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APPENDIX

A

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Supreme Court of Florida

No. SC17-1074

JACK R. SLINEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 31, 2018]

PER CURIAM.

We have for review Jack R. Sliney's appeal of the circuit court's order denying Sliney's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Sliney's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Sliney's appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017). After this

Court decided Hitchcock, Sliney responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Sliney's response to the order to show cause, as well as the State's arguments in reply, we conclude that Sliney is not entitled to relief. Sliney was sentenced to death following a jury's recommendation for death by a vote of seven to five. Sliney v. State, 699 So. 2d 662, 667 (Fla. 1997). His sentence of death became final in 1998. Sliney v. Florida, 522 U.S. 1129 (1998). Thus, Hurst does not apply retroactively to Sliney's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Sliney's motion.

The Court having carefully considered all arguments raised by Sliney, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Charlotte County,
George C. Richards, Judge - Case No. 081992CF0004510001XX

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Julissa R. Fontán, Maria E. DeLiberato and Chelsea Shirley, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Scott A. Browne, Senior Assistant Attorney General, Tampa, Florida,

for Appellee

APPENDIX

B

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO: 92-CF-451

JACK SLINEY,
Defendant.
_____/

FINAL ORDER DENYING DEFENDANT'S SUCCESSIVE 3.851 MOTION AND DENYING REQUEST TO HOLD CASE IN ABEYANCE

THIS CAUSE comes before the Court on Defendant's "Successive Motion To Vacate Death Sentence," filed on January 10, 2017, pursuant to Fla. R. Crim. P. 3.851. The State filed a response to the motion on March 1, 2017. A case management conference was held on March 8, 2017. Having reviewed the pleadings, the record, and the applicable law, the Court finds as follows:

1. The facts of this case are outlined in the Florida Supreme Court opinion on direct appeal, Sliney v. State, 699 So. 2d 662 (Fla. 1997).

> The victim in this case, George Blumberg, and his wife, Marilyn Blumberg, owned and operated a pawn shop. On June 18, 1992, Marilyn drove to the pawn shop after unsuccessfully attempting to contact George by phone. When she entered the shop, she noticed that the jewelry cases were empty and askew. She then stepped behind the store counter and saw George lying face down in the bathroom with scissors protruding from his neck. A hammer lay on the floor next to him. Marilyn called 911 and told the operator that she thought someone had held up the shop and killed her husband.
>
> A crime-scene analyst who later arrived at the scene found, in addition to the hammer located next to the victim, parts of a camera lens both behind the toilet and in the bathroom wastepaper basket. The analyst also found traces of blood and hair in the bathroom sink. The only relevant fingerprint found in the shop belonged to codefendant Keith Witteman.
>
> During an autopsy of the victim, the medical examiner found various injuries on the victim's face; three crescent-shaped lacerations on his head; three stab wounds

in his neck, one of which still contained a pair of scissors; a number of broken ribs; and a fractured backbone. The medical examiner opined that the facial injuries occurred first and were caused by blunt trauma. When asked whether the camera lens found at the scene could have caused some of the victim's facial injuries, the medical examiner responded affirmatively. The stab wounds, the medical examiner testified, were inflicted subsequent to the facial injuries and were followed by the three blows to the head. The medical examiner confirmed that the three crescent-shaped lacerations found on the victim's head were consistent with the end of the hammer found at the scene. Finally, the medical examiner opined that the broken ribs and backbone were the last injuries the victim sustained and that the cause of these injuries was most likely pressure applied to the victim's back as he lay on the ground.

The day after the murder, Kenneth Dale Dobbins came forward indicating that he might have seen George Blumberg's assailants. Dobbins had been in the pawn shop on June 18, 1992, and prior to his departure, he saw two young men enter the shop. The two men approached George and began discussing a piece of jewelry that they apparently had discussed with him on a prior occasion.

Dobbins saw the face of one of the men as the two walked past him. Based on the description Dobbins gave, investigators drew and circulated a composite of the suspect. One officer thought his stepdaughter's boyfriend, Thaddeus Capeles, might recognize the suspect because Capeles and the suspect appeared to be close in age. The officer showed Capeles the composite as well as a picture of a gun that had been taken from the Blumbergs' pawn shop. Capeles did not immediately recognize the person in the composite but later contacted the officer with what he believed to be pertinent information. Capeles told the officer that when he visited the Club Manta Ray, Jack Sliney, who managed the teen club, asked him whether he was interested in purchasing a gun. He thought the gun Sliney showed him looked somewhat like the one in the picture the officer had shown him.

The officer arranged a meeting between Capeles and Carey Twardzik, an investigator in the Blumberg case. During that meeting, Capeles agreed to assist with the investigation. At Twardzik's direction, Capeles arranged a controlled buy of the gun Sliney had shown him. His conversations with Sliney, both on the phone and at the time he purchased the gun, were recorded and later played to the jury. After discovering that the serial number on the gun matched the number on a firearms register from the Blumbergs' pawn shop, investigators asked Capeles to arrange a second controlled buy of some other guns Sliney mentioned during his most recent conversation with Capeles. Capeles' conversations with Sliney regarding the second sale, like the conversations surrounding the initial sale, were recorded and later played to the jury. As with the first sale, the serial numbers on the guns Capeles obtained matched the numbers on the firearms register obtained from the Blumbergs' shop. At trial, Marilyn Blumberg identified the guns Sliney sold to Capeles and confirmed that they were present in the pawn shop the day prior to the murder.

Shortly after the second gun transaction, several officers arrested Sliney. The arrest occurred after Sliney left the Club Manta Ray, sometime between 1 and 1:45 a.m. At the time of the arrest, codefendant Keith Witteman and a female were also in Sliney's truck. Despite the testimony of several defense witnesses to the contrary, the arresting officers testified that Sliney did not appear to be drunk or to have any difficulty in following the instructions they gave him.

Following the arrest, Sliney was taken to the sheriff's department. Officer Twardzik read Sliney his Miranda1 rights, and Sliney thereafter indicated that he wanted to talk. He gave both written and taped statements in which he confessed to the murder. In his taped statement which was played to the jury, Sliney told the officers that shortly after he and Keith Witteman entered the shop, they began arguing with George Blumberg about the price of a necklace Sliney wanted to buy. According to Sliney, Witteman pressured him to hit Blumberg. Sliney grabbed Blumberg, and Blumberg fell face down on the bathroom floor. Sliney fell on top of Blumberg. Sliney then turned to Witteman and asked him what to do. Witteman responded, "You have to kill him now," and began taking things from the display cases and placing them in a bag. Thereafter, Sliney recalled hitting Blumberg in the head with a camera lens that Sliney took from the counter and stabbing Blumberg with a pair of scissors that Sliney obtained from a drawer. Sliney was somewhat uncertain of the order in which he inflicted these injuries. Next, he recalled removing a hammer from the same drawer in which the scissors were located and hitting Blumberg on the head with it several times.

Sliney left Blumberg on the floor. He washed his hands in the bathroom sink, and then he and Witteman left the shop. According to Sliney, Witteman, in addition to taking merchandise from the shop, took money from the register and the shop keys from Blumberg's pocket. He used the keys to lock the door as the two exited the shop.

Before returning home, Sliney and Witteman disposed of several incriminating items and transferred the jewelry they obtained from the shop, as well as a .41 caliber revolver, into a gym bag. Sliney put the bag in a trunk in his bedroom. Officers conducting a search of Sliney's home later found the gym bag containing the jewelry and gun.

In addition to recounting the circumstances surrounding the murder, Sliney told the officers that he had been in the pawn shop prior to the murder. He said, however, that he did not decide to kill Blumberg before entering the shop or at the time he and Blumberg were arguing. Rather, he told them that he did not think about killing Blumberg until Witteman said, "[W]e can't just leave now. Somebody will find out or something. We got to kill him."

