occur.

need to go with this? I think maybe you made your points on this" (PC-R. 370). This clearly shows the second prong of Stano was present.

The only remaining question is whether "the evidence was material to the issues at trial." Stano, 901 F.2d at 899. 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).

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." United States v. Bagley, 473 U.S. 667, 680 (1985). However, it is not the defendant's burden to show the nondisclosure "[m]ore 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. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here.

The undisclosed evidence establishes that Ms. O'Brien realized that it was simply her word against Mr. Routly's word (PC-R. 1803). She was afraid the jury would believe Mr. Routly and that she would be charged with having committed the murder. Clearly, her testimony was motivated by Ms. O'Brien's survival instinct, by her desperate need for immunity. Ms. O'Brien was the State's case. Under Smith v. Wainwright, a reversal is required:

> 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.

799 F.2d at 1444.

The issue of "materiality" is a legal conclusion entitled to no deference. See United States v. Bagley, 473 U.S. 667, 682 (1985); Strickland v. Washington, 466 U.S. 668, 698 (1984). "Issues which are mixed questions of law and fact are subject to independent review." Martin v. Kemp, 760 F.2d 1244, 1247 (11th Cir. 1985). The circuit court erred as a matter of law. The nondisclosure of Defense Exhibits 11, 12, 14, 16 and 23 as a matter of law undermine confidence in the outcome. Rule 3.850 relief is required.

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 SUBORNED PERJURY.

The State in its brief never addressed the circuit court's ruling of law. The circuit court declared:

> 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.

(PC-R. 1745).

This was the circuit court's ruling. The issue on appeal is whether the circuit court's legal understanding was correct. As explained in Mr. Routly's initial brief, the circuit court was wrong as a matter of law. See Alcorta v. Texas, 355 U.S. 78 (1957).

The United States Supreme Court has held:

> First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; Curran v. State of Delaware, 3 Cir., 259 F.2d 707. See State of New York ex rel. Whitman v. Wilson, 318 U.S. 688, 63 S.Ct. 840, 87 L.Ed. 1083, and White v. Ragen, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348. Compare Jones v. Commonwealth of Kentucky, 6 Cir., 97 F.2d 335, 338, with In re Sawyer's Petition, 7 Cir., 229 F.2d 805, 809. Cf. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; United States ex rel. Thompson v. Dye, 3 Cir., 221 F.2d 763; United States ex rel. Almeida v.

Baldi, 3 Cir., 195 F.2d 815, 33 A.L.R.2d 1407; United States ex rel. Montgomery v. Ragen, D.C., 86 F. Supp. 382. See generally annotation, 2 L.Ed.2d 1575.

The principles that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. 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. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. *** That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

The United States Supreme Court has explained "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" Giglio v. United States, 405 U.S. 150, 154 (1972). In other words, reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985).

It does not matter who failed in their duties to insure an adversarial testing; the prosecutor or the defense attorney. The bottom line is that the jury was lied to, and in all likelihood, the jury convicted Mr. Routly on the basis of false testimony. Accordingly, due process requires that a new trial be ordered.

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 State erroneously asserts that the circuit court found that the "zero" pretrial penalty phase preparation was effective representation (PC-R. 406). The circuit court in fact found:

> 5. THE JURY RECOMMENDATION OF LIFE IMPRISONMENT SHOULD NOT HAVE BEEN OVER-RIDDEN, AND IT WOULD NOT LEGALLY HAVE BEEN OVERRIDDEN BUT FOR THE STATE'S SUPPRESSION OF EVIDENCE, DEFENSE COUNSEL'S INEFFECTIVENESS, AND THE TRIAL COURT'S CONSIDERATION OF IMPROPER FACTORS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> Defendant contends that counsel was ineffective in failing to present witnesses and items of evidence in the sentencing phase.
>
> Having considered each of these items, the Court finds beyond a reasonable doubt that any alleged failure to present this evidence at the sentencing phase had no effect on the sentence.
>
> The remaining portions of this point by the Defendant have been raised on appeal and in habeas proceedings and denied.

(PC-R. 1746).

Because the circuit court -- Judge Angel -- would have imposed death regardless of the mitigation presented at the Rule 3.850 hearing, he denied relief. 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.") When such a "reasonable basis" appears in the record, this Court does not hesitate to reverse an override:

> The principle enunciated in Tedder, "[I]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," . . . has been consistently interpreted by this Court to mean that when there is a reasonable basis in the

> record to support a jury's recommendation of life, an override is improper . . . . When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.

Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987).

Because the jury recommendation is an essential part of the Florida capital sentencing proceeding, this Court has rejected the suggestion that it assess the propriety of an override based solely on the reasonableness of the trial judge's findings:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the State's theory, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry, 507 So. 2d at 1376-77 (emphasis added). The mitigation which effective counsel would have presented would have precluded the affirmance by this Court of an override. Had trial counsel investigated and prepared, he would have discovered a wealth of evidence over and above what was presented.[2] This evidence would have precluded an override. Under the correct standard, prejudice was shown. Rule 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 AMENDMENTS.

The State argues that a portion of this claim (relating to failure to adequately litigate confession issue) is procedurally barred. The State ignores the new evidence set out previously in this reply brief establishing that the State presented false evidence at trial in order to get the circuit court to deny the suppression motion. However, had counsel obtained the booking card, he would have

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[2]The State seems to adopt the position since some mitigation was presented, as a matter of law, counsel could not have been ineffective. However, that assuredly is not the law. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991)(counsel was ineffective for not discovering and presenting more mitigation).

learned that Mr. Routly was arrested in Michigan on the Florida charge (PC-R. 1785). This evidence would have corroborated Mr. Routly's testimony and impeached the State's witness. Since this new evidence was not of record at the time of direct appeal, a procedural bar cannot be applied.

The State also relies upon this Court's finding on direct appeal that probable cause for Mr. Routly's arrest was present "due to the existence of the pending Michigan charges" (Answer Brief of Appellee at 59). Again, Mr. Routly was not arrested on Michigan charges as the booking card plainly demonstrates (PC-R. 1785). Counsel's performance was either deficient or the State suppressed exculpatory evidence. Either way, an adversarial testing did not occur.

In Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), the relationship between Brady and ineffective claims was noted. There, the defendant had argued that an adversarial testing had not occurred because either the State violated Brady and defense counsel was ineffective. The Eleventh Circuit concluded that since Brady was not violated, but the jury did not hear the important impeachment, counsel was ineffective. Here too, the jury did not hear impeachment of the State's star witness. Either the State violated Brady or defense counsel was ineffective, because the bottom line is that an adversarial testing did not occur.

The State also asserts that the test for deficient performance is whether "no reasonable competent attorney" would have acted as Mr. Routly's trial counsel (Answer Brief of Appellee at 68). The State's position is ludicrous. The test for deficient performance is not polling of the defense bar to determine if there is some other attorney out there who would make the same mistake. Deficient performance occurs where "counsel's failure to present or investigate . . . resulted not from an informal judgment, but from neglect." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). Counsel has "a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984). See Chambers v. Armontrout, 909 F.2d 825 (8th Cir. 1990)(in banc). Here, under the appropriate standard, if the State is correct in that a Brady violation did not occur, then counsel's failure to investigate and to know the law rendered his performance deficient. See Harrison