IN THE SUPREME COURT OF FLORIDA

JACK RILEA SLINEY,

Appellant,

vs.

FSC Case No. SC05-13
LT Case No. 92-451-CF

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

THOMAS H. OSTRANDER, ESQUIRE
FLA. BAR NO. 0508349
2701 Manatee Ave W Unit 1
Bradenton, Florida 34205-4952
(941) 746-7220

SARA K. DYEHOUSE, ESQUIRE
FLA. BAR NO. 0857238
3011 RICHVIEW PARK CIRCLE
TALLAHASSEE, FL 32301
(850) 907-9559

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant, JACK RILEA SLINEY, was the defendant in the trial court below and will be referred to herein as “Appellant” or by his proper name. Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as “the State." Reference to the direct appeal will be by the symbols “ROA,” followed by the appropriate volume and page numbers. Reference to the post-conviction proceedings will be by the symbols “PCR,” followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

Around 5:50 p.m. on June 18, 1992, Marilyn Blumberg drove to Ross Pawn Shop in Englewood, Florida, when her husband, George, did not come home from work and did not answer the phone at the shop. When she arrived, she found the door locked, the “closed” sign displayed, and the lights off. Upon

entering the store, she noticed the display cases were empty or in disarray. She found her husband was lying behind a display case in a pool of blood with a pair of scissors protruding from his neck. She immediately dialed 911 and then left the shop. (ROA VIII 666-77).

Gil Stover, a crime scene technician with the Charlotte County Sheriff's Office, found the victim lying face-down on the floor behind a display case/counter, half-way inside a small bathroom. The victim's glasses and a hammer were on the floor near the body. A piece of camera lens was behind the toilet, and another whole camera lens was in the wastebasket in the bathroom. (ROA VIII710-18). The FBI crime lab found no prints of value on the camera lenses, hammer, or scissors. The only print of value was that of Keith Witteman, Appellant's co-defendant, which was found on the frame of a mirror setting on one of the display cases. (ROA X 1018-19).

During the autopsy, Dr. Imami discovered scrapes and contusions on the forehead, cheeks, lips, eyes, and an ear of the victim. His right eye was swollen shut, and the bridge of his nose was broken. Dr. Imami speculated that the injuries may have been caused by the camera lens found in the wastebasket or by some other blunt object.[1] On the top and

[1] However, no evidence was presented that the camera lens contained blood or skin or any other indicia that it had been used to cause the injuries to the victim's face.

the back of the victim's head, Dr. Imami found three concentric-shaped lacerations about 1.5 inches in diameter, consistent with the hammer found near the body.[2] There were three stab wounds to the side of the neck, one of which still contained a pair of orange-handled scissors. The victim's ribs were also broken 22 times on both the left and right sides, and front and back. Finally, the victim's back bone was fractured near the lower chest on the back side. Dr. Imami believed that these latter injuries were caused by increased pressure applied while the victim was lying on the floor face down. Dr. Imami estimated the time of death at 3:30 p.m. (ROA IX 751-779).

Dale Dobbins was in Ross Pawn Shop sometime during the mid- to late-afternoon on the day of the murder. Just as he was leaving, two white males entered the store. They both immediately turned their backs on him, which he found odd and suspicious, so he stayed for a few minutes, but left when he got no sign from the pawn shop owner that he needed help. The next day, when Mr. Dobbins heard about the murder, he approached the police and assisted in preparing a composite sketch of one of the two men. He later identified Appellant in a photo lineup, and identified him at trial as one of the

[2] Again, no evidence was presented that the hammer contained blood or skin or any other indicia that it had been used to cause the injuries to the victim's head.

two men he had seen in the pawn shop on that day. (ROA IX 788-800).

Stanley McGinn, a patrol officer for the Punta Gorda Police Department, learned of the murder during roll call at work and was provided a copy of the composite sketch. Because his stepdaughter was dating a young man named Thaddeus Capeles from Englewood, who was roughly the same age as the person in the composite, he showed the composite to Thaddeus, who called later with a possible identification of the suspect. McGinn then informed Detective Cary Twardzik, the lead investigator on the murder case, about Thaddeus' phone call. (ROA IX 801-05).

Detective Twardzik had no leads in the case until McGinn called on June 27, 1992. When Twardzik contacted Mr. Capeles, Thaddeus informed the detective that Appellant had approached him at Club Manta Ray, a teen dance club that Appellant managed, and offered to sell him a gun. Twardzik then set up a "sting" operation, whereby Capeles would wear a body mic and purchase the gun from Appellant. When the serial number on the gun matched the gun register at Ross Pawn Shop, Twardzik then arranged for Capeles to purchase additional guns from Appellant. The serial numbers from those guns matched the gun register as well. At that point, Twardzik and others arrested

Appellant for dealing in stolen property. (ROA II 351; IX 805-914; X 943-59).

After orally waiving his Miranda rights,[3] Appellant initially claimed that he bought the guns, and some jewelry, from a black male at the Port Charlotte mall three weeks before. When confronted with the fact that the guns were stolen from the pawn shop only ten days previously, Appellant asked for a piece of paper and provided a hand-written confession, wherein he admitting beating and stabbing the victim. He later gave an oral taped confession, wherein he again admitted to killing Mr. Blumberg while his friend, Keith Witteman, stole jewelry and guns from the pawn shop display cases. (ROA X 959-1009). Based on the confessions, the detectives obtained a search warrant for Appellant's home, where he lived with his parents. In a trunk in Appellant's bedroom, which Appellant was sharing with Keith Witteman, the police discovered a .41 caliber gun, which was not listed on the pawn shop's firearm register, and a gym bag containing jewelry later identified by the victim's wife as jewelry stolen from the pawn shop. (ROA X 1010, 1036-39).

After Sliney's arrest, the trial court appointed Assistant Public Defender Mark Cooper to represent him. A few

[3] Detectives Twardzik and Sisk got distracted during the interrogation and forgot to have Appellant sign the waiver portion of the rights form. (ROA X 965).

weeks later, the Public Defender moved to withdraw his office due to an excessive caseload.[4] Sliney also filed a *pro se* motion to discharge the Public Defender's Officer, alleging that its excessive caseload would prevent it from representing him effectively. (ROA I 12). The hearing on these motions occurred on October 1, 1992. Unfortunately it was never transcribed, and the court reporter's notes have been destroyed. Court minutes, which appear in the original record on appeal, indicate that Appellant listed nine reasons why Cooper should be dismissed. Besides himself, three other witnesses testified on Appellant's behalf. The minutes

[4] This motion was docketed into the court file, see https://www.co.charlotte.fl.us/scripts/mgrqispi.dll?appname=MPI%20Criminal&prgname=PUBSEARCHF, and was thus part of the "files and records" to which the trial court had access in assessing Appellant's post-conviction claims. The motion, however, was not included in the original record on appeal. For this Court's convenience, Appellant has provided it as **Appendix A.**

reflect that the motion was denied without prejudice.[5] (ROA I 11).

Eight months before trial, dissatisfied with Cooper's representation, and fearful that Cooper would not be able to effectively represent Appellant as Cooper had told the trial court, Appellant's father hired the law firm of Norton and Marryott for $10,000. (PCR III 304-05, 364-65, 408-09). Kevin Shirley, an associate, was assigned to the case. Shortly thereafter, Shirley filed a motion to suppress Appellant's written and oral confessions on the ground that he was intoxicated at the time of his arrest and interrogation. (ROA I 46; II 252-367)). Several patrons from Club Manta Ray testified at the suppression hearing that Appellant had been drinking all night and was visibly intoxicated by 1:00 a.m., just prior to his arrest. (ROA II 257-65, 266-70, 270-77). Appellant testified, as well, that he had been drinking all night and could not remember waiving his rights or providing either the written or oral confessions. (ROA II 277-95). Detective Cary Twardzik and Detective Lloyd Sisk both testified, however, that Appellant successfully negotiated two

[5] The order, which is in the court file, but which was not included in the original record on appeal, has been provided in **Appendix B**.

separate gun sales with Thaddeus Capeles, followed all directions when engaged in a felony stop, and otherwise presented no indications that he was intoxicated when he waived his rights or provided the confessions. (ROA II 296-349, 350-60). The trial court denied the motion to suppress, finding that Sliney "was not so impaired by alcohol that [he] lacked the ability to exercise his free will." (ROA II 364-67).