Prior to trial, Sliney moved to suppress the statements he made to the law enforcement officers. He alleged that the statements were involuntary and thus

> inadmissible. The trial court denied the motion. At trial, Sliney presented several witnesses to the jury in support of his position that his confession was untrustworthy. Sliney also testified on his own behalf. His testimony was inconsistent with the statements he made to law enforcement officers. He testified that it was actually Witteman who murdered Blumberg. Sliney told the jury that he paid for the necklace he was looking at before he began arguing with Blumberg over the price. During the argument he grabbed Blumberg, and Blumberg fell to the floor. When he saw that Blumberg was bleeding, he left the shop. He lay down in his truck because the sight of the blood made him sick. Several minutes later, Witteman came out to the truck. He removed a pair of weight lifting gloves from Sliney's gym bag and then went back into the shop. When Witteman exited the shop again he had with him a gun and a pillow case full of things. Sliney explained that he did not go to the police when he discovered that Blumberg was dead because Witteman threatened to harm his family.

Sliney, 699 So. 2d at 664-666.

2. A jury convicted Defendant of first-degree murder and recommended a sentence of death by a vote of seven to five. The trial court followed the recommendation, finding two aggravating factors, and sentenced Defendant to death. Defendant's convictions and sentences were then affirmed on appeal. Id. Defendant filed a petition for writ of certiorari with the United States Supreme Court, which was denied February 23, 1998. Sliney v. Florida, 522 U.S. 1129 (1998).

3. Defendant filed a postconviction motion on June 19, 2001. The evidentiary hearing was held on June 19, 2003. Defendant was permitted to file an amended motion on November 17, 2003. The evidentiary hearing on the amended motion was held on December 2, 2003. The trial court denied Defendant's postconviction motion on December 14, 2004. The Florida Supreme Court affirmed the denial. Sliney v. State, 944 So. 2d 270 (Fla. 2006).

4. In this current successive motion, Defendant raised three claims that he is entitled to relief under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (Fla. 2016). A case management conference was held on March 8, 2017. Having determined that the claims

raised are purely legal arguments which do not require an evidentiary hearing, the Court makes the following findings as to Defendant's claims.

5. **As to Claim I**, Defendant argued that in light of the Hurst decisions, his death sentence violated the Sixth Amendment. Defendant argued that his sentence was erroneous because all factors to impose the sentence were not found by a jury. He noted that his penalty phase jury verdict was seven to five, and the trial judge, not the jury, found the existence of aggravating and mitigating factors. Defendant argued that this error was not harmless because the State could not show beyond a reasonable doubt that no juror would have voted for a life sentence.

6. The State argued that no harmless error analysis was necessary, since the Hurst decisions do not apply retroactively to this case, and thus there was no constitutionally cognizable error.

7. Defendant argued that although his case was final before Ring v. Arizona, 536 U.S. 583 (2002), he is still entitled to have the Hurst decisions apply retroactively to his case because he raised and specifically preserved a Ring claim, citing Mosley v. State, ___ So.3d ___, 2016 WL 7406506, *45 (Fla. 2016). Defendant contended that Mosley created two classes of defendants entitled to retroactive application of Hurst v. State - those whose cases were final after Ring was decided, and those whose cases were final before Ring, but who preserved a Ring claim. Defendant argued that fundamental fairness, as argued in Mosley, also required retroactive application of the Hurst decisions to his case. However, a plain reading of the opinion does not support that argument. In Mosley, the Florida Supreme Court held that for defendants whose cases were final after Ring, and who raised Ring claims in vain, Hurst v. Florida applied retroactively. Id. at *25 ("Defendants who were sentenced to death under

Florida's former, unconstitutional capital sentencing scheme after Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida"). Mosley does not hold that Hurst applies retroactively for cases which were final before Ring was decided, even if a Ring claim was made. In Asay v. State, ___ So.3d ___, 2016 WL 7406538 (Fla. 2016), the Florida Supreme Court held that Hurst did not apply retroactively for any capital case final before Ring, because a new penalty phase for decades-old cases would be less complete and less accurate than the original proceedings. The Florida Supreme Court has not held that fundamental fairness acts as an alternative basis for retroactivity. On the contrary, the Florida Supreme Court cited fundamental fairness in Mosley only when analyzing why cases final after Ring should receive retroactive application of Hurst v. Florida, since it had previously ruled in Asay that Hurst v. Florida did not apply retroactively to cases final before Ring. No Florida Supreme Court case since Mosley has held that fundamental fairness can be used to make a retroactive application of Hurst to cases final before Ring. While Defendant cited to the concurring and dissenting opinions in Asay and Mosley in support of retroactive application to his case, this Court is bound by the majority opinions of the Florida Supreme Court. Hurst v. Florida does not apply retroactively to Defendant's case even though he preserved a Ring claim. *See* Gaskin v. State, ___ So.3d ___, 2017 WL 224772 (Fla. 2017) (Hurst does not apply retroactively to a defendant whose case was final before Ring was decided, regardless of that defendant having raised and preserved Ring claims); Bogle v. State, ___ So.3d ___, 2017 WL 526507 (Fla. 2017). To the extent that Defendant argued that partial retroactivity was unconstitutional, this Court is bound by the decisions of the Florida Supreme Court, and it is outside of this Court's authority to find Florida Supreme Court decisions unconstitutional.

8. To the extent Defendant argued that he should be given retroactive application of Hurst v. State based on the above arguments because the Florida Supreme Court has not yet ruled on the retroactivity of Hurst v. State, this Court declines to extend the rulings of the Florida Supreme Court. Since the Hurst decisions do not apply retroactively to this case, Defendant is not entitled to relief as a matter of law. No harmless error analysis is required here, as this case was final prior to Ring. Therefore, **Claim I is DENIED.**

9. **As to Claim II,** Defendant argued that in light of the Hurst v. State decision, Defendant's death sentence violated the Eighth Amendment. Defendant argued that his sentence constituted cruel and unusual punishment, because the Hurst v. State decision held that the Eighth Amendment required a unanimous jury verdict in order to impose a death sentence. Defendant argued that he is in the class of defendants for whom at least one juror voted in favor of life, and he cannot be executed under the Eighth Amendment. Defendant also argued that he is in a protected class of pre-Ring death row inmates who are not being treated equally with post-Ring defendants, or other pre-Ring defendants who are receiving new penalty phases after collateral proceedings. Defendant argued that the recent Florida Supreme Court decisions permitting partial retroactivity inject arbitrariness into the capital sentencing scheme and violate the Eighth Amendment. Defendant argued that in Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court held that the death penalty could be not imposed in an arbitrary or capricious manner.

10. The State argued that this claim is procedurally barred, because the U.S. Supreme Court has never held that the Eighth Amendment requires unanimous jury verdicts in capital cases. The State argued that the U.S. Supreme Court overruled Spaziano v. Florida 468 U.S. 447 (1984) in Hurst solely to the extent that it allowed a sentencing judge to find aggravating factors

independent of a jury's factfinding, and did not overrule it on Eighth Amendment grounds. The State noted that the Florida Supreme Court is required by the Florida Constitution's conformity clause to interpret Florida's prohibition against cruel and unusual punishment in conformity with the Supreme Court's holdings on the Eighth Amendment. To the extent Defendant raised fairness, the State argued that the accuracy of Defendant's death sentence was not at issue, such that fairness did not demand retroactive application of Hurst.

11. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law, and his death sentence does not constitute cruel and unusual punishment. To the extent Defendant argued the Florida Supreme Court's decisions regarding retroactivity are unconstitutional, this Court is bound by the decisions of the Florida Supreme Court, and it is outside of this Court's authority to find Florida Supreme Court decisions unconstitutional. Therefore, **Claim II is DENIED.**

12. **As to Claim III**, Defendant argued that Hurst v. State and Perry v. State, 41 Fla. L. Weekly S449 (Fla. 2016), are new law that would apply at resentencing, and require the Court to revisit previously raised postconviction claims. Defendant argued that his previously presented postconviction claims must be re-visited and re-evaluated in light of the new Florida law which would govern at resentencing. Defendant cited to Hildwin v. State, 141 So.3d 1178 (Fla. 2014) and Swafford v. State, 125 So.3d 760 (Fla. 2013) in arguing that the standard for newly discovered evidence – whether a different outcome was probable – should be applied by the Court to reconsider all his prior postconviction claims in light of the requirement that the jury must now make all findings unanimously. Defendant believed that the prejudice analysis would be different now, and that the prior postconviction claims would be granted because there was a reasonable probability that on resentencing, at least one juror would again vote for a life

sentence. The State argued that the cases relied on by Defendant apply to claims of newly discovered evidence, not to claims of new law. The State argued that Hurst does not "operate to breathe new life into previously denied claims." Response p. 24. As the State pointed out, Defendant cited to no legal authority which would authorize, much less require, this Court to reconsider previously denied postconviction claims. Defendant has not claimed the existence of any newly discovered evidence. Since Hurst does not apply retroactively to this case, Defendant is not entitled to relief as a matter of law. Therefore, **Claim III is DENIED.**

13. In the response to the State's notice of supplemental authority filed March 20, 2017, Defendant requested these proceedings be held in abeyance until the U.S. Supreme Court issues a ruling on the State's petition for writ of certiorari in Johnson v. State, 205 So.3d 1285 (Fla. 2016). Defendant acknowledged that Johnson is a post-Ring case. The Court finds that any decision which may be rendered by the U.S. Supreme Court regarding the Florida Supreme Court's retroactivity analysis on a post-Ring case would not impact this pre-Ring case.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Successive Motion To Vacate Death Sentence," is DENIED. Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

DONE AND ORDERED in Chambers at Punta Gorda, Charlotte County, Florida, this 11 day of April, 2017.

