IN THE SUPREME COURT OF FLORIDA

JACK RILEA SLINEY,

Petitioner,

vs. FSC Case No.SC05-1462

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L.T. Case No. 92-451CF

JAMES V. CROSBY, JR., Secretary,
Florida Department of Corrections,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

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FACTS AND PROCEDURAL HISTORY

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 Aclosed@ sign displayed, and the lights off. Upon entering the store, she noticed the display cases were empty or in disarray. 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, Petitioner=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. On the top and 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. 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 at around 4:30 p.m. 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

Petitioner in a photo lineup, and identified him at trial as one of the 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 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 that evening with a possible identification of the suspect. McGinn then informed Detective Cary Twardzik, the lead investigator on the murder, about Thaddeus= phone call. (ROA IX 801-05).

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

guns matched the gun register as well. At that point, Twardzik and others arrested Petitioner for dealing in stolen property. (ROA II 351; IX 805-914; X 943-59).

After orally waiving his Miranda rights,[1] Petitioner initially claimed that he bought the guns, and some jewelry, from a black male at the Port Charlotte mall three weeks ago. When confronted with the fact that the guns were stolen from the pawn shop only ten days previously, Petitioner 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 Petitioner=s home, where he lived with his parents. In a trunk in Petitioner=s bedroom, which Petitioner 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

[1] The detective got distracted and forgot to have Petitioner sign the waiver portion of the rights form. (ROA X 965).

containing jewelry later identified by the victim=s wife as jewelry stolen from the pawn shop. (ROA X 1010, 1036-39).

Prior to trial, Petitioner challenged the admission of his 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 Petitioner 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). Petitioner 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 Twardzik and Detective Lloyd Sisk both testified, however, that Petitioner successfully negotiated two 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. (ROA II 364-67).

Petitioner 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). Petitioner 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, Petitioner testified that he and Keith Witteman went to Ross Pawn Shop so Petitioner could buy Witteman a gold necklace in exchange for a gold bracelet Witteman owned that Petitioner wanted. At one point, the victim quoted Petitioner a price for the necklace. Petitioner began looking at other merchandise, but came back to the necklace, at which point the victim quoted a higher price. Petitioner paid for the necklace, but confronted Mr. Blumberg about the change in price. They began arguing. As the argument escalated, Petitioner went behind the counter and grabbed the victim by the shoulder. They both fell to the ground. When Petitioner stood up, he noticed that Mr. Blumberg was bleeding, so he asked Witteman what they should do. Witteman said he did not know. Petitioner 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. 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

Petitioner to get up and drive, so they left. They drove to two secluded locations where Witteman disposed of several items, then they went home. Petitioner learned the next day from his mother that the victim had died. (ROA XI 1112-28).

The jury returned verdicts of guilty to first-degree premeditated murder, first-degree felony murder, and armed robbery. (ROA XII 1335). Following the verdicts, Petitioner fired his private attorney, Kevin Shirley, and the trial court appointed Assistant Public Defender Mark Cooper to handle the penalty phase. (ROA I 169; XI 1342). At the penalty phase, Petitioner presented the following evidence: (1) a neighbor who had lived across the street from Petitioner and his family for 13 years testified that Petitioner was polite, courteous, well-mannered, and a good neighbor (ROA III 385-87); (2) a track coach at Petitioner=s high school testified that Petitioner ran track and pole vaulted, worked hard, and was never a problem (ROA III 388-91); (3) the principal at Petitioner=s high school testified that Petitioner was an average student, was not a disciplinary problem, and had received a scholarship to continue his education (ROA III 392-94; (4) Petitioner=s brother testified that Petitioner once changed the tire on an elderly woman=s car without charge, and he used to mow the law and pick up groceries for an elderly man down the street (ROA III 395-98); (5)

Petitioner=s mother and father 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 testified that Petitioner had received no disciplinary reports during his 16 months in jail, despite being housed in a Atough wing@ (ROA III 411-14).