Appellant pursued the involuntary confession argument at trial, calling as witnesses the patrons from Club Manta Ray who saw him drinking and intoxicated by the end of the evening. (ROA XI 1062-68, 1074-80, 1082-88). Appellant testified, as well, that he was intoxicated when he was arrested and did not remember waiving his rights or confessing to the crime. Regarding the murder, Appellant testified that he and Keith Witteman went to Ross Pawn Shop so Appellant could buy Witteman a gold necklace in exchange for a gold bracelet Witteman owned that Appellant wanted. At one point, the victim quoted Appellant a price for the necklace. Appellant began looking at other merchandise, but came back to the necklace, at which point the victim quoted a higher price. Appellant paid for the necklace, but confronted Mr. Blumberg about the change in price. They began arguing. As the argument escalated, Appellant went behind the counter and

grabbed the victim by the shoulder. They both fell to the ground. When Appellant stood up, he noticed that Mr. Blumberg was bleeding, so he asked Witteman what they should do. Witteman said he did not know. Appellant responded that they should call 911, but instead of doing so, he left the store, because he was nauseous from seeing the blood, and lay down in his truck. A few minutes later, Witteman came outside to check on him and went inside the truck's cab, retrieving a pair of workout gloves. Witteman went back inside the pawn shop and returned five or six minutes later carrying a pillow case full of stuff. Witteman was wearing a tan sweater that was not his own and had a gun stuck into his waistband. Witteman told Appellant to get up and drive, so they left. They drove to two secluded locations where Witteman disposed of several items, then they went home. Appellant learned the next day from his mother that the victim had died. (ROA XI 1112-28).

The jury returned verdicts of guilty on October 1, 1993, to first-degree premeditated murder, first-degree felony murder, and armed robbery. (ROA XII 1335). Following the verdicts, Appellant fired Kevin Shirley, alleging numerous reasons for his discharge, most notably that Shirley had done nothing to prepare for the penalty phase. (ROA XII 1343-45). Because Appellant was indigent and was not competent to

represent himself, the trial court re-appointed Assistant Public Defender Mark Cooper to handle the penalty phase, postponing the trial 33 days to give Cooper time to prepare. (ROA I 169; XI 1342).

The trial court granted Cooper's motion to appoint Dr. Bob Silver, Ph.D., as a confidential expert "to assist counsel in sentencing preparation and evaluation of the Defendant herein." (ROA I 170). The court denied, however, Cooper's later motion for extension of time and motion for appointment of independent investigator/mitigation specialist. (ROA I 174-75, 176-77, 179). In his motion for extension of time, Cooper alleged that he had insufficient time to read the 1,359 pages of trial transcripts that had been delivered on October 18, 1993, and he needed more time to contact penalty phase witnesses. (ROA I 174-75). The trial court denied the motion because Sliney had hired his own attorney of choice, that attorney had had over a year to prepare, Sliney chose to fire his attorney prior to the penalty phase, and 30 days was adequate time for Cooper to prepare. (ROA I 179).

At the penalty phase, the State presented no additional testimony or evidence and waived its opening statement. (ROA III 383-84). On Appellant's behalf, A.P.D. Cooper presented the following witnesses: (1) a neighbor who had lived across the street from Appellant and his family for 13 years, who

testified that Appellant was polite, courteous, well-mannered, and a good neighbor (ROA III 385-87); (2) a track coach at Appellant's high school, who testified that Appellant ran track and pole vaulted, worked hard, and was never a problem (ROA III 388-91); (3) the principal at Appellant's high school, who testified that Sliney was an average student, was not a disciplinary problem, and had received a scholarship to continue his education (ROA III 392-94; (4) Sliney's brother, who testified that Appellant once changed the tire on an elderly woman's car without charge and used to mow the law and pick up groceries for an elderly man down the street (ROA III 395-98); (5) Appellant's mother and father, who both testified that they loved their son, were very proud of his accomplishments, and had had high hopes for his future (ROA III 399-403, 404-10); and (6) a correctional officer with the county jail, who testified that Appellant had received no disciplinary reports during his 16 months in jail, despite being housed in a "tough wing" (ROA III 411-14).

In aggravation, the jury was instructed on the "avoid arrest" and "felony murder" aggravating factors. (ROA III 439). In mitigation, it received instructions on the "no significant history," "extreme duress," age, and the catchall mitigating factors. (ROA III 439-40). The jury returned a recommendation of death by a vote of 7 to 5. (ROA I 194; III

445). The trial court took the matter under advisement until the disposition of Keith Witteman's case. (ROA Supp. 23-24). Although a separate jury later recommended a life sentence for Witteman, the trial court nevertheless sentenced Sliney to death, finding in aggravation that Appellant committed the murder during the commission of a felony (robbery), and that he committed the murder to avoid arrest. In mitigation, the trial court gave "substantial weight" to Appellant's lack of criminal history, it gave "little weight" to his age (19), and it gave "little weight" to his other nonstatutory mitigation, except for his good behavior in jail, which the court gave "some weight." It rejected in mitigation any evidence that Appellant acted under the extreme duress or substantial domination of Keith Witteman. Moreover, it found that Witteman's life sentence was not a significant mitigating factor because Appellant was far more culpable. (ROA II 221-27; III 470-79). Finally, it departed upward in imposing a life sentence for the armed robbery because of the capital murder conviction. (ROA II 228).

On direct appeal, Assistant Public Defender Robert Moeller raised the following issues for this Court's review: (1) the trial court erred in denying Appellant's motion to suppress his confessions, (2) the trial court erred in admitting a transcript of the 911 call Marilyn Blumberg made

after finding her husband dead, (3) the trial court erred in admitting irrelevant and prejudicial portions of the taped transactions between Appellant and Thaddeus Capeles, (4) the trial court erred in admitting the firearms register from the pawn shop because it constituted inadmissible hearsay, (5) the trial court erred in ruling inadmissible the testimony of three jail inmates who overheard Keith Witteman making an inculpatory statement, (6) the trial court erred in denying penalty phase counsel's motion for appointment of a penalty phase expert and motion for extension of time, (7) the trial court erred in instructing the jury on, and finding the existence of, the felony murder and avoid arrest aggravators, (8) Appellant's sentence was not proportionately warranted, (9) the trial court erred in departing from the guidelines on the robbery charge without clear and legitimate reasons for doing so, and (10) the trial court erred in assessing a public defender's fee and costs without notice and a hearing.

Initial brief. This Court found Issues 1 through 9 without merit and affirmed Appellant's convictions and sentences; however, it set aside the order on fees and costs and remanded for proper notice and a hearing. Sliney v. State, 699 So. 2d 662 (Fla. 1997). Three justices dissented on proportionality grounds. Id. at 672-73.

The U.S. Supreme Court denied Sliney's certiorari petition on February 23, 1998. Sliney v. Florida, 522 U.S. 1129 (1998). The Office of CCRC--Southern Region initially represented Sliney, until the circuit court for Charlotte County appointed Mark Ahlbrand, a registry attorney. (PCR I 4). The circuit court allowed Mr. Ahlbrand to withdraw, however, on February 4, 1999, a mere 19 days before Sliney's federal habeas corpus petition was due.[6] (PCR I 4). Unrepresented by counsel, Sliney filed *pro se* a "shell" motion for post-conviction relief on February 19, 1999, in order to toll the statute of limitations in federal court. (PCR I 1-7). On February 23, 1999, exactly one-year from the denial of certiorari, the circuit court appointed Thomas Ostrander, Esquire, another registry attorney, to represent Sliney in his post-conviction proceeding. (PCR I 8). Ostrander, too, filed a "shell" motion on March 31, 1999, in order to toll the federal statute of limitations, although the one-year period had already expired. (PCR I 10-34).