George C. Richards
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Scott Browne**, scott.browne@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; **Maria E. DeLiberato**, deliberato@ccmr.state.fl.us, Capital Collateral Regional Counsel – Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; **Julissa Fontan**, fontan@ccmr.state.fl.us, Capital Collateral Regional Counsel – Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; **Chelsea Shirley**, shirley@ccmr.state.fl.us, Capital Collateral Regional Counsel – Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; and **Administrative Office of the Courts** (XIV), 1700 Monroe St., Ft. Myers, FL 33901; this 11th day of April, 2017.

ROGER D. EATON
Clerk of Court

By: _____
Deputy Clerk

APPENDIX

C

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

STATE OF FLORIDA,

Plaintiff,

Case No.: 92-CF-451

v.

JACK SLINEY,

Defendant.

_____/

SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

Defendant Jack Sliney, by and through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. This motion is filed in light of a change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March 7, 2016, and the decisions of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, --- So.3d --- 2016 WL 6036982 (Fla.), *Mosley v. State*, ---So.3d --- 2016 WL7406506 (Fla. December 22, 2016) and *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016).

1. The judgment and sentence under attack and the name of the court that rendered the same.

The Circuit Court of the Twentieth Judicial Circuit, Charlotte County, entered the judgments of convictions and sentence under consideration. Nineteen-year-old Jack Sliney and his co-defendant were charged by indictment dated September 3, 1992, with one count of first degree premeditated murder, one count of felony murder, and one count of robbery.

Mr. Sliney's trial began on September 27, 1993 and concluded on October 1, 1993, when a jury found Mr. Sliney guilty on all counts. Trial counsel was discharged after the trial, and the Public Defender's Office was appointed for the penalty phase, which was set for approximately 30 days later. The public defender moved for a continuance to adequately prepare for the penalty

phase, and also moved for the appointment of a mitigation specialist. TR ROA Vol. 1, p. 174-177. Both motions were denied. *Id.* at 179. The penalty phase took place on November 4, 1993. Trial counsel presented the testimony of 7 witnesses. The presentation took less than one hour and takes up less than 30 pages in the transcript. *Id.* at 181-186; TR ROA Vol. 3, p. 385-414. The jury returned an advisory sentence of 7-5 after approximately an hour of deliberation. TR ROA Vol. 1, p. 185-86. The Court subsequently conducted a hearing on December 10, 1993, where defense counsel asked the Court to consider letters in support of Mr. Sliney. Mr. Sliney also made an oral statement, and the State presented victim impact testimony. Supp. TR ROA Vol. 1, p. 1-24. On February 14, 1994, this Court, as the sole fact-finder, found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury and sentenced Mr. Sliney to death. TR ROA Vol 2, p. 221-228. [1]

On direct appeal, in a 4-3 decision, the Florida Supreme Court affirmed Mr. Sliney's convictions and sentences of death. *Sliney v. State*, 699 So.2d 662 (Fla. 1997). Three members of the Court found Mr. Sliney's sentence to be disproportionate, and would have reduced Mr. Sliney's sentence to life with the possibility of parole after 25 years. The United States Supreme Court denied certiorari on February 23, 1998. *Sliney v. Florida*, 118 S.Ct. 1079 (1998).

Mr. Sliney filed a *pro se* Motion to Vacate Judgments of Conviction and Sentence on February 16, 1999. On March 19, 1999, Thomas Ostrander was appointed to represent Mr. Sliney in post-conviction. Counsel subsequently amended the motion. This Court held an evidentiary hearing on April 29, 2002. On June 19, 2003, Sliney filed a motion to amend his 3.850 Motion to allege a claim regarding a conflict of interest with his trial lawyer, who had previously represented

[1] In a separate trial, Mr. Sliney's co-defendant received a life sentence.

Detective Sisk, a key prosecution witness who had interrogated Sliney, in a civil matter, prior to Mr. Sliney's trial. Counsel also represented Detective Sisk's son in a divorce proceeding prior to Mr. Sliney's trial. Trial counsel had failed to disclose this information to Mr. Sliney. The Court held a supplemental evidentiary hearing on this claim on December 2, 2003. As noted by the Florida Supreme Court on appeal, at that supplemental hearing, post-conviction counsel Ostrander failed to call Detective Sisk, and failed to put on any evidence as to what trial counsel "should have done in cross examination that was not done." *Sliney v. State*, 944 So. 2d, 270, 280 (Fla. 2006). This Court denied Mr. Sliney's 3.850 motion on December 14, 2004. The Florida Supreme Court affirmed the denial of relief. *Sliney v. State*, 944 So. 2d, 270 (Fla. 2006).

To ensure he complied with his federal habeas deadline, Mr. Sliney timely filed a *pro se* federal habeas petition in the United States District Court, Middle District, Ft. Myers Division. *Sliney v. Secretary, Florida Department of Corrections*, 2:06-cv-670-36SPC. (Doc. 1). Mr. Ostrander was subsequently appointed to represent him in his federal habeas proceedings. (Doc. 9). Mr. Sliney raised six grounds in his federal habeas petition. Four of the grounds were found to be procedurally defaulted due to appellate counsel's failure to raise them during the post-conviction appeal. (Doc. 27). Mr. Sliney's Petition was denied on September 24, 2010. (Doc. 27). He was denied a Certificate of Appealability (COA). (Doc. 27). Counsel filed a Notice of Appeal and an untimely application for COA to the Eleventh Circuit, which was denied by a single judge on December 21, 2010. Counsel did not seek reconsideration of the COA from a three-judge panel nor did counsel file a Petition for Writ of Certiorari in the United States Supreme Court. Mr. Ostrander effectively ended his representation with Mr. Sliney in December of 2010, asserting that there was nothing more that could be done on his case. Mr. Sliney repeatedly sought to contact Mr. Ostrander, whom

he had not seen since the evidentiary hearings took place in the circuit court.[2] Mr. Sliney filed multiple motions to discharge Mr. Ostrander and sought to have counsel from Capital Collateral Regional Counsel – Middle Region (CCRC-M) appointed. This Court, on May 23, 2014 denied Mr. Sliney's Motion to Discharge Counsel. The Court noted in the Order, though did not take testimony or evidence at the hearing, that while the performance of appellate counsel (Sara Dyehouse) may have been ineffective, Mr. Ostrander was not ineffective for relying on her to handle the appeal. Subsequently, in August of 2016, Mr. Ostrander was suspended from the practice of law by the Florida Supreme Court. *See* Motion to Substitute Counsel and Appoint Capital Collateral Regional Counsel – Middle Region (CCRC-M), filed on August 26, 2016 and attached as an Exhibit to this Motion. This Court granted that request on the same day. Since that time, counsel has endeavored to obtain records on Mr. Sliney's case, including the files from Mr. Ostrander. Mr. Ostrander has not replied to counsel's multiple phone calls or emails, and a certified letter was returned. Undersigned counsel does not currently know the whereabouts of Mr. Ostrander nor has possession of his files, despite this Court's Order directing Mr. Ostrander to provide them.

Mr. Sliney now seeks an order of this Court vacating his death sentences, imposed by this Court only after an advisory jury recommendation of 7-5.