The jury returned a recommendation of death by a vote of 7 to 5. (ROA I 194). The trial court followed that recommendation, finding in aggravation that Petitioner 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 Asubstantial weight@ to the Petitioner=s lack of criminal history, it gave Alittle weight@ to Petitioner=s age (19), and it gave Alittle weight@ to Petitioner=s other nonstatutory mitigation, except for his good behavior in jail, which the court gave Asome weight.@ It rejected in mitigation any evidence that Petitioner acted under the duress or domination of Keith Witteman. Moreover, it found that Witteman=s jury recommendation for life imprisonment was not significant because Petitioner 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 Petitioner=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 Petitioner 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) Petitioner=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 of Appellant**. This Court found Issues 1 through 9 without merit and affirmed Petitioner=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.

GROUNDS FOR RELIEF

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE REPEATED INTRODUCTION OF COLLATERAL CRIME EVIDENCE THAT, BECAUSE OF ITS DETAIL, VOLUMINOUS NATURE, AND IRRELEVANT CONTENT, PREJUDICED PETITIONER=S RIGHT TO A FAIR TRIAL.

A habeas corpus petition is the proper vehicle for bringing claims of ineffective assistance of appellate counsel. See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). When entertaining a habeas petition based on a challenge of ineffective assistance of appellate counsel, this Court must decide Afirst, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of

the result." Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988).

Although habeas petitions should not be used to challenge matters that were not objected to at trial, Parker v. Dugger , 550 So. 2d 459, 460 (Fla. 1989), an exception may be made where appellate counsel failed to raise a claim that presents a fundamental error. See Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990). A fundamental error is defined as an error that Areaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.@ Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997).

This Court has repeatedly stated that collateral crime evidence is presumptively prejudicial. See, e.g., Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). Such evidence is treated cautiously because of its propensity to prejudice the jury against the accused Aeither by depicting him as a person of bad character or by influencing the jury to believe that because he committed the other crime or crimes, he probably committed the crime charged.@ Craig v. State, 510 So. 2d 857, 863 (Fla. 1987). Thus, the jury should not be distracted by information about unrelated matters. Id.

With proper notice to the defense, collateral crime evidence can be relevant and admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fla. Stat. ' 90.404(2)(a) (1991). In Petitioner=s case, the identity of the person who actually killed Mr. Blumberg was the only material fact at issue, but for collateral crime evidence to be admissible to prove identity, there must be Aa close similarity of facts, a unique or >fingerprint= type of information.@ State v. Savino, 567 So. 2d 892, 894 (Fla. 1990). The collateral crime evidence admitted at trial, however, involved Petitioner selling guns stolen from the pawn shop to Thaddeus Capeles several weeks after the homicide.[2] Thus, this type of evidence would not have been admissible to prove identity under the Williams rule. Ultimately, since the State failed to file its notice of intent to admit Williams rule evidence, the trial court was deprived of an opportunity to assess the relevance and prejudicial nature of this evidence before it was submitted to the jury.

Undoubtedly, the State will contend that this evidence did not constitute collateral crime evidence under ' 90.404(2)(a),

[2] Appellant was, in fact, initially arrested for dealing in stolen property. (ROA II 351).

but rather was evidence that was Ainextricably intertwined@ with the crimes charged and was relevant and admissible under ' 90.402. Thus, no notice of intent was required. Evidence that is inextricably intertwined, however, is evidence that is Ainseparable from the crime charged . . . . It is admissible under section 90.402 because ›it is a relevant and inseparable part of the act which is in issue. . . . It is necessary to admit the evidence to adequately describe the deed.:" Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994) (quoting Charles W. Ehrhardt, Florida Evidence '404.17 (1993 ed.)).

In Conde v. State, 860 So. 2d 930, 937 (Fla. 2003), the State introduced evidence that Afire rescue personnel discovered a woman, naked and bound in duct tape, trapped in [Conde=s] apartment@ six months after the murder for which he was on trial. That discovery led to evidence that implicated Conde in the murder, which in turn led to Conde=s arrest and subsequent confessions. Id. at 947. Although the trial court agreed to admit the evidence, it severely limited its scope:

> You will be able to introduce information about a call from the neighbors. Fire rescue appeared. They broke in. They found a woman whom they removed the tape from. That there was an identification of this defendant from a photograph. And then you spring forward into what the police did as far as the investigation. There will be no other information about her being a prostitute, about DNA linkage, whatever may have been

> with her. . . . That identification alone gives you enough to paint a picture of why the police went forward.

Id.

In affirming the admission of this collateral crime as evidence inextricably intertwined with the crime charged, this Court noted that while evidence Athat is inextricably intertwined with the charged crime is admissible to establish the entire context of the crime, care should be taken to exclude unnecessary details.@ Id. at 948. Further noting that Ano bright line between the admissible and inadmissible facts of inextricably intertwined collateral crimes@ existed, and that A[t]he drawing of that line is within the discretion of the trial court,@ this Court found that Conde=s trial court had sufficiently limited testimony regarding the collateral crime Ato a quick recital of the basic facts.@ To further support its affirmance of the trial court=s discretion, this Court cited to Consalvo v. State, 697 So. 2d 805 (Fla. 1996), Long v. State, 610 So. 2d 1276 (Fla. 1992), and Henry v. State, 574 So. 2d 73, 75 (Fla. 1991), in which limited evidence of collateral crimes had been admitted to place the events in context and to describe adequately the investigation. Id. See also Steverson v. State, 695 So. 2d 687, 689 (Fla. 1997) (quoting Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984)) (AEven when evidence of a collateral

crime is properly admissible in a case, . . . ›the prosecution should not go too far in introducing evidence of other crimes. The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident.=@).

In the present case, the evidence of Petitioner=s collateral crimes were not limited in any way. In fact, evidence of the details of the crimes became repetitive and a focus of the trial. Initially, the State introduced the testimony of Stanley McGinn, a former patrol officer with the Punta Gorda Police Department, who testified that he was informed about the robbery/murder during roll-call and was provided a composite sketch of a potential suspect. Because his stepdaughter was dating a young man about the same age as the potential suspect, he decided to show his stepdaughter=s boyfriend, Thaddeus, the composite sketch. Later that evening, Thaddeus called McGinn and told him the identity of the suspect. McGinn then contacted the lead investigator in the robbery/murder, Cary Twardzik, and related the information.[3] (ROA IX 801-05).

Thaddeus Capeles then testified in great detail about how Petitioner approached him to buy a gun the day after McGinn

[3] Twardzik testified that he had no leads on the suspect until McGinn called. (ROA X 943).

showed him the composite, and how he (Capeles) agreed to work with the sheriff:s office as part of a sting operation to buys guns from Petitioner. (ROA IX 810-909). Initially, over defense objection (ROA IX 817-64), Capeles was allowed to provide a step-by-step account of his interactions with the police as they planned and executed two separate controlled buys of guns from Petitioner. Then, over defense objection (ROA IX 862-64), the State was allowed to play four audio tapes of the interactions between Petitioner and Capeles, who was wearing a body mic, even though Capeles had just related the same information. These tape recordings, which were collectively an hour long, also contained conversations unrelated to the purchase, as well as expletives and racial epithets, that further prejudiced Petitioner in the eyes of the jury. For example, during the first controlled buy, the following conversation occurred between Petitioner and Thaddeus Capeles:

TC: Remember, mum:s the word.

JS: No, you mum:s the word.

TC: Both of us mum:s the word.

JS: Except if you ever get bumped with it, where:d you get it from? Some nigger.

TC: Some nigger?

JS: Yes.

TC: Nigger from P.G.?

JS: Yes.

TC: All right. Not a word.

(ROA IX 885). The following conversation also occurred between Petitioner and Thaddeus Capeles during the second controlled buy:

TC: Oh, my God! What is up?

JS: You=re not gonna mess with me, right, man? No fucking cops or nothing!

TC: I don=t know. You=re scaring me, dude.

JS: Dude, you watch too much television.

TC: What=s up, dude?

TC: Who=s that?

TC: Lose the glasses, man!

TC: Where we going?

JS: Right here.

TC: Okay. Okay.

JS: Get rid of this stack of rubber here.

TC: Stack?

JS: Yeah, we=re fucking.

TC: Who, Chris?

JS: Some chick - there=s a whole bunch of ›em in there - some chick is gonna fuck me and Keith both at the same time, man. No shit.

TC: You guys are sick.

JS: No, I'm gonna do it.

(ROA IX 901-02). These extraneous conversations regarding an anticipated three-way sexual encounter, as well as the foul language and racist remarks, were relevant to prove nothing more than Petitioner's bad character.[4]

In addition to Capeles' testimony regarding the controlled buys of the guns, and the tape recordings of the controlled buys of the guns, Detective Twardzik also testified in detail to the controlled buys of the guns. (ROA X 943-54). The State's case-in-chief consumes 375 pages of testimony. Of those 375 pages, 125 pages are devoted to the collateral crime evidence,[5] which is a third of the State's case. Granted Petitioner's sale of the guns provided a link in the chain that led to his arrest for murder, but this testimony should have been limited to the basic facts, which would have adequately explained how the

[4] The prosecutor made a point to refer to the sexual encounter during his cross-examination of Petitioner. (ROA XI 1163-64).

[5] See McGinn's testimony (ROA IX 801-05), Capeles' testimony (ROA IX 805-914), and Twardzik's testimony (ROA X 943-955).

investigation progressed to Petitioner=s arrest, his confessions, and the physical evidence seized pursuant to a search warrant, which was based on the controlled buys and confessions.

Concededly, appellate counsel raised on direct appeal the prejudicial nature of the extraneous conversations between Petitioner and Thaddeus Capeles during the controlled buys. Initial brief at 58-60. But appellate counsel should have challenged the prejudicial nature of the collateral crime evidence as a whole, to the extent it became a feature of the trial. By failing to do so, he deprived Petitioner of the opportunity to allege a meritorious claim that, within a reasonable likelihood, would have required reversal and a new trial. Counsel=s omission constituted Aa serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance@ that Acompromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988). Therefore, this Court should grant relief and remand this case for a new trial.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL HEARSAY TESTIMONY RELATING ACCUSATORY INFORMATION THAT WAS ADMITTED ONLY TO ESTABLISH THE SEQUENCE OF INVESTIGATION.

During the guilt phase of Petitioner=s trial, the State called as a witness Deputy Joseph Marinola of the Charlotte County Sheriff=s Office, who was one of the first officers on the scene. Deputy Marinola testified, without objection, that A[t]he call was dispatched as an aggravated battery. Subject was struck in the head with a hammer.@ (ROA VIII 701) (emphasis added). The following witness, Gil Stover, a crime scene technician with the Charlotte County Sheriff=s Office, was also asked why he was dispatched to the scene. He answered, without objection, AI was called by Detective Sergeant Twardzik in reference to a homicide that had been committed there.@ (ROA VIII 711). In addition, the paramedic who arrived simultaneously with Deputy Marinola testified, without objection, as follows:

> I stepped out of the ambulance. The wife was coming out of the shop at that time. Immediately I knew something was wrong more so than we had received a call as a [sic] individual had been hit by a hammer. I expected somebody who was working had possibly hit their hand or something. I wasn=t expecting what we found, but knew instantly when we pulled up and saw the wife that something was worse.

(ROA VIII 742). Finally, Detective Cary Twardzik, the lead investigator for the Charlotte County Sheriff=s Office, was allowed to testify, without objection, AOn the evening of the

18th, I received a phone call at my house about six o'clock stating that there had been a robbery and a homicide.@ (ROA X 923).

Each witness testified to information related by some unknown third party. Had the testimony been admitted to prove the truth of the matter asserted, it would have constituted hearsay without an applicable exception to justify its admission. Undoubtedly, however, the State will contend that the testimony excerpted above was not admitted to prove the truth of the matter asserted, but was admitted merely to establish a logical sequence of events in the investigation. As such, it would not be inadmissible hearsay.

However, such testimony still must pass the tests of relevancy and prejudice, which it cannot do. As this Court held in State v. Baird, 572 So. 2d 904, 908 (Fla. 1990), Awhen the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great.@ Given the Ainherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being tried,@ this Court suggested that the Abetter practice is to allow the officer to state that he acted upon a 'tip' or

›information received,: without going into the details of the accusatory information.@ Id. Accord Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989) (en banc) (concluding that while police may testify they arrived on scene because of statement made to them, content of statement is inadmissible, especially where it is accusatory); see also Muhammad v. State, 782 So. 2d 343, 359 (Fla. 2001) (AWe have consistently disapproved the tactic of offering hearsay statements under the guise of providing a ›logical sequence: of events where the contents of the statement were not relevant to establish a logical sequence of events.@).

In Conley v. State, this Court reaffirmed Baird where a police officer was allowed to testify, over objection, that he A›received the call in reference to a man chasing a female down the street.:@ Then he added: A›The man supposedly had some type of gun or rifle.:@ 620 So. 2d 180, 182 (Fla. 1993). In reversing Conley:s convictions, this Court found that Athe contents of the statement were not relevant to establish a logical sequence of events, nor was the reason why officers arrived at the scene a material issue in the case.@ Id. at 183. Ultimately, this Court held, Athe inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information to establish the logical sequence of events

outweighs the probative value of such evidence. Such practice must be avoided.@ Id.

In the present case, four state witnesses testified as to why they were dispatched to the scene, all of which were based on hearsay information from various third parties. The reason why they were dispatched to the scene was not material to any issue in the case. Thus, the testimony served only to prejudice Petitioner unduly by implying that some unknown, but credible, third person had concluded that Mr. Blumberg was killed with a hammer and robbed. Given the fundamentally erroneous nature of this testimony, appellate counsel was constitutionally ineffective for failing to raise this issue on appeal.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE PROSECUTOR=S FUNDAMENTAL MISSTATEMENT OF THE LAW TO THE JURY, WHICH PREJUDICED PETITIONER=S DEFENSE.

In his defense, Petitioner testified that he and the victim argued over the price of a gold necklace. During the argument, Petitioner went behind the counter and grabbed the victim on the shoulders, at which point they both fell, with Petitioner landing on top of the victim. Petitioner noticed that the victim was bleeding and became nauseous from seeing the blood. He asked Keith Witteman what they should do, and Witteman responded that he did not know. Petitioner said they needed to

call 911, but instead of doing so, went out to his pickup truck to lie down in the bed. Witteman eventually came out 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 Petitioner to get up and drive, so they left. They drove to two secluded locations where Witteman disposed of several items, then they went home. Petitioner learned the next day from his mother that the victim had died. (ROA XI 1112-28).

Based on Petitioner=s testimony, defense counsel asked for instructions on all of the possible lesser-included offenses. As to Count I (premeditated first-degree murder), the lesser-included offenses consisted of second-degree murder, manslaughter (by culpable negligence), attempted first-degree premeditated murder, culpable negligence, and aggravated battery. (ROA XII 1300-01). In his closing argument to the jury, defense counsel told the jury, AI can=t in all candor stand before you . . . and say Jack Rilea Sliney is not guilty of everything, find him not guilty and let him go home. I can=t do that.@ (ROA XII 1269). Instead, he invited the jury to find Petitioner guilty of aggravated battery, for grabbing the victim

and causing him to fall, causing serious bodily injury: AIt is quite clear on its face that Jack Sliney is guilty of at least aggravated battery of George Blumberg, and you=re going to receive the instruction on that.@ (ROA XII 1269) (emphasis added). Alternatively, defense counsel offered another option:

> There is another jury instruction with regard to culpable negligence. I invite you and I encourage you to look at that. It=s not complicated and actually involves because of [sic] the gross negligence on the part of Jack Sliney.
>
> I don=t know how you want to interpret the facts and I=m not going to ask you to interpret the facts in any way but to determine whether or not Jack Rilea Sliney is guilty rather of aggravated battery, but of something a little more serious, culpable negligence.
>
> Whether his conduct of leaving Mr. Blumberg there to the mercy of Keith Witteman is felt [so] inexcusable that, in fact, it operates as culpable negligence.

(ROA XII 1270) (emphasis added).

In rebuttal, the prosecutor denigrated counsel=s argument and negated Petitioner=s defense by fundamentally misstating the law:

> While we=re talking about the elements I think I need to clear up something rather quickly, and I=m sure that counsel didn=t mean to mislead you. Culpable negligence is not a more serious crime than aggravated battery; aggravated battery being a felony and culpable negligence being a misdemeanor.

> I wanted to clear that up but I=m sure that he did not mean to mislead anybody on that.

(ROA XII 1276).

From the context of defense counsel=s argument, it is clear that counsel was inviting the jury to consider the offense of manslaughter by culpable negligence, which is a second-degree felony, not the misdemeanor culpable negligence offense. See Fla. Stat. '' 782.07(1), 784.045(2) (1991). Defense counsel initially conceded that Petitioner was guilty of Aat least aggravated battery.@ (ROA XII 1269) (emphasis added). Then he invited the jury to consider Aa little more serious@ offense. Although manslaughter and aggravated battery are both second-degree felonies, he logically could not have been referring to culpable negligence, since it is only a first-degree misdemeanor, and thus not Aa little more serious@ than aggravated battery.

By falsely Aclarifying@ the law, the prosecutor effectively derogated defense counsel=s credibility and veracity, and left the jury to believe that defense counsel was trying to trick them into convicting Petitioner of a misdemeanor instead of a felony when, in fact, manslaughter by culpable negligence was a serious second-degree felony. This gross misstatement of the law, posed as an attempt to clarify the law, went uncorrected by the trial court and fundamentally affected Petitioner=s trial.

See Miller v. State, 712 So. 2d 451, 453 (Fla. 2d DCA 1998) ("A defendant has a fundamental right to present a defense and to have the jury properly instructed on any legal defense supported by the evidence. These rights stand for naught if the prosecutor can ridicule a defense so presented, denigrate the accused for his temerity in raising the issue, and misstate the law in contradiction of the judge=s instructions, as the prosecutor in this case did.") (citations omitted); Quaggin v. State, 752 So. 2d 19 (Fla. 5th DCA 2000) (error in instructions on justifiable use of force, which was preserved for review, coupled with prosecutor=s misstatements regarding defendant=s burden of proof, although not preserved, went to heart of case so as to constitute fundamental error); Priestley v. State, 537 So. 2d 690 (Fla. 2d DCA 1989) (finding fundamental error where trial court gave incorrect instruction and prosecutor misstated the law, which Ahad the effect of negating Priestley=s defense@); Harvey v. State, 448 So. 2d 578, 581 (Fla. 5th DCA 1984) (AThe trial judge in this case should have corrected the misleading instruction. This instruction, the prosecutor=s repeated misstatements of the law and the obvious jury confusion deprived Harvey of a fair trial so as to constitute fundamental error which requires reversal even in the absence of timely objections."); Tuff v. State, 509 So. 2d 953 (Fla. 4th DCA 1987)

(reversing based on prosecutor:s comments, finding fundamental error in remarks that suggested improper test of culpable negligence, attacked defense counsel, and were otherwise inflammatory). Since the jury instructions did not inform the jury of the degree or severity of each lesser-included offense in relation to each other or to the offense charged, the instructions did nothing to cure the error. Thus, appellate counsel was constitutionally ineffective for failing to raise this fundamental error on appeal.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Petitioner, JACK RILEA SLINEY, respectfully requests that this Honorable Court grant this petition for writ of habeas corpus and remand this cause for a new trial or such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States Mail, postage prepaid, to Scott Browne, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013; Thomas H. Ostrander, Esq., 2701 Manatee Avenue West, Suite A, Bradenton, FL 34205; and Jack R. Sliney, DC# 905288, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4000, this 19th day of August, 2005.

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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.

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SARA K. DYEHOUSE, ESQ.