On June 1, 1999, the trial court ordered counsel to file a consolidated motion for post-conviction relief. (PCR I 39). Counsel did so, raising the following six claims: (1) trial

[6] On June 25, 1998, this Court "toll[ed] the time requirements set forth in Florida Rules of Criminal Procedure 3.851 and 3.852 until October 1, 1998," for Sliney and others. Amendments to Florida Rules of Criminal Procedure, 719 So. 2d 869 (Fla. 1998).

counsel, Kevin Shirley, was ineffective for failing to investigate and present a voluntary intoxication defense that included evidence of both alcohol and steroid use; (2) penalty phase counsel, Mark Cooper, was ineffective for failing to investigate and present mitigation relating to Sliney's abuse of alcohol and steroids; (3) the penalty phase jury instructions impermissibly shifted the burden of proof to the defendant to prove that life imprisonment was the appropriate penalty; (4) trial counsel, Kevin Shirley, was ineffective for failing to move to strike for cause, or for failing to object to the state's cause challenges against, jurors Walker, Noles, and Lukas; (5) trial counsel, Kevin Shirley, was ineffective for failing to move for a change of venue; and (6) cumulative errors deprived Sliney of a fair trial and sentencing proceeding. (PCR I 110-51).

Six and a half months later, after the State had responded to the motion, Mr. Ostrander moved to amend Sliney's motion for post-conviction relief to add the following claim: Sliney's venire was not sworn prior to voir dire. (PCR II 228-31). At the Huff hearing, the trial court granted the motion to amend and scheduled an evidentiary hearing on all claims, including the supplemental claim. (PCR II 252-53, 253-56).

At the evidentiary hearing, held on April 29, 2002, Mr. Ostrander's first witness was Sliney's mother, Nancy, who testified that she never meet Mark Cooper before they retained Kevin Shirley; that neither Kevin Shirley nor anyone else associated with his office discussed the penalty phase or asked her about her family; that no one asked for her son's school or medical records; that Shirley never asked her to testify during the penalty phase; that Cooper discussed with her in relation to the penalty phase Sliney's alcohol and steroid use, but never asked about their family history; that she and her husband drank daily in front of their children; that her husband had recently died of cirrhosis of the liver; that her oldest son, Tim, drank and got into trouble with the law; that she never saw Appellant drink, but saw him passed out on two occasions; and that she was not aware of any steroid use by Appellant. (PCR III 302-19). On cross-examination, Mrs. Sliney testified that her husband drank at least a six-pack of beer per day, but that neither she nor her husband were abusive toward Appellant; and that Appellant told her while in jail awaiting trial that neither alcohol nor steroids had affected him on the day of the murder. (PCR III 319-32).

Sliney's next witness was his older brother, Tim, who testified that he has never spoken to Kevin Shirley; that he

spoke briefly with Mark Cooper prior to the penalty phase; that he discussed his brother's education with Cooper, but that Cooper never asked him about Appellant's drug or alcohol use, about their family background, or about Appellant's relationship with their parents; that their parents drank excessively every day; that he began drinking at 15 years of age and drank excessively while at home; that his drinking caused him "problems" at home; that he consumed alcohol with Appellant on numerous occasions; that he is now a recovering alcoholic; that he discovered around the time of Appellant's graduation from high school that Appellant was using steroids; and that he had heard that Appellant was getting into fights and that his level of aggression was increasing. (PCR III 302-35, 335-56, 357-401). On cross-examination, Tim Sliney testified that Appellant had become short-tempered and that, when talking about the murder, Appellant had told him that he (Appellant) had a "red out" where he saw red when he committed the offense. (PCR III 344-54).

Finally, Appellant testified in his own behalf that prior to trial, he had discussed with Mark Cooper his use of alcohol and steroids. He had also told Dr. Spellman, who had been appointed as a confidential mitigation expert, about his previous steroid use, including the night before the murder. Specifically, he related that he had just ended a cycle of

oral steroids, but was supplementing with injections before beginning a new cycle. He also drank a lot of beer and mixed drinks. As a result, he became "abrasive, short-tempered." He switched attorneys prior to trial because Cooper had told him that he could not adequately represent him because of his case load. Appellant also discussed his alcohol and steroid use with Kevin Shirley, specifically that he had started drinking alcohol at 14 years of age and that, by 19, he was drinking every day. Shirley assured him that, at most, he would be convicted of second-degree murder, so they never discussed the penalty phase. Despite the fact that he had been using steroids for approximately four years, he and Shirley never discussed a steroid rage defense. Mark Cooper wanted to represent him in the penalty phase as a clean-cut, all-American kid. (PCR III 357-87).

On cross-examination, Appellant admitted that he agreed with Cooper's penalty phase theme. Appellant also denied killing the victim. Finally, he admitted that he told Dr. Silver, whom Mark Cooper had retained for the penalty phase, that he had never used steroids. (PCR III 387-99).

The State's first witness was a court clerk, who testified that she personally administered the oath to Sliney's venire. (PCR III 402-06). The State's second witness was Kevin Shirley, Appellant's trial attorney. Mr.

Shirley testified that Appellant's father hired him for $10,000. He explained that the fee was so low because Mark Cooper had done most of the preliminary work deposing the witnesses. Shirley testified that he had numerous conversations with Appellant's father, in hopes that the father could better communicate with Appellant, but Shirley did not know how much the father actually told his son. Regarding a steroid rage defense, Shirley explained that it would have been inconsistent with Appellant's defense since he insisted that he had not killed the victim. Shirley also did not pursue a voluntary intoxication defense because Appellant gave him no indication that he was intoxicated at the time of the crime. He did not move for a change of venue because the case was not overly publicized and he "couldn't show an inherent bias against Mr. Sliney." As for the jurors who were chosen to sit, any decisions regarding the jury were left to Appellant. (PCR III 406-20).

On cross-examination, Shirley admitted that he had never prepared a penalty phase before. He did not hire a mitigation specialist or anyone else to assist him in preparing for Sliney's penalty phase. Although he spoke with Appellant and his father regarding Appellant's friends, activities, and personality, Shirley did not seek releases for school or medical records. Moreover, although Dr. Spellman suggested

that he retain an expert more versed in capital litigation, he did not do so. He could also not remember whether he ever spoke to Dr. Spellman directly. After the verdicts, he was considering asking the trial court for a continuance of the penalty phase because he had not spoken with Appellant's brother or sought an expert. In addition, Shirley noted that Sliney's parents attended most of the trial intoxicated. (PCR III 420-46).

The State's next witness was Mark Cooper, Appellant's penalty phase attorney. Mr. Cooper had to rely on notes he had written on Sliney's file jacket regarding his actions on the case because he had virtually no independent recollection of the case. His notes reflected that he was re-appointed on Appellant's case on October 4, 1993, and he immediately ordered the transcripts from the trial. Several days later, he and a social worker from his office visited Sliney at the jail. Sliney told him that he had used oral steroids once or twice in the weeks prior to the murder, but any evidence of alcohol or steroid abuse would have been inconsistent with his theme during the penalty phase that Sliney was "a good, clean-cut kid." On October 19, he asked Sliney's father for a witness list for the penalty phase. His notes reflected that he had several conversations with Dr. Silver, who had been appointed for mitigation purposes. Regarding mental

mitigation, neither Dr. Spellman, Dr. Silver, nor Dr. Kling, whose credentials were not identified and who provided no written report, could support any type of mental mitigation. (PCR III 448-63). On cross-examination, Mr. Cooper doubted if he had done much to prepare for the penalty phase prior to Kevin Shirley's appointment, because he had barely finished taking witness depositions. Moreover, once he was re-appointed, he picked up the case "cold" from Shirley, meaning that Shirley provided him nothing of use for the penalty phase. As for presenting evidence of steroid use, once Appellant told him that he did not use steroids, he did not pursue the matter any further. (PCR III 463-76).

The State's final witness was Dr. Robert Silver, a clinical psychologist who evaluated Sliney on October 14, 1993, three weeks before the penalty phase. Sliney admitted to using steroids twice and to consuming alcohol on the day and evening prior to the murder. Dr. Silver reviewed Dr. Spellman's report and noticed that Appellant had claimed that he could not remember details of the offense. Sliney had a much more detailed memory during his evaluation. When confronted with the discrepancy, Sliney indicated that he had heard that if he emphasized drug use, he might get off or get a better sentence. (PCR III 476-81).

On cross-examination, Dr. Silver admitted that although he was appointed to assess mitigation, he was familiar with chapter 921 only in "a very general way." He also opined that Sliney was immature for his age. Dr. Silver's impression was that Sliney thought he could talk his way out of trouble. (PCR III 481-83).

On June 19, 2003, fourteen months after the evidentiary hearing, but prior to the trial court's ruling on the motion for post-conviction relief, Mr. Ostrander moved a second time to amend the motion. This time he alleged that Kevin Shirley had previously represented Detective Lloyd Sisk, one of the investigators on Sliney's case and a witness at Sliney's suppression hearing and trial, first in a civil lawsuit and later in his divorce. He had also represented the investigator's son in his divorce during Sliney's trial. He appended to the motion pleadings in these various cases signed by Kevin Shirley as counsel of record for Lloyd Sisk or his son. (PCR IV 625-30).

The trial court granted Appellant's motion to amend and scheduled an evidentiary hearing on the claim. (PCR V 832-35). At the hearing, Appellant testified that Shirley had never told him that he had represented Corporal Sisk. During Sisk's testimony at trial, Sliney wrote Shirley notes regarding questions to ask Corporal Sisk and about

discrepancies in the officer's testimony, but Shirley dismissed him. (PCR V 909-20). The State called no witnesses to rebut the claim.

On December 14, 2004, the trial court denied Sliney's motion for post-conviction relief. (PCR VI 933-60). This appeal follows.

SUMMARY OF ARGUMENT

In the present case, Appellant was appointed a public defender who certified to the court that he could not present an effective defense due to his excessive case load. The trial court nevertheless refused to allow the Public Defender's Office to withdraw. Fearful that the assistant public defender assigned to his case was, in fact, overburdened and unable to adequately represent him, Appellant's family hired a private attorney who misled them into believing that he was qualified to represent Appellant in a death penalty case. Convinced that the jury would convict Appellant of no more than second-degree murder, this attorney did nothing to prepare for a penalty phase. When the jury returned verdicts of guilty to first-degree murder, Appellant fired him, because he had done nothing to prepare for the penalty phase.

Since Appellant was indigent and not competent to represent himself, the trial court re-appointed the original assistant public defender, over the attorney's objection, to prepare Appellant's penalty phase from scratch within 30 days. But this attorney, who had previously certified that he could not effectively represent Appellant, failed to investigate and present compelling evidence in mitigation that would have helped to explain why a "good, clean-cut kid" with no prior history of criminal activity suddenly attacked Mr. Blumberg over the price of a gold necklace. With the jury split 7 to 5, and this Court split 4 to 3 on proportionality, there is a reasonable probability that had counsel investigated and presented this evidence, Appellant would be serving a life sentence, rather than facing execution.

ARGUMENT

ISSUE I

TRIAL COUNSEL, KEVIN SHIRLEY, RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO AN ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS PERFORMANCE.

The Sixth and Fourteenth Amendments to the United States Constitution establish a right to effective assistance of

counsel with “a correlative right to representation that is free from conflicts of interest.” Wood v. Georgia, 450 U.S. 261 (1981). See also Bonin v. California, 494 U.S. 1039, 1044 (1990) (Marshall, J., dissenting) (“The right to counsel’s undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial.”). This Sixth Amendment right exists regardless of whether counsel is appointed or retained. See Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (“A proper respect for the Sixth Amendment disarms [the] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel . . . . The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant’s entitlement to constitutional protection.").

In the present case, Appellant’s trial counsel, Kevin Shirley, rendered ineffective assistance of counsel during the guilt phase of Appellant’s trial when he decided to conceal

and perpetuate an actual conflict of interest that adversely affected his performance at trial. In 1988, Shirley had represented one of the State's key witnesses, Detective Lloyd Sisk. (PCR V 871). Specifically, Shirley had filed a lawsuit on Sisk's behalf against Charlotte County Sheriff Glen Sapp, seeking reinstatement and back wages after Sisk was fired for conduct unbecoming an officer. According to the complaint, Sisk had been prosecuted for two unnamed criminal offenses against a minor. His trial ended in a mistrial, due to a hung jury, and the court later dismissed the case "due to failure by the prosecution to meet a burden of proof on a collateral matter in the original trial." (PCR V 876-77). Following the trial, the sheriff's office conducted an internal investigation and found "that the allegations were substantiated." The department thereafter terminated Sisk, who appealed to the Career Service Review Board. The Board sustained the termination. (PCR V 877). Shirley represented Sisk during the appeal to the Review Board and filed the subsequent civil suit on Sisk's behalf. (PCR V 878, 881). In 1990, Shirley renewed his relationship with Detective Sisk when he filed a petition for dissolution of marriage on Sisk's behalf. (PCR V 891-92).

In January 1993, Appellant's father hired the law firm of Norton & Marryott to represent Appellant at trial. (ROA I

41). Kevin Shirley, an associate, was assigned to the case. A month later, Shirley agreed to represent Detective Sisk's son in his divorce proceedings. (PCR V 888-89). At no time did Kevin Shirley inform Appellant that he had previously represented Detective Lloyd Sisk or that he was currently representing Sisk's son.[7] (PCR V 912).

In July 1993, by then fully aware that Detective Sisk had been instrumental in Appellant's investigation as a suspect, his arrest, and his interrogation, Shirley filed a motion to suppress Appellant's written and oral confessions. (ROA I 46). At the ensuing motion hearing in August 1993, Shirley alleged that Sliney's confessions were involuntary, and thus inadmissible, because he was not fully informed of his rights and was not competent to knowingly waive his rights because he was impaired by alcohol. (ROA II 253-54). To support these allegations, Shirley called as witnesses three people who had seen and interacted with Sliney just prior to his arrest. All three witnesses testified that Sliney had been drinking steadily from 2:00 p.m. to 1:00 a.m. and was visibly

[7] Sometime prior to the evidentiary hearing on this supplemental claim, the State informed collateral counsel that Shirley had also previously represented Detective Cary Twardzik, the lead investigator on the case. Because Appellant had not included this allegation in his sworn amended motion, the State objected to any testimony regarding Shirley's representation of Twardzik, and the trial court sustained the objection when collateral counsel agreed not to pursue it. (PCR V 904-05, 914-15).

intoxicated, particularly by 1:00 a.m. (ROA II 257-65, 266-70, 270-77). Sliney, too, testified that he had been drinking all night and was intoxicated at the time of his arrest. He stated that he vomited into a trash can at the police station while he was being interrogated. He had no recollection of being informed of his rights or of confessing to the murder. (ROA II 277-95).

To rebut Appellant's allegations, the State called as witnesses Detectives Cary Twardzik and Lloyd Sisk. Sisk testified that he did not smell alcohol on Appellant and saw no indication that he was intoxicated. He also denied that Appellant vomited into the trash can during the interrogation. (ROA II 350-60). In denying the motion to suppress, the trial court noted the conflicting testimony, but ultimately determined that Appellant's confessions were "knowingly, voluntarily and freely made." (ROA II 364-67).

Shirley pursued the involuntary confession argument at trial, calling as witnesses the same patrons from Club Manta Ray who saw Sliney drinking and intoxicated by the end of the evening. (ROA XI 1062-68, 1074-80, 1082-88). Appellant testified, as well, that he was intoxicated when he was arrested and did not remember waiving his rights or confessing to the crime. (ROA XI 1131-34).

Regarding the murder, Appellant testified that he and Keith Witteman went to Ross Pawn Shop so Appellant could buy Witteman a gold necklace in exchange for a gold bracelet Witteman owned that Appellant wanted. At one point, the victim quoted Appellant a price for the necklace. Appellant began looking at other merchandise, but came back to the necklace, at which point the victim quoted a higher price. Appellant paid for the necklace, but confronted Mr. Blumberg about the change in price. They began arguing. As the argument escalated, Appellant went behind the counter and grabbed the victim by the shoulder. They both fell to the ground. When Appellant stood up, he noticed that the victim was bleeding, so he asked Witteman what they should do. Witteman said he did not know. Appellant responded that they should call 911, but instead of doing so, left the store because he was nauseous from seeing the blood and lay down in his truck. ROA XI 1112-21).

A few minutes later, Witteman came outside to check on him and went inside the truck's cab, retrieving a pair of workout gloves. Witteman went back inside the pawn shop and returned five or six minutes later carrying a pillow case full of stuff. Witteman was wearing a tan sweater that was not his own and had a gun stuck into his waistband. Witteman told Appellant to get up and drive, so they left. They drove to

two secluded locations where Witteman disposed of several items, then they went home. Appellant learned the next day from his mother that the victim had died. (ROA XI 1121-28).

The State's only witness in rebuttal was Detective Sisk. As before, Sisk testified that he was with Detective Twardzik when they performed a felony stop and arrest of Appellant. During the course of his arrest, Appellant allegedly had no trouble responding to their commands. There were also no indications that Appellant was intoxicated. (ROA XI 1169-74). Kevin Shirley's entire cross-examination of Detective Sisk consisted of the following:

> Q Corporal Sisk, you weren't with him at all times, though, that evening, were you?
>
> A No, sir, I wasn't.
>
> Q What time was that written statement taken?
>
> A I'm not sure. I'd have to go back through the reports to find the exact time.
>
> Q What time was the taped statement taken?
>
> A I wasn't in the room for the taped statement.
>
> Q Okay. Did he appear tired to you at all?
>
> A No, sir, he appeared pretty talkative.
>
> Q Okay. And you were with him until what time in the morning?

> A Up until the time -- After he finished the written statements, then I left the room.
>
> Q Okay. You don't know what time that was?
>
> A Not off the top of my head, no.
>
> MR. SHIRLEY: I don't have any further questions.

(ROA XI 1175).

Aside from Appellant's confessions, there was no evidence, physical or otherwise, to establish first-degree premeditated murder.[8] Nothing else refuted Appellant's testimony at trial that Keith Witteman killed the victim after he (Sliney) fled the pawn shop. The only physical evidence consisted of Witteman's fingerprint on the frame of a mirror in the pawn shop. (ROA X 1019). That Appellant was caught selling guns stolen from the pawn shop proved only that he was dealing in stolen property. Likewise, the fact that the police seized jewelry stolen from the pawn shop from a trunk

[8] The grand jury indicted Appellant on one count of first-degree premeditated murder and one count of first-degree felony murder, rather than on a single, all-inclusive count of first-degree murder. (ROA I 4-5). The jury later returned separate verdicts of guilty on both counts (ROA I 159-60), but the trial court adjudicated Appellant guilty on only the premeditated murder count. (ROA II 232-33, 463; XII 1352). Likewise, it sentenced Appellant only on the premeditated murder count. (ROA II 232-33, 237, 463). Since the only evidence of premeditation came from Appellant's confession, the voluntariness and admissibility of those confessions took on an even greater significance.

in Appellant's bedroom, again, proved only that he was in possession of stolen property, particularly since he was sharing his bedroom with Keith Witteman at the time. (ROA XI 1107). In short, the confessions were critical evidence, and their admissibility was highly contested. Detective Sisk provided key testimony for the State, while Kevin Shirley labored under a conflict of interest as he attempted to cross-examine a former client and the father of an existing client.

Florida Rule of Professional Conduct 4-1.7 provided generally at the time that a lawyer must not represent a client (a) if the representation of that client will be directly adverse to the interests of another client, or (b) if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client, **and** each client consents after consultation. Rule 4-1.8(b) more specifically provided that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6 [confidentiality of information]."

In the present case, these rules required at the very least that Kevin Shirley inform Appellant of his prior representation of Detective Sisk, and of his current representation of Sisk's son, so that Sliney could make an informed decision about his continued representation by Shirley. Kevin Shirley, however, did not do so. Rather, despite the importance of the motion to suppress and the whole voluntariness issue, he chose to ignore the rules of professional conduct and proceed with his representation of Appellant while operating under an actual conflict of interest that adversely affected his ability to impeach Sisk's testimony.

To establish a claim of ineffective assistance of counsel that is founded on an alleged conflict of interest, a defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." Sullivan, 446 U.S. at 350. See also Mickens v. Taylor, 535 U.S. 162 (2002). An actual conflict exists when an attorney "actively represents conflicting interests." Id. See also Guzman v. State, 644 So. 2d 996, 999 (Fla. 1994) ("We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another."). To establish an actual conflict of interest, a defendant "must identify specific evidence in the record that suggests his

interests were impaired or compromised for the benefit of the lawyer or another party." Brown v. State, 894 So. 2d 137, 157 (Fla. 2004). Once an actual conflict is established, the deficient-performance prong of Strickland is satisfied, and prejudice satisfying the second prong is presumed, even in the absence of other proof of actual prejudice. Id.

The question of whether an actual conflict of interest existed that adversely affected counsel's performance is a mixed question of law and fact. See Brown, 894 So. 2d at 157; Hunter, 817 So. 2d at 792 (citing Cuyler, 446 U.S. at 342). Once both prongs of the Cuyler test are satisfied, "prejudice is presumed and the defendant is entitled to relief." Hunter, 817 So. 2d at 792 (citing Strickland, 466 U.S. at 692; Cuyler, 446 U.S. at 349-50).

In the present case, Kevin Shirley was faced with having to cross-examine a key state witness who had been his client for several years, and whose son he was currently representing. See Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987) ("An attorney who cross-examines a former client inherently encounters divided loyalties."). In fact, Shirley was forced to choose between discrediting his former client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve Sisk's attorney/client privilege. According to the Eleventh Circuit,

"these assertions would suffice to demonstrate an actual conflict of interest." Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986).

Shirley obviously knew the details of Sisk's felony arrest and prosecution for offenses against a minor. In representing Sisk before the Review Board, and in litigating the civil action, Shirley was invariably aware of Sisk's entire service record. He was also privy to intimate personal details related to Sisk's marriage and ultimate divorce. Moreover, Shirley's relationship with Sisk deepened when Shirley agreed to represent Sisk's son while he was representing Appellant. Finally, Jack Sliney testified at the supplemental evidentiary hearing that he passed notes to Shirley during the trial, pointing out discrepancies in Sisk's testimony, but Shirley told him, "[D]on't worry about it right now; everything is gonna be just fine." Shirley consistently assured Appellant that, at worst, he would be convicted of only second-degree murder. (PCR V 916-17).

Had Shirley been a public defender, his former representation of Sisk would have warranted a motion to withdraw based on a certification of conflict pursuant to section 27.53(3), Florida Statutes (1993).[9] See Nixon v.

[9] In relevant part, section 27.53(3) stated:

> If at any time during the

Siegel, 626 So. 2d 1024, 1025 (Fla. 3d DCA 1993) (quashing order denying public defender's motion for appointment of other counsel where public defender had previously represented state's main witness: "it cannot be said as a matter of law that the conflict vanishes when the case of one of the adverse defendants is concluded."); Ortiz v. State, 844 So. 2d 824, 826 (Fla. 5th DCA 2003)(reversing convictions because trial court erroneously denied motion to withdraw based on conflict: "There exists a risk of conflicting interest in the instant case as the State's key witness against Ortiz, the confidential informant, was also being represented by the Office of the Public Defender. It cannot be said that the apparent conflict created when defense counsel represented both appellant Ortiz and the State's key witness is not prejudicial to Ortiz so as to have denied him his right to effective assistance of counsel.").[10] Under the circumstances

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> representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to move the court to appoint other counsel.

[10] In 1992, certifications of conflict were not subject to review by the trial court. Thus, once a public defender certified conflict, the trial court was mandated to appoint conflict-free counsel. See Guzman v. State, 644 So. 2d 996

facing Kevin Shirley, it was incumbent upon him to move to withdraw, based upon the conflict of interest presented by this prior representations of Sisk, and his simultaneous representations of both Sisk's son and Appellant. His failure to do so was both constitutionally deficient and presumptively prejudicial. See Guzman, 644 So. 2d at 999 (remanding for new trial where trial court erroneously denied motion to withdraw based upon previous representation of State's main witness by public defender's office); Lovett v. State, 857 So. 2d 368 (Fla. 5th DCA 2003) (reversing order denying appellant's motion to withdraw his plea where "[t]he public defender's office was representing Lovett, while representing another client who had a significant interest in seeing Lovett incarcerated"); Lee v. State, 690 So. 2d 664, 667 (Fla. 1st DCA 1997) ("In this case, there can be no doubt that attorney Loveless and the defendant had an actual conflict of interest. Attorney Loveless had personally represented a primary witness against the defendant in the past and his office had also represented that witness about the time he was assisting law

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(Fla. 1994) ("[A] trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. This is true even if the representation of one of the adverse clients has been concluded. Consequently, in this case, once the public defender determined that a conflict existed regarding Guzman, the principles set forth in those cases required the trial judge to grant the motions to withdraw.").

enforcement officers in their effort to obtain a confession from the defendant.").

In denying this claim, the trial court made the following findings:

> 7. With regard to the supplementary claim and collateral counsel's allegation that trial counsel had a conflict of interest through his prior representation of Detective Sisk, the Court finds that there was no "actual conflict of interest," as contemplated by the Sixth Amendment of the United States Constitution. As stated by the United States Supreme Court in Mickens v. Taylor, an "actual conflict of interest" is a conflict of interest that adversely affects counsel's performance.
>
> The Court has thoroughly reviewed counsel's cross-examination of Detective Sisk at trial, and finds that there is no evidence to support a claim that Mr. Shirley's prior representation of Detective Sisk adversely affected his performance. See also, Hunter v. State, supra.
>
> In addition, as with the other claims, collateral counsel failed to present any expert testimony in support of the bare allegation that counsel had a conflict of interest that was undisclosed and that adversely affected his performance. In fact, collateral counsel did not even present testimony from Mr. Shirley on this point, although he had every opportunity to do so.

(PCR VI 958).

The record simply does not support the trial court's conclusions. First, as excerpted previously, Shirley's cross-examination of Sisk at trial was both meager and ineffectual.

Quite obviously Shirley chose to preserve his attorney/client relationship with Sisk at the expense of Appellant's defense. Second, although it is unclear what "expert testimony" the trial court expected, none was offered because this claim did not require expert testimony. The facts and evidence, by themselves, established an actual conflict of interest that adversely affected Shirley's performance. Third, as for Appellant's failure to call Kevin Shirley as a witness, Shirley testified at the first supplemental hearing that he had represented Sisk prior to trial. (PCR IV 615). Moreover, official court records appended to the amended motion to vacate conclusively established Shirley's representation of Sisk and his son. (PCR V 876-92). Had Appellant called Shirley as a witness at the second supplemental evidentiary hearing, Shirley undoubtedly would have asserted his lawyer/client privilege as to any potential impeachment evidence against Detective Sisk that he chose not to use against him. Thus, it would have been fruitless to call him as a witness.

Ultimately, Shirley failed to bring the conflict to the trial court's attention before trial, so the matter could be examined and resolved. See Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978) ("[D]efense attorneys have the obligation, upon discovering a conflict of interests, to advise the court

at once of the problem.”). Instead, he labored under the conflict of interest, and even exacerbated it by representing Sisk’s son during Appellant’s trial, which further adversely affected his performance. Given that both prongs of the Sullivan analysis were established, prejudice under Strickland should have been presumed, and Appellant should have been awarded a new trial, complete with conflict-free counsel. Since the trial court failed to reach the correct legal conclusion, this Court should reverse the trial court’s order and grant relief herein.

ISSUE II

TRIAL AND PENALTY PHASE COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE IN MITIGATION.

The Sixth and Fourteenth Amendments to the United States Constitution entitle every criminal defendant to a fair trial. Embodied within the concept of a fair trial is the right to counsel. Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel plays a crucial role in the adversarial system because accused persons unskilled in the vagaries of the law require the specialized skill and knowledge of an attorney to meet and defend the State's case. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685 (1984). Rather, a defendant is entitled to an attorney "who plays the role necessary to ensure that the trial is fair." Id. In other words, "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

As has long been established, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. To prove such a claim, a defendant must of necessity demonstrate that counsel's performance was deficient, i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Equally incumbent, the defendant must demonstrate that his attorney's deficient performance prejudiced his defense, i.e. "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. When alleging a claim that counsel was ineffective for failing to present mitigating evidence, the defendant must show that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." Asay v. State, 769 So. 2d 974, 985 (Fla. 2000) (quoting Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1988)).

Soon after Appellant's arrest, the trial court appointed the public defender's office. Mark Cooper, who was in the Charlotte County office, was assigned to the case. (PCR III 449). According to Mark Cooper's case progress notes,[11] he met

[11] Cooper had very little recollection of his representation of Appellant and was allowed to read handwritten notes he had made on Appellant's file jacket into the record at the evidentiary hearing. (PCR III 450, 452-53).

with Appellant and/or Appellant's father on several occasions prior to Appellant's formal arraignment on September 8, 1992. (PCR III 450-51). During those meetings, Appellant discussed his use of alcohol and steroids prior to the murder.[12] (PCR III 358-60).

On August 14, 1992, Douglas Midgley, the Public Defender for the Twentieth Judicial Circuit, whose office was in Lee County, filed a Motion to Withdraw Due to Excessive Trial Caseload in Appellant's case. See **App. A.** In response, on August 27, Appellant filed his own *pro se* Motion to Withdraw the Public Defender [sic] Office. In that motion, he alleged (1) that the office "will not be able to require sufficient time to research or properly prepare my case, Due to their Extensive case load," (2) that "the counselors will not be fully capable of competenly [sic] defending my case to their fullest professional ability," and (3) that "there is a conflict of interest and misrepresentation in that, Mark Cooper wants me to plead out to a charge that A. Did not happen [and] B. There is no evidence of, except what comes

[12] Discovery would have revealed, as well, that the Charlotte County Sheriff's Office had executed a search warrant on Appellant's home. They found, among other things, 5 vials containing a yellow liquid, marked "Testosterone Injection," along with a syringe and 2 needles. The inventory and return appear in Appellant's court file. However, the return was not included in the original record on appeal. For this Court's convenience, Appellant has provided it as **Appendix C**.

into existence by fabrication." (ROA I 12). The hearing on these motions occurred on October 1, 1992. Unfortunately it was never transcribed, and the court reporter's notes have been destroyed. Court minutes, which appear in the original record on appeal, indicate that Appellant listed nine reasons why Cooper should be dismissed. Besides himself, three other witnesses testified on Appellant's behalf. (ROA I 11). The written order denying the motions provides no reason for their denial. See **App. B.**

On September 10, while the motions to withdraw were pending, Cooper moved to have Dr. Michael Spellman, Ph.D., a licensed clinical psychologist, appointed "to assist counsel in determining the Defendant [sic] mental health state and functioning level." (ROA I 10). During Dr. Spellman's evaluation, Appellant disclosed his alcohol and steroid use, specifically that he had just ended a cycle of oral steroids and was supplementing with injections before beginning a new cycle. (PCR III 361-62). Dr. Spellman acknowledged in his report that Appellant reported using steroids, including on the day before the murder. (PCR II 220). Noting that "the use of substances is relevant to Mr. Sliney's mental status," Dr. Spellman also detailed Appellant's reported history of alcohol and substance abuse. (PCR II 221).

Ultimately, Dr. Spellman encouraged Cooper to obtain another expert. In his report to counsel, he wrote, "I do not regard myself as an expert in capitol [sic] cases. So, please be aware that the following assessment does not take into account the types of information and considerations that an established expert might bring to bear." (PCR II 220). Later in his report, Dr. Spellman again reiterated his recommendation that Cooper obtain other experts:

> My primary recommendations at this time involves [sic] obtaining additional experts even. It seems most likely that the expert in the area of organic psychoses in general, and Testosterone effects in particular will be most helpful.
>
> Another recommendation has to do with involving a psychologist or psychiatrist who is expert in the area of capitol [sic] murder. . . .
>
> It is, in my opinion, not possible for me to render an opinion as to Mr. Sliney's competence at the time of the alleged murder. This is due, primarily, to concerns of the possibility of an organic psychosis or some other form of Testosterone induced problem. . . .

(PCR II 226-27).

Moreover, Dr. Spellman indicated that Appellant's MMPI results were "of questionable validity," but he did not follow up with additional tests "in order to keep this patient unfamiliar with the test materials so that an expert in capitol [sic] murder could have a 'naive subject' in Mr.

Sliney. . . . [T]he possibility of a [sic] organic psychosis warrants further consideration. An expert in that area will be needed if that line of reasoning is to be pursued." (PCR II 226). For Cooper's reference, Dr. Spellman appended articles regarding testosterone, psychosis, aggression, and antisocial behavior. (PCR II, 226).

Despite the questionable validity of the MMPI results, Dr. Spellman offered several hypotheses regarding Appellant's mental state:

> [S]everal points in the MMPI suggest that Mr. Sliney is an individual whose character structure includes passive-dependent and passive-aggressive features. In practical terms, I would hypotheses [sic] that Mr. Sliney has a stronger than average need to please others, and a stronger than average need to suppress and repress any thoughts, feelings, drives, etc. that he believes would be unacceptable to others.
>
> This hypothesis gains additional credence insofar as Mr. Sliney earned particularly high scores on research scales of the "MMPI" which correlate with "over controlled hostility" and "inhibited aggression". Of course, these elevations may reflect an acute state rather than an enduring trait.
>
> Bearing in mind that we are still dealing with hypotheses in practical term [sic] I would also apathies [sic] may be inflexible in his approach to self-evaluations, and problem solving. Others with this propensity tent [sic] to stick rigidly to a limited array of behaviors and recipes by which they conduct themselves. When faced with a novel circumstance or a circumstance in which the "recipes" do not work these

> individuals tend to become acutely distressed.

(PCR II 224).

Despite Dr. Spellman's recommendations that Cooper seek the assistance of other experts, he did not do so prior to trial. In fact, Cooper doubted at the evidentiary hearing whether he was serious about the penalty phase when Dr. Spellman sent him the report because he had barely finished taking witness depositions. (PCR III 465). This doubt was confirmed by Appellant's mother, who testified at the evidentiary hearing that Cooper never spoke to her prior to the trial, nor did she meet with anyone else from his office to discuss Appellant's background or their family history. (PCR III 303-04).

Eight months before trial, dissatisfied with Cooper's representation, and fearful that Cooper would not be able to effectively represent Appellant as Cooper had told the trial court, Appellant's father hired the law firm of Norton and Marryott for $10,000. (PCR III 304-05, 364-65, 408-09). Kevin Shirley, an associate, was assigned to the case. Although Shirley informed Appellant that he had handled a few first-degree murder cases, including one capital case, Shirley admitted at the evidentiary hearing that he had been only a second-chair attorney on one capital case and had never before

prepared a penalty phase. (PCR III 409, 421). Regardless of his inexperience, he did not hire a mitigation specialist, or obtain releases for school or medical records, nor did he retain a mental health expert, despite Dr. Spellman's recommendations to do so.[13] (PCR III 423, 429, 439). He was even contacted by a mitigation specialist from Mississippi (a relative of Appellant's), who provided a list of specialists in Florida, but Shirley never followed up. (PCR III 436-39). When the jury returned guilty verdicts, his plan was to ask the trial court to postpone the penalty phase, because he had yet to talk to Appellant's brother or hire an expert. (PCR III 430).

Regarding Appellant's history of alcohol, steroid, and drug abuse, Shirley recalled discussing the use of steroids with Appellant, but did not recall discussing them for mitigation purposes.[14] (PCR III 410, 416). Appellant's mother testified that Shirley never talked with her about their family history and never asked her to testify at the penalty phase. Had he done so, she would have told him that she and her husband drank daily in front of their children, including Appellant, who lived at home up until his arrest. (PCR III

[13] In fact, he could not recall ever speaking with Dr. Spellman. (PCR III 446).

[14] Unfortunately, Shirley's files were destroyed in a fire. (PCR III 425).

306-10). Her husband drank at least a six pack of beer per day. (PCR III 325). He recently died of cirrhosis of the liver. (PCR III 311-12). Appellant's older brother, Tim, also drank and got in trouble with the law. (PCR III 310-11). Although she never saw Appellant drink, she saw him passed out on two occasions. (PCR III 309-10).

Appellant's older brother, Tim, also testified that Kevin Shirley had never contacted him. (PCR III 340). Had he done so, Tim would have confirmed that his parents drank excessively every day. (PCR III 336-37). He began drinking, as well, at age 15 and drank excessively while he lived at home, which caused problems. (PCR III 337). He admitted that he was an alcoholic and was attending AA meetings. (PCR III 343). He also testified that he had consumed alcohol with Appellant. (PCR III 338). Around the time of Appellant's graduation from high school, which was roughly 3 weeks before the murder, Tim Sliney learned that Appellant was using steroids. (PCR III 339). He had also heard that Appellant was getting into fights and had increased aggression. (PCR III 343). He noticed, too, that Appellant's attitude had changed, and that Appellant was short-tempered. (PCR III 348). When Appellant talked about the murder, he told his brother that he had had a "red out" where he saw red. (PCR III 351-52).

Finally, Appellant testified that he and Shirley discussed his alcohol, drug, and steroid abuse, but they never discussed the penalty phase. Shirley was convinced that Appellant would be convicted of no more than second-degree murder. (PCR III 367-73, 380).

Faced with entering a penalty phase completely unprepared, Appellant fired Kevin Shirley after the jury's verdicts. At a hearing in chambers, Appellant read to the court a letter prepared by his father, outlining the reasons for Shirley's dismissal. That letter read in pertinent part:

> I, Jack Rilea Sliney, in the case of 92-451 CF and 92-465 CF, do hereby discharge the services of Kevin C. Shirley, Attorney-at-Law, for failure to prepare an adequate defense; misrepresentations of his ability and resources to handle a case of this magnitude . . . .
>
> * * * *
>
> Kevin Shirley stated on the first day of jury selection that he might call on his senior partner, Thomas D. Marryott, for the penalty phase due [to] the fact that Marryott has more experience and knowledge in the penalty phase.
>
> Mr. Shirley never explained the penalty phase of the trial. My wife and I had no idea until this past . . . Friday that the penalty phase came after conviction.
>
> Mr. Shirley never informed my wife . . . or me that we would have to testify in the penalty phase until today, Sunday at 1:50 p.m.

> At that time Mr. Shirley said, quote, to this time they only know Jack as an arrogant, cold-blooded killer, so you and Nancy . . . will need to testify otherwise, unquote.
>
> At this time at 5:30 p.m. on October 3, 1993, we have no idea what we will be questioned about . . . .
>
> * * * *
>
> To my knowledge, at this time Mr. Shirley has not done any preparation for [the] penalty phase.

(ROA XII 1343-45).

Since Appellant could not afford to hire another attorney and was not competent to represent himself, the trial court re-appointed Assistant Public Defender Mark Cooper, over Cooper's vehement objections, and gave him 33 days to prepare. (ROA XII 1345-54, 1358). Cooper testified at the evidentiary hearing that he picked up the penalty phase "cold," meaning that Shirley provided him nothing of use for the penalty phase. (PCR III 470). The first thing Cooper did was to order the trial transcripts, since he had not been present during the trial. (ROA I 171). Those transcripts, numbering 1,359 pages, were not delivered to counsel, however, until October 18, 1993, seventeen days before the penalty phase hearing.[15] (ROA I 174).

[15] As a result, Cooper moved for a continuance. (ROA I 174-75). He also moved for the appointment of an independent capital case investigator/mitigation specialist. (ROA I 176-

While he waited for the trial transcripts, Cooper obtained the appointment of Dr. Robert Silver, Ph.D., "to assist counsel in sentencing preparation and evaluation of the Defendant herein." (ROA I 170). Silver, however, was a clinical, not a forensic, psychologist, who admitted at the evidentiary hearing that, although his role was to look for mitigation, he was familiar with chapter 921 only in "a very general way." (PCR III 477, 482-83).

Regarding Appellant's alcohol and steroid use, Dr. Silver testified at the evidentiary hearing that Appellant indicated using steroids twice (PCR III 478), but his written report reflected that Appellant had reported never using steroids (PCR II 216). Cooper's case progress notes are similarly conflicting. From a meeting with Appellant on October 6, 2003, Cooper wrote the following synopsis of their conversation: "never used steroids, only sold them, only took one or two orally weeks before the offense." (PCR III 460)

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77). Both motions were denied. (ROA I 179). In denying the motion for continuance, the trial court noted that Sliney had hired his own attorney of choice, that that attorney had had over a year to prepare, that Sliney chose to fire his attorney prior to the penalty phase, and that 30 days was adequate time for Cooper to prepare. (ROA I 179). In affirming the trial court's denial of these motions, this Court focused on the fact that "[c]ounsel was appointed on October 4, 1993, with the penalty phase postponed until November 4, 1993, over one year from Sliney's indictment on September 3, 1992." Sliney v. State, 699 So. 2d 662, 671 (Fla. 1997) (emphasis added). Nothing had been done to prepare for the penalty phase, however, until Cooper was reappointed in October 1993.

(emphasis added). Focusing on the first phrase, rather than the last one, Cooper did not pursue the issue any further. (PCR III 466). Moreover, he claimed that Appellant's use of alcohol and steroids would have conflicted with the penalty phase theme that Appellant was "a good, clean-cut kid." (PCR III 460).

Good, clean-cut kids, however, do not normally brutally attack pawn shop owners over the price of a gold necklace. Cooper should have made some attempt to explain Appellant's aberrant behavior. As it was, Appellant had no criminal history, much less any prior acts of violence. Something caused him to attack Mr. Blumberg. Assuming that Appellant, as opposed to Keith Witteman, actually killed the victim, one cannot help but wonder (as the jury must have) why this "good, clean-cut kid" went into a killing frenzy, bludgeoning, stabbing, and stomping the victim to death.

In denying this claim, the trial court made the following conclusions:

> No evidence was presented by collateral counsel to rebut the testimony of Mr. Cooper, and both Mr. Shirley and Mr. Cooper had obtained the opinions of two psychologists and a psychiatrist in anticipation of a possible penalty phase proceedings.
>
> In addition, the Court will again note here that no expert testimony was presented during either evidentiary hearing held in this matter in support of the claim that

> counsel failed to investigate, develop or present evidence at the penalty phase proceeding. In short, there has been a complete failure of proof on this claim.

(PCR VI 955).

Once again, the record does not support the trial court findings. First, Kevin Shirley did not obtain the opinion of any mental health expert. Second, Mark Cooper enlisted the aid of Dr. Spellman, but the doctor was admittedly not qualified to assist in the penalty phase and could not render an opinion as to Appellant's competency at the time of the murder. Third, Cooper obtained the appointment of Dr. Silver, but he was not competent to assist in the penalty phase either.[16] Nevertheless, as detailed below, he had relevant and compelling opinions to present to the jury. Finally, the fact that Appellant did not offer the testimony of an expert witness at the evidentiary hearing does not defeat his claim. Appellant's mother and brother, as well as Appellant himself, testified to the minimal efforts of both Kevin Shirley and Mark Cooper, and to evidence in mitigation that Cooper should have presented, but failed to present.

Evidence of Appellant's alcohol and steroid use, his parents' chronic and excessive alcohol use (which ultimately

[16] Although Cooper apparently consulted with a Dr. Kling, the court file does not include any order appointing this expert, nor did anyone at the evidentiary hearing identify this person or his credentials.

led to his father's death), and his brother's alcoholism (that also led to trouble with the law) should have been presented. It would have helped to explain how this "good, clean-cut kid" with no prior history of violence could abandon all restraint and unleash such a torrent against an elderly business owner in broad daylight, during normal business hours. Moreover, Dr. Silver's testimony could have, and should have, been presented to underscore just how out-of-character this act was for Appellant. Although the doctor had some negative things to say about Appellant, he also had opinions that would have, within a reasonable probability, affected the jury's recommendation, the trial court's ultimate sentence, or this Court's proportionality analysis. See Phillips, 608 So.2d 778, 783 (Fla. 1992) ("[T]the fact that [Appellant's mitigation evidence] may be rebutted by State evidence or argument does not change the fact that it should have been considered by the jury."). Specifically, Dr. Silver could have testified to the following, which comes from his written report to Cooper:

> From the interview and history there was no indication that he acted as he did out of duress, or because he had been emotionally or physically abused, or had had a bad childhood. He did what he did due to character weakness. It is tragic an innocent person had to lose his life, and now this young man faces forfeiting his. The one element of mitigation is his relative youth. Yet, even at this late

date, Mr. Sliney does not seem to have digested the full impact of his predicament. Whatever the reason, this young man made the biggest mistake of his life and he still hopes to find a way out. He seems to believe that somehow, in some way, he will be vindicated. Perhaps sustaining this belief keeps his fear at day. Indeed, he did not seem particularly anxious or remorseful. He is primarily concerned with saving himself. However, based on his personality, it would be predicted with a reasonable degree of accuracy that, if he were incarcerated, he would be a model prisoner. He is not the type to make waves in jail, or fight the system.

Another factor of significance is that Mr. Sliney does not really have a prior history of violence, and the act for which he was found guilty seems rather out of character for him. He apparently was not inclined in the past toward aggressive criminal behavior by breaking and entering, or robbery, or thievery, or direct confrontation with victims. For the most part his prior criminal tendencies involve bending the rules or sneaking around the rules.

On the surface Mr. Sliney is respectful of authority and not apt to provoke or directly do something to bring attention to possible illegal behavior. He did not have the kind of background or record that would readily identify him as someone who is antisocial or headed for major trouble. And, unlike the usual criminal, he is dissuaded by punishment, such that he is likely to have a higher potential for being deflected in future criminal activity than the average convict. The saddest thing, though, is he may have committed too serious an offense for society to grant him mercy, although he is the kind of individual who possibly could be deterred from future lawbreaking.

(PCR II 218) (emphasis added).

At the time of sentencing, the trial court accorded "substantial weight" to Appellant's lack of a significant criminal history, "little weight" to his youth, and "some weight" to his good behavior in jail. (ROA II 225-26). Regarding Appellant's youth, Dr. Silver could have testified that Appellant was immature for a 19-year-old. (PCR III 482). Moreover, testimony regarding Appellant's propensity to be a model prisoner if given a life sentence would have provided a significant basis upon which to base a life sentence. Without this testimony, the jury's vote was 7 to 5, and this Court split 4 to 3 on proportionality. Had Mark Cooper presented the mitigation evidence outlined above, including Dr. Silver's testimony, there is a reasonable probability that the jury would have recommended a life sentence or this Court would have vacated Appellant's sentence on proportionality grounds. See Rompilla v. Beard, 18 Fla. L. Weekly Fed. S 419 (2005) (granting certiorari on ineffectiveness claim where defense counsel failed to investigate mitigation possibilities and "unjustifiably relying instead on Rompilla's own description of an unexceptional background"); Wiggins v. Smith, 539 U.S. 510 (2003) (granting certiorari on ineffectiveness claim where defense counsel failed to investigate mitigation relating to

defendant's dysfunctional background); Williams v. Taylor, 529 U.S. 362 (2000) (granting certiorari on ineffectiveness claim where defense counsel failed to investigate mitigation, including expert testimony that, if kept in "structured environment," defendant would not pose future danger to society); Orme v. State, 896 So. 2d 725 (Fla. 2005) (finding trial counsel ineffective for failing to investigate and present evidence of bipolar disorder); Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) (finding trial counsel ineffective in penalty phase for failing to present evidence of abusive childhood and history of drug and alcohol abuse); Rose v. State, 675 So.2d 567 (Fla. 1996) (finding trial counsel ineffective in penalty phase where "there was no investigation of options or meaningful choice"; rather, counsel latched onto admittedly ill-conceived "accidental death" theory proposed by colleague); Hildwin v. Dugger, 654 So.2d 107, 110 & n.7 (Fla. 1995) (finding counsel's sentencing investigation "woefully inadequate" despite calling defendant's father, two guardians, defendant's friend, and defendant himself: "The testimony of these witnesses was quite limited."). Therefore, this Court should reverse the trial court's order denying relief and remand this case for a new penalty phase proceeding.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant, JACK RILEA SLINEY, respectfully requests that this Honorable Court reverse the trial court's denial of relief and remand this cause for a new trial.

Respectfully submitted,

_____

SARA K. DYEHOUSE, ESQ.
Fla. Bar No. 0857238
3011 Richview Park Circle
Tallahassee, FL 32301
(850) 907-9559

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was hand delivered to Scott Browne, Assistant Attorney General, The Capitol PL-01, Tallahassee, FL 32301; and was sent by United States mail, postage prepaid, to Jack Sliney, DC# 905288, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, this _____ day of August, 2005.

_____

SARA K. DYEHOUSE, ESQ.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____

SARA K. DYEHOUSE, ESQ.