2. Issues raised on appeal and disposition thereof.

The following issues were raised in Mr. Sliney's direct appeal:

1. Sliney's confession was involuntary and should have been suppressed. (Denied)
2. The trial court erred in admitting into evidence portions of the transcript of Marilyn's Blumberg's 911 call. (Denied)
3. The trial court erred in allowing the jury to hear taped conversations between Capeles and Sliney, which included racial epithets. (Denied)

[2] According to Mr. Sliney, undersigned counsel's visit to Mr. Sliney was Mr. Sliney's first legal visit in 14 years. Because counsel still has not received complete records, counsel cannot verify this but has no reason to dispute this fact, which is supported by Mr. Ostrander's late 2010/early 2011 letter to Sliney.

4. The firearms register from the Blumberg's pawn shop constituted inadmissible hearsay. (Denied)
5. The trial court erred in excluding testimony from several inmates to whom Witteman admitted killing Blumberg. (Denied)
6. The trial court erred in refusing to appoint an investigator to research mitigating evidence and in failing to allow the public defender adequate time to prepare for the penalty proceeding. (Denied)
7. The trial court erroneously found both aggravating factors. (Denied)
8. Death is disproportionate. (Denied)(Three members of the Court would have granted relief and imposed a life sentence with the possibility of parole after 25 years)
9. The trial court erred in giving an upward departure for the armed robbery count. (Denied)
10. The trial court improperly assessed fees and costs against Mr. Sliney. (Order assessing costs set aside and remanded to allow Mr. Sliney an opportunity to be heard)

3. Disposition of all previous claims raised in post-conviction proceedings and the reasons the claims raised in the present motion were not raised in the former motions.

A. *Initial 3.850 Motion*:
   1. Trial counsel was ineffective for failing to investigate, develop, and present a defense of voluntary intoxication (Denied).
   2. Trial counsel rendered ineffective assistance of counsel during the penalty phase by failing to investigate and present mitigation regarding Sliney's alcohol and steroid use. (Denied).
   3. The trial court unconstitutionally shifted the burden of proof in its instructions to the jury at sentencing. (Denied).
   4. Trial counsel was ineffective for failing to properly examine the jury during voir dire. (Denied).
   5. Trial counsel was ineffective for failing to move for a change of venue. (Denied).
   6. Sliney was denied a fair trial due to cumulative error. (Denied).
   7. Trial counsel failed to disclose and had an actual conflict of interest because he represented Detective Sisk, a key prosecution witness and one of the interrogating officers, in civil matters prior to Mr. Sliney's trial. (Denied).

B. *State Petition for Habeas Corpus*:
   1. Appellate Counsel rendered ineffective assistance by failing to raise on appeal meritorious issues which warranted reversal of Mr. Sliney's convictions. None of the claims attacked appellate counsel's failure to appeal the denial of the constitutional challenge to the death penalty scheme. (Denied).

C. *Reason claims not raised in previous motions*:

On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. It declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional

deficiencies. It was intended to apply in any trial, penalty phase, retrial or resentencing conducted in Florida, even when the homicide at issue had occurred prior to March 7, 2016. The revised sentencing statute provided that when 3 or more jurors voted in favor of a life sentence, the judge could not impose a death sentence. For a death recommendation to be returned, 10 jurors must have voted in favor of a death sentence.

On October 14, 2016, the Florida Supreme Court issued its decision in *Perry v. State*, --- So. 3d---, 2016 WL 6036982 (Fla. October 14, 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, the Florida Supreme Court concluded that the Sixth and the Eighth Amendment required a unanimous jury verdict recommending a death sentence before one could be imposed. As the Florida Supreme Court explained in *Hurst*, "Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses". *Hurst v. State*, 202 So.3d 40, 72 (Fla. 2016) (internal citations omitted). Accordingly, the jury must unanimously find that sufficient aggravators existed to justify a death sentence and that the aggravators outweighed the mitigating factors that were present in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, --- So. 3d ---, 2016WL 6036982 *8, quoting *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016) ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that

are necessary before a sentence of death may be considered by the judge or imposed.'") *See also Hurst v. State*, 202 So.3d at 62, n. 18.

On the basis of the new Florida law arising from *Hurst v. Florida*, the enactment of Chapter 2016-13, *Perry v. State*, *Hurst v. State*, and *Mosley v. State*, Mr. Sliney files this motion to vacate and presents his claims for relief arising from the resulting new Florida law, which was previously unavailable when Mr. Sliney filed his prior motions.

4. The nature of the relief sought.

Mr. Sliney seeks to set aside his death sentence and receive a new penalty phase, or, in the alternative, a life sentence.

5. Claims for which an evidentiary hearing is sought.

CLAIM I

MR. SLINEY'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA* and *HURST V. STATE*.

This claim is evidence by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motion to vacate, and all evidence presented by him during the previously conducted evidentiary hearings on the previously presented motion to vacate are incorporated herein by specific reference.

2. This motion is filed within one year of the issuance of *Hurst v. Florida*, the enactment of Chapter 2016-13, the issuance of *Perry v. State*, *Hurst v. State*, *Mosley v. State*, and *Asay v. State*, all of which established new Florida law. Accordingly, this motion is timely.

3. The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital

defendant's constitutional right to a jury trial. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who has been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

A. Mr. Sliney is entitled to retroactive application of both *Hurst* decisions under the fundamental fairness doctrine.

4. The *Hurst* decisions apply retroactively to Mr. Sliney under the equitable "fundamental fairness" retroactivity doctrine, which the Court has applied in cases such as *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). In *Mosley*, the Court explained that although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to retroactive application of the *Hurst* decisions by virtue of the fundamental fairness doctrine, which has been applied in cases like *James*. *See Mosley*, 2016 WL 7406506, at *19. The Court's fundamental fairness analysis in *Mosley* made no distinction between pre-*Ring* and post-*Ring* sentences. *Id.* at *18-19.

Rather, the *Mosley* Court's separate fundamental fairness analysis focused on whether it would be fundamentally unfair to bar Mosley from seeking *Hurst* relief on retroactivity grounds, regardless of when his sentence became final, by virtue of the fact that Mosley had previously attempted to challenge Florida's unconstitutional capital sentencing scheme and was "rejected at every turn" under the Court's flawed pre-*Hurst* law. *Mosley*, 2016 WL 7406506, at *19.

5. Although *Mosley* was a post-*Ring* case, the Court's fundamental fairness approach applies to pre-*Ring* defendants, who may also obtain retroactive *Hurst* relief on fundamental fairness grounds. *See id.* at *19 n. 13. In other words, to the extent *Mosley* stands for the proposition that defendants sentenced after *Ring* are categorically entitled to *Hurst* relief under *Witt*, it also stands for the proposition that any defendant, regardless of when they were sentenced, can receive the same retroactive application of the *Hurst* decisions as a matter of fundamental fairness, as measured by this Court on a case-by-case basis.

6. Mr. Sliney's original trial counsel challenged the constitutionality of Florida's death penalty scheme prior to trial, specifically filing a motion for all findings of facts to be made by a jury. TR ROA Vol. 1, p. 13-14. Counsel also filed a Motion to Dismiss the Indictment Re: Constitutionality of the Death Penalty. *Id.* at 34-36. However, due to ineffective assistance, Appellate counsel did not appeal the denial of these motions and did not lodge a constitutional challenge to Florida's death penalty scheme. Appellate counsel did however, challenge the trial court's instructions and findings of the aggravating circumstances. *Sliney v. State*, 699 So.2d 662, 671-72. (Fla. 1997).

7. Inexplicably, even though the *Ring* opinion was issued during the pendency of Mr. Sliney's post-conviction proceedings in the circuit court, Mr. Ostrander did not raise a *Ring* claim. Mr. Sliney should not now be barred from seeking *Hurst* relief due to ineffective assistance of counsel.

8. The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity

outweighed the State's interests in the finality of death sentences. In this case, the interests of finality must yield to fundamental fairness. Penalty phase counsel had less than 30 days to prepare for a penalty phase, without the benefit of a mitigation specialist, and failed to raise a challenge to Florida's death penalty scheme. Further, direct appeal counsel failed to appeal the denial of the motions that initial trial counsel had filed. Finally, due to egregious neglect, post-conviction counsel failed to challenge Mr. Sliney's sentence under *Ring*, missed filing deadlines in federal court, incorrectly told Mr. Sliney he was out of options, failed to visit Mr. Sliney during the 14 years he represented him, and ultimately abandoned his representation of Mr. Sliney in 2010, leaving Mr. Sliney effectively without counsel for nearly six years. Moreover, this Court noted that the attorney Ostrander hired to file his post-conviction appeal, where a *Ring* challenge could also have been mounted, was deficient. *See* Pro Se Petition to Invoke All Writs Jurisdiction and Appendix, attached as an Exhibit to this Motion.[3]

9. Under a fundamental fairness analysis, this Court should either deem initial trial counsel's preservation sufficient, or, in the alternative, determine that appellate counsel was ineffective in failing to appeal the denial of these motions. Mr. Sliney had an absolute right to effective assistance of counsel on direct appeal, and he was denied this right.

10. Applying the *Hurst* decisions retroactively to Mr. Sliney "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 2016 WL 7406506, at *25. Accordingly, this Court should hold that fundamental fairness requires retroactively applying the

[3] In a letter to Mr. Sliney written by Mr. Ostrander, Mr. Ostrander conceded that Ms. Dyehouse was deficient and that her "failure...lay in the fact that she may have been deeply depressed and distracted. *See* Appendix A to All Writs Petition.

Hurst decisions in this case.

B. Mr. Sliney is entitled to retroactive application of both *Hurst* decisions under the traditional *Witt* test.

11. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect.[4] Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.* *Hurst v. Florida* and the change in Florida law made in its wake satisfy the first two *Witt* retroactivity factors—(1) *Hurst v. Florida* is a decision by the US Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that provides for judges, not juries, to make the factual findings that are statutorily required to authorize the imposition of a death sentence.

12. The third factor under *Witt* is also met because *Hurst v. Florida* "constitutes a development of fundamental significance," i.e., it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States

[4] Mr. Sliney recognizes that *Asay v. State*, ---So.3d --- 2016 WL7406538 (Fla. December 22, 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst* under a *Witt* analysis, but that case left open the possibility for retroactivity under fundamental fairness. Rehearing has been filed in *Asay* and the case is not final. In addition, Mr. Sliney' case should be decided on an individual basis. Moreover, the United States and Florida Constitutions cannot tolerate the concept of "partial retroactivity," where similarly situated defendants are granted or denied the benefit of seeking *Hurst* relief in collateral proceedings based on when their sentences were finalized. To deny Sliney the retroactive effect of *Hurst* deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

Supreme Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted). [5]

13. Retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925.

14. Anything less than full retroactivity leads to disparate treatment among Florida capital defendants. See *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (new penalty phases on 1974

[5] The first *Stovall/Linkletter* factor – the purpose to be served by the new rule – weighs heavily in favor of retroactivity. The right to a trial by jury is a fundamental feature of the United States and Florida Constitutions and its protection must be among the highest priorities of the courts, particularly in capital cases. *See Asay*, 2016 WL 7406538, at *10 ("[I]n death cases, this Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life").The second *Stovall/Linkletter* factor – extent of reliance on the old rule – also weighs in favor of applying those decisions retroactively. This factor requires examination of the "extent to which a condemned practice infect(ed) the integrity of the truth-determining process at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Florida's unconstitutional sentencing scheme has always been unconstitutional and systemically infected the truth-determining process at penalty-phase proceedings since the statute was enacted – including Mr. Sliney's trial. Finally, the third *Stovall/Linkletter* factor – effect on administration of justice – also weighs in favor of retroactivity. This factor does not weigh against retroactivity unless it will, "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt v. State*, 387 So. 2d 922, 929–30 (Fla. 1980). There can be no serious rationale for a prediction that categorically permitting the retroactive application of the *Hurst* decisions to all pre-*Ring* defendants will "destroy" the judiciary. Undoubtedly, retroactive application will have slightly more of an impact on the administration of justice but that is not the test. Retroactive application of new rules affecting much larger populations have been approved. *See e.g. Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

murders); *State v. Dougan*, 202 So.3d 363 (Fla. 2016)(granting a new trial in a 1974 homicide); *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014)(granting a new trial in a 1985 homicide); *Cardona v. State*, 185 So.3d 514 (Fla. 2016)(granting a new trial in a 1990 homicide), and *Johnson v. State*, ---So.3d --- 2016 WL 7013856 (Fla. December 1, 2016)(on a direct appeal from a resentencing, the Court remand for a new penalty phase because of *Hurst* error in a 1981 triple homicide).

15. Ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires the retroactive application of *Hurst* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

C. Mr. Sliney has a federal right to retroactive application of the *Hurst* decisions.

16. Sliney is also entitled to the retroactive effect of *Hurst* under federal law. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.").

17. In *Hurst v. State*, the Florida Supreme Court announced not one, but two substantive constitutional rules. *First*, the Florida Supreme Court held that the Sixth Amendment requires that a jury decide whether those aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. *Second*, the Florida Supreme Court held that the Eighth Amendment required that a jury unanimously determine that the evidence presented at the penalty phase warrants a death sentence.

18. *Hurst v. State* held that the "specific findings required to be made by the jury include the

existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Such findings are manifestly substantive.[6] See *Montgomery v. Louisiana*, 136 S.Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural).

19. Because the Sixth and Eighth Amendment rules announced in *Hurst v. State* are substantive, Mr. Sliney is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

D. The State cannot establish that the *Hurst* error in Mr. Sliney's sentencing was harmless beyond a reasonable doubt.

20. The procedure employed when Mr. Sliney received death sentences at his sentencing deprived him of his Sixth Amendment rights under *Hurst v. Florida* and the resulting new Florida law requiring the jury's verdict authorizing a death sentence to be unanimous or else a life sentence

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[6]In contrast, in *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), the Supreme Court (applying *Teague v. Lane*, 489 U.S. 288 (1989)) found that *Ring v. Arizona*, 489 U.S. 288 (1989)—the basis of *Hurst v. Florida*—was not retroactive on federal collateral review. The rationale of *Summerlin* was that the requirement that a jury rather than a judge make findings on such factual matters as to whether the defendant had previously been convicted of a crime of violence was procedural rather than substantive.

Support for this distinction comes from recent actions of the United States Supreme Court during the past year in cases from Alabama, whose capital system is being challenged on the grounds that the ultimate power to impose a death sentence rests with judges rather than juries. In *Johnson v. Alabama*—a case where the certiorari petition had not made a *Hurst* or *Ring* argument—the Supreme Court granted a *Hurst*-based petition for rehearing, vacated the state court's judgment, and remanded to the state court for further consideration in light of *Hurst*. *See* No. 15-7091, 2016 WL 1723290 (U.S. May 2, 2016). The Supreme Court then followed this approach in three additional cases. *See Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937 (U.S. May 31, 2016); *Kirksey v. Alabama*, No. 15-7923, 2016 WL 378578 (U.S. June 6, 2016); *Russell v. Alabama*, No. 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016).

Last month, in *Powell v. Delaware*, the Delaware Supreme Court held that its recent decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), which invalidated Delaware's death penalty scheme under *Hurst*, applied retroactively under that state's retroactivity doctrine. *See* --- A.3d ----, 2016 WL 7243546 (Del. Dec. 15, 2016). As the *Powell* Court noted, *Schriro* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf* the applicable burden of proof." 2016 WL 7243546, at *3.

is required, rather than a judge imposed sentence. In the wake of *Hurst v. Florida*, the Florida Supreme Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State*, 202 So.3d at 57-58. Individual jurors may decide to exercise "mercy" and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State*, 2016 WL 6036982 at *8. Like in Hurst's case, in Mr. Sliney's penalty phase, five jurors voted for life.

21. The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Sliney's case. In *Hurst v. State*, the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." 202 So.3d at 68. "[T]he harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (internal citations and quotation marks omitted). The State must show beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Mr. Sliney by voting for a life sentence. The State cannot meet this burden in Mr. Sliney's case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

22. As the Florida Supreme Court pointed out in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found

proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as making findings the Sixth Amendment requires a jury to make.

23. When considering harmless error, this Court must look at the totality of the evidence, both at trial and in post-conviction. Mr. Sliney's jury heard mitigating evidence for less than one hour. Substantial mitigation was not presented to Mr. Sliney's jury nor adequately investigated or presented in post-conviction, and he still received five votes in favor of life.

24. The error in Mr. Sliney's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt where five jurors voted for life, hearing only limited mitigation. *See Johnson v. State*, ---So.3d---, 2016WL 7013856 (Fla. December 1, 2016)(*Hurst* error not harmless in a case with 11-1 votes for each of the three murder convictions); *Simmons v. State*, --- So.3d ---, 2016 WL 7406514(Fla. December 22, 2016)(*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances); and *Franklin v. State*, --- So.3d ---, 2016 WL 6901498 (Fla. November 23, 2016)(*Hurst* error not harmless in the murder of a prison guard where the defendant had previously been serving a life sentence and the jury vote was 9-3).

25. Mr. Sliney's death sentence must be vacated and a resentencing ordered.

CLAIM II
MR. SLINEY'S DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT UNDER *HURST V. STATE* AND SHOULD BE VACATED.

This claim is evidenced by the following:

1. All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motion to vacate, and all evidence presented by him during the previously conducted evidentiary hearing is incorporated herein by specific reference.

2. In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury "unanimity in a recommendation of death in order for death to be considered and imposed." *Hurst*, 202 So.3d at 61. Quoting the United States Supreme Court, the Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* Then from a review of the capital sentencing laws throughout the United States, the Court in *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the Court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63.

3. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society."

Atkins v. Virginia, 536 U.S. 304, 312 (2002)[7]. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment.

4. Mr. Sliney is within the protected class. At his original sentencing, the jury recommended death by a simple majority of 7-5. Under the Eighth Amendment and the Florida Constitution his execution would thus constitute cruel and unusual punishment and would be manifestly unjust. His death sentence must accordingly be vacated, and a life sentences imposed. At the very least, he is due a new penalty phase.

5. Under *Witt v. State* and the fundamental fairness doctrine, the Florida Supreme Court's decision in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to

[7] "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted).

execute a person whose death sentence was imposed under an unconstitutional scheme.[8] Additionally, because both the Eighth Amendment rules announced in *Hurst v. State* are substantive, Mr. Sliney is, as *Montgomery v. Louisiana* held, entitled under the United States Constitution to benefit from them in this state post-conviction proceeding.

6. Moreover, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), even a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

7. In *Caldwell*, the prosecutor's argument improperly diminished the jury's sense of responsibility. As such, the Supreme Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated.[9] *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* explained: "Even when a sentencing jury is unconvinced that

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[8] "[R]etroactivity is binary – either something is retroactive, has effect on the past, or it is not." *Asay*, 2016 WL 7406538, at *27 (Perry, J., dissenting). This legal reality is highlighted by the United States Supreme Court's decision in *Montgomery*, the Delaware Supreme Court's recent decision in *Powell v. Delaware*, 2016 WL 7243546 (Del. Dec. 15, 2016)(holding *Hurst* retroactive to all prisoners), and the Florida Supreme Court's decision in *Falcon*. If "partial retroactivity" ultimately occurs, Florida will again be the outlier, subjecting its citizens to disparate treatment under the law, in violation of the state and federal constitutions.

[9] In her concurrence, Justice O'Connor wrote: "In telling the jurors, 'your decision is not the final decision...[y]our job is reviewable,' the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." *Caldwell*, 472 U.S. at 342-43.

death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire makes the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.[10]

8. Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

9. The United States Supreme Court in *Caldwell* found that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

[10] This would certainly apply to the circumstances in Mr. Sliney's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

10. This Court cannot rely on the jury's death recommendation in Mr. Sliney's case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

11. In *Hurst v. Florida*, the United States Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

12. Mr. Sliney's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the

individual jurors must know that the each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. See *Perry v. State.* Mr. Sliney's jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed." As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). Mr. Sliney's death sentences likewise violates the Eighth Amendment under *Caldwell.* The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation.

13. In Mr. Sliney's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions, especially since five jurors voted originally for life.

14. Finally, this Court should also vacate Mr. Sliney' death sentences based on the Florida Constitution. *See* Article I, Section 15(a) and Article I, Section 16(a). The increase in penalty imposed on Mr. Sliney was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." There was no

"unanimity in the final jury recommendation for death." This was a further violation of Florida Constitution.

15. Mr. Sliney had a number of other rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). Because the State proceeded against Mr. Sliney under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Sliney. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Sliney was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Sliney was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment. This Court should vacate the death sentence.

CLAIM III

THIS COURT'S DENIAL OF MR. SLINEY'S PRIOR POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK.

This claim is evidence by the following:

1. All other factual allegations contained in this motion and set forth in the Defendant's previous motion to vacate, and all evidence presented by him during the previously conducted evidentiary hearings are incorporated herein by specific reference.

2. In *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla.2014), the Florida Supreme Court explained then when presented with qualifying newly discovered evidence:

> the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

In *Swafford*, the Florida Supreme Court indicated the evidence to be considered in evaluating whether a different outcome was probable, included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id.* Put simply, the analysis requires envisioning how a new trial or resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial or resentencing must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require that the jury unanimously determine that sufficient aggravating factors existed to justify a death sentence and unanimously determine that the aggravators outweigh the mitigating factors. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

3. This is new Florida law that did not exist when Mr. Sliney previously presented his original 3.850 *Strickland* claims. Accordingly, Mr. Sliney' previously presented claims must be reevaluated in light of the new Florida law. The Florida Supreme Court explained in *Hurst v. State* that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." 202 So.3d 40, 59. Thus, reliability of Florida death sentences is the touchstone of the new Florida law requiring a unanimous jury to make the factual determinations necessary for the

imposition of a death sentence and requiring the jury to unanimously return a death recommendation before a death sentence is authorized as a sentencing option. The new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable.

4. Further, the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the *Strickland* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

5. This Court must re-visit and re-evaluate the rejection of Mr. Sliney's previously presented *Strickland* claims in light of the new Florida law which would govern at a resentencing. When such a re-evaluation is conducted, it is apparent that the outcome would probably be different and that Mr. Sliney would likely receive a binding life recommendation from the jury.

CONCLUSION

Based on the foregoing, Mr. Sliney requests: 1) a "fair opportunity" to demonstrate that his death sentence stands in violation of the Sixth and Eighth Amendments, the Florida Constitution, and *Hurst v. Florida, Perry v. State, Hurst v. State*, and *Mosley v. State*; 2) an opportunity for further evidentiary development to the extent necessary; and, 3) on the basis of the reasons presented herein, an Order vacating his sentence of death and granting a new penalty phase, or, in the alternative, the imposition of a life sentence.

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851(e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby

certifies that counsel fully discussed with and explained the contents of this motion to Mr. Sliney, and that counsel to the best of their ability has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

Respectfully submitted,

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant Capital Collateral Counsel
deliberato@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
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Assistant Capital Collateral Counsel
Fontan@ccmr.state.fl.us

/s/Chelsea Shirley
Chelsea Shirley
Florida Bar No. 112901
Assistant Capital Collateral Counsel
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813-558-1600
Shirley@ccmr.state.fl.us

Counsel for Mr. Sliney

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been electronically filed with the Clerk of the Clerk for the Twentieth Judicial Circuit in and for Charlotte County and electronically served upon the Honorable George C. Richards, tdelsasso@ca.cjis20.org, Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, and Assistant State Attorney Cynthia Ross, cross@sao.cjis20.org

and servicesao-ch@saocjis20.org on this 9th day of January, 2017.

/s/ Maria E. DeLiberato
Maria E. DeLiberato
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/s/ Julissa R. Fontán
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Chelsea Shirley
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Shirley@ccmr.state.fl.us

Counsel for Mr. Sliney

EXHIBIT A

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

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 92-CF-451**

v.

JACK SLINEY

Defendant.

UNOPPOSED MOTION TO SUBSTITUTE COUNSEL AND APPOINT CAPITAL COLLATERAL REGIONAL COUNSEL – MIDDLE REGION

Defendant, **JACK SLINEY,** by and through undersigned counsel, hereby files this **UNOPPOSED MOTION TO SUBSTITUTE COUNSEL AND TO APPOINT CAPITAL COLLATERAL REGIONAL COUNSEL – MIDDLE REGION (CCRC-M)** and hereby states as follows:

1. Mr. Sliney is an indigent prisoner under sentence of death. He is currently represented by registry counsel Thomas Ostrander.

2. On August 18, 2016, after he entered a Conditional Guilty Plea for a Consent Judgment, Mr. Ostrander was suspended by the Florida Supreme Court for sixty days, effective thirty days from the date of the Order. Guilty Plea and Order Attached as Exhibit A.[1]

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[1] The Conditional Guilty Plea also reflects a current suspension from the 11th Circuit Court of Appeals and an indication that Mr. Ostrander is not admitted to practice before the 11th Circuit Court of Appeals.

3. The Florida Supreme Court further ordered Mr. Ostrander to "close out his practice and protect the interests of existing clients."

4. Undersigned counsel attempted to contact Mr. Ostrander via telephone and email on Monday, August 22, 2016 to ascertain his position on this Motion. As of the filing of this motion, undersigned counsel has received no response.

5. Due to Mr. Ostrander's suspension, Mr. Sliney is currently without counsel.

6. Under Florida Statute 27.702, Mr. Sliney is entitled to continuous representation for the duration of his collateral appeals.

7. Due to Mr. Ostrander's suspension, Mr. Sliney is without an advocate to maintain awareness of relevant changes in the law, and/or continue to investigate his case for potential newly discovered evidence.[2]

8. Moreover, a denial of this Motion to Substitute and appoint CCRC-M would amount to a violation of Mr. Sliney's right to counsel and due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

9. After Mr. Sliney's direct appeal was final, Capital Collateral Regional Counsel – South Region (CCRC-S) was initially appointed to represent him in his collateral appeals. However, they filed a notice of conflict and Mr. Ostrander was subsequently appointed as Registry Counsel.

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[2] As just one example, the Florida Supreme Court is currently considering the retroactivity of *Hurst v. Florida*, 136 S.Ct. 616 (2016), the outcome of which could potentially affect Mr. Sliney's death sentence - imposed after a jury vote of 7-5.

10. Undersigned counsel has contacted CCRC-S and can represent to this Court that they maintain their conflict and request that CCRC-M be appointed pursuant to Fl. Stat. 27.703(1).

11. Undersigned counsel has contacted Assistant Attorney General Scott Browne and Assistant State Attorney Cynthia Ross who have both indicated they have no objection to the Motion to Substitute Counsel and to having CCRC-M appointed as counsel of record.

12. Undersigned counsel also spoke with Mr. Sliney and can represent to the Court that Mr. Sliney also consents to the representation by CCRC-M.

13. Undersigned counsel has prepared and attached a Proposed Order Appointing CCRC-M for the Court's convenience, however, counsel are available for a hearing should this Court require additional information.

WHEREFORE, Mr. Sliney respectfully requests this Court grant his Unopposed Motion to Substitute Counsel, terminate Mr. Ostrander's representation, and appoint CCRC-M to represent him for the duration of his capital collateral proceedings.

Respectfully submitted,

s/James Viggiano
James Viggiano
Florida Bar No. 0715336
Capital Collateral Regional
Counsel-Middle Region

s/Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar 664251
Assistant Capital Collateral Regional
Counsel-Middle Region

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically filed with the Clerk of the Clerk for the Twentieth Judicial Circuit in and for Charlotte County and electronically served upon the Honorable George C. Richards, tdelsasso@ca.cjis20.org, Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, Assistant State Attorney Cynthia Ross, cross@sao.cjis20.org, Thomas Ostrander, skydogesq@aol.com, Capital Collateral Regional Counsel – South Region Neal Dupee, dupreen@ccsr.state.fl.us, and furnished via United States mail Jack Sliney, DOC #905288, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

s/Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar 664251
Assistant Capital Collateral Regional
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Filing # 45378413 E-Filed 08/18/2016 10:34:39 AM

Supreme Court of Florida

THURSDAY, AUGUST 18, 2016

CASE NO.: SC16-1379
Lower Tribunal No(s).:
2016-10,172 (12B)

THE FLORIDA BAR vs. THOMAS HAROLD OSTRANDER

Complainant(s) Respondent(s)

The conditional guilty plea and consent judgment for discipline are approved and respondent is suspended from the practice of law for sixty days, effective thirty days from the date of this order so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until he is reinstated. Respondent is further directed to comply with all other terms and conditions of the consent judgment.

Upon reinstatement, respondent is further placed on probation for one year under the terms and conditions set forth in the consent judgment.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Thomas Harold Ostrander in the amount of $1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this suspension.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ld
Served:

JULIE MARIE HEFFINGTON
ADRON HAYS WALKER
ADRIA E. QUINTELA

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

_____/

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned respondent, Thomas Harold Ostrander, and files this Conditional Guilty Plea pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar.

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.

2. Respondent is currently the subject of a Florida Bar disciplinary matter which has been assigned The Florida Bar File No. 2016-10,172 (12B).

3. As to The Florida Bar File No. 2016-10,172 (12B), there has been a finding of probable cause by the grievance committee.

4. Respondent is acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion. Respondent is represented by Adron Hays Walker in this matter.

5. The disciplinary measures to be imposed upon respondent are as follows:

A. Respondent shall be suspended from the practice of law for sixty (60) days.

B. Respondent shall be placed on probation for a period of one (1) year upon reinstatement. As a condition of the probation, respondent shall pay restitution to Michael James Harrell in the amount of $5,000.00 within the one-year period of probation. Respondent must submit proof of payment of restitution to the Bar's headquarters office in Tallahassee within the time frame for payment of the court's order. Respondent shall provide verifiable proof of payment and receipt which shall consist of a copy (front and back) of the negotiated check or a copy of the check and certified return. In the event the client cannot be located after a diligent search, respondent shall execute an affidavit of diligent search and provide same to The Florida Bar and shall pay the full amount of the restitution to the Clients' Security Fund of The Florida Bar. Failure to timely submit proof of payment of the restitution will result in respondent being deemed a delinquent member pursuant to Rule 1-3.6.

C. Respondent shall pay the bar's costs in this disciplinary proceeding.

6. Respondent acknowledges that, unless waived or modified by the Court on motion of respondent, the court order will contain a provision that prohibits respondent from accepting new business from the date of the order or opinion and shall provide that the suspension is effective 30 days from the date of the order or opinion so that respondent may close out the practice of law and protect the interest of existing clients.

7. The following allegations and rules provide the basis for respondent's guilty plea and for the discipline to be imposed in this matter:

A. The Florida Bar received an Order of Indefinite Suspension from The United States Attorney's Office related to respondent's attempt to represent Michael Harrell in his direct criminal appeal before The United States Court Of Appeals for the Eleventh Circuit. The district court had previously appointed Mark Ciaravella as appellate counsel to represent Mr. Harrell on his appeal. Respondent submitted to the appellate court a "Notice of Appearance" indicating that he would be co-counsel for Mr. Harrell in his appeal. Respondent was neither a member of the Eleventh Circuit's Bar nor was he court-appointed appellate counsel. Mr. Ciaravella informed the court that Mr. Harrell's family had paid respondent the sum of $5,000.00 to "only 'oversee' and otherwise contribute to the appeal." Mr. Ciaravella submitted a "Motion to Withdraw as Counsel for Appellant", which the court granted.

Appellant's brief and appendix were due by October 20, 2014, and October 27, 2014, respectively. On December 17, 2014, and December 18, 2014, the deputy clerk sent dismissal notices to respondent regarding the overdue brief and appendix. Respondent's secretary informed the deputy clerk that respondent was in the hospital in a diabetic coma. No brief or appendix was ever submitted to the court. The Florida Bar sent respondent a letter by regular U.S. Mail to respondent's official bar address and by electronic mail to respondent's official bar email address requesting that he submit a response to the Eleventh Circuit's Order indefinitely suspending him. Respondent failed to respond to The Florida Bar as required in the letter and failed to contact the grievance committee investigating member.

8. In mitigation, respondent is 67 years old and suffers from serious medical issues related to his problems with diabetes that will require ongoing monitoring and follow-up [Florida Standards for Imposing Lawyer Sanctions 9.32 (h)].

9. By reason of the foregoing, respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.16 (Declining or Terminating Representation) (a) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to

represent the client; Rule 4-5.5 (Unlicensed Practice of Law) (a) a lawyer may not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so; and Rule 4-8.4 (g) (Misconduct) a lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency when bar counsel or the agency is conducting an investigation into the lawyer's conduct.

10. The Florida Bar has approved this proposed plea in the manner required by Rule 3-7.9.

11. If this plea is not finally approved by the Board of Governors of The Florida Bar and the Supreme Court of Florida, then it shall be of no effect and may not be used by the parties in any way.

12. If this plea is approved, then respondent agrees to pay all reasonable costs associated with this case pursuant to Rule 3-7.6(q) in the amount of $1,250.00. These costs are due within 30 days of the court order. Respondent agrees that if the costs are not paid within 30 days of this court's order becoming final, respondent shall pay interest on any unpaid costs at the statutory rate. Respondent further agrees not to attempt to discharge the obligation for payment of the bar's costs in any future proceedings, including but not limited to, a petition for bankruptcy. Respondent shall be deemed delinquent and ineligible to practice law

pursuant to Rule 1-3.6 if the cost judgment is not satisfied within 30 days of the final court order, unless deferred by the Board of Governors of The Florida Bar.

13. Respondent acknowledges the obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement, and is also evidence of good faith and fiscal responsibility. Respondent understands that failure to pay the costs of this proceeding will reflect adversely on any other bar disciplinary matter in which respondent is involved.

14. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 3 day of June, 2016.

Thomas Harold Ostrander, Respondent
514 27th Street West
Bradenton, FL 34205-4143
(941) 526-9551
Florida Bar ID No.: 508349
skydogesq@aol.com

Dated this 3rd day of June, 2016.

Adron Hays Walker
Barnes Walker
3119 Manatee Avenue W.
Bradenton, FL 34205-3350

(941) 741-8224
Florida Bar ID No.: 302287
awalker@barneswalker.com

Dated this 7 day of June, 2016.

Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
4200 George J. Bean Parkway, Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 92-CF-451**

v.

JACK SLINEY

Defendant.

ORDER GRANTING UNOPPOSED MOTION TO SUSBTITUTE COUNSEL AND APPOINTING CAPITAL COLLATERAL REGIONAL COUNSEL – MIDDLE REGION

THIS CAUSE comes before the Court on Defendant's Unopposed Motion to Substitute Counsel and Appoint Capital Collateral Regional Counsel – Middle Region, filed on August 26, 2016. Having reviewed the Motion and its Exhibits and the relevant law, the Court hereby GRANTS the Motion. As of the date of this Order, the Court herby terminates the representation of Thomas Ostrander and appoints Capital Collateral Regional Counsel – Middle Region (CCRC-M) for the duration of the Defendant's collateral appeals. Mr. Ostrander shall coordinate with CCRC-M to arrange for the transfer of all of the Defendant's files in his possession to CCRC-M within 30 days of the date of this Order.

DONE AND ORDERED in Chambers at Punta Gorda, Charlotte County, Florida, this ____ day of ____, 2016

_____
George C. Richards
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above order has been furnished to Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, Assistant State Attorney Cynthia Ross, cross@sao.cjis20.org, Thomas Ostrander, skydogesq@aol.com, Capital Collateral Regional Counsel – South Region Neal Dupree, dupreen@ccsr.state.fl.us, and furnished via United States mail Jack Sliney, DOC #905288, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083 this ___ day of ___, 2016.

Barbara T. Scott
Clerk of Court

By: _____
Deputy Clerk

EXHIBIT B

SUPREME COURT OF FLORIDA

JACK SLINEY,

PETITIONER,

V.

CASE NO.

L.T. NO. 92-451 CF

STATE OF FLORIDA,

RESPONDENT,

PETITION TO INVOKE ALL WRITS JURISDICTION

COMES NOW, PETITIONER, JACK SLINEY, PRO SE, PURSUANT TO RULE 9.100 FLORIDA RULE OF APPELLATE PROCEDURE AND RESPECTFULLY PETITIONS THIS HONORABLE COURT TO EXERCISE ITS SUPERVISORY AUTHORITY UNDER SECTION 27.711(12), FLORIDA STATUTE TO MONITOR COUNSELS PERFORMANCE AND FOR THE ISSUANCE OF A CONSTITUTIONAL WRIT DIRECTING THE CIRCUIT COURT, TWENTIETH JUDICIAL CIRCUIT TO APPOINT SUBSTITUTE COUNSEL. IN SUPPORT THEREOF, PETITIONER SHOWS AS FOLLOWS:

I.

BASIS FOR INVOKING JURISDICTION

THIS COURT HAS JURISDICTION TO ISSUE ALL WRITS NECESSARY TO THE COMPLETE EXERCISE OF ITS JURISDICTION UNDER ARTICLE V, SECTION 3 (b)(7), OF THE FLORIDA CONSTITUTION AND RULE 9.030(A)(3), FLORIDA RULE OF APPELLATE PROCEDURE. SEE VENTURA V. STATE, 2 So.3d 194, 201 AND N.9 (FLA 2009)(ANY EXERCISE OF JURISDICTION WITH REGARD TO VENTURAS PRO SE ALL WRITS PETITION WOULD NECESSARILY AID THIS TRIBUNAL IN THE "COMPLETE EXERCISE OF ITS JURISDICTION" CONCERNING THIS CAPITAL CASE. ART. V, SECTION 3(b)(7), FLA. CONST.; SEE ALSO ART. V, SECTION 3(b)(1),

FLA. CONST.; WILLIAMS V. STATE, 913 So.2d 541, 543 (FLA. 2005) ("THE ALL WRITS PROVISION OF ARTICLE V, SECTION 3(b)(7) DOES NOT CONSTITUTE A SEPARATE SOURCE OF ORIGINAL OR APPELLATE JURISDICTION. RATHER, IT OPERATES IN FURTHERANCE OF THE COURTS' 'ULTIMATE JURISDICTION' CONFERRED ELSEWHERE IN THE CONSTITUTION") (EMPHASIS SUPPLIED); STATE V. FOURTH DIST. COURT OF APPEAL, 697 So.2d 70, 71 (FLA. 1997) ("WE NOW HOLD THAT IN ADDITION TO OUR APPELLATE JURISDICTION OVER SENTENCES OF DEATH, WE HAVE EXCLUSIVE JURISDICTION TO REVIEW ALL TYPES OF COLLATERAL PROCEEDINGS IN DEATH PENALTY CASES") (EMPHASIS SUPPLIED); COLEMAN V. STATE, 930 So.2d 580, 580-81 (FLA. 2006) (CONSIDERING ALLEGATIONS WITH REGARD TO THE PERFORMANCE OF ASSIGNED POST-CONVICTION COUNSEL UNDER SECTION 27.711(12), FLORIDA STATUTES (2005), AND REMANDING TO THE CIRCUIT COURT WITH INSTRUCTIONS FOR THE ASSIGNED ATTORNEY TO RESPOND TO THESE ALLEGATIONS)).

II.

STATEMENT OF THE FACTS

PETITIONER IS A CAPITAL DEFENDANT UNDER SENTENCE OF DEATH WHO WAS INITIALLY ASSIGNED THE OFFICE OF CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE (CCRC-M) HOWEVER, THAT OFFICE BECAUSE OF AN EXTENSIVE CASELOAD WAS DISCHARGED AND MR. THOMAS OSTRANDER, REGISTRY COUNSEL, WAS ASSIGNED WHO REPRESENTED PETITIONER FROM THE OUTSET OF HIS POST CONVICTION PROCEEDINGS TO DATE.

ON SEPTEMBER 3, 1992 PETITIONER WAS INDICTED ON COUNT ONE: FIRST DEGREE PRE-MEDITATED MURDER; COUNT TWO: FIRST DEGREE FELONY MURDER; AND COUNT THREE: ROBBERY WITH A DEADLY WEAPON.

FOLLOWING A JURY TRIAL PETITIONER WAS FOUND GUILTY ON ALL COUNTS AND SENTENCED TO DEATH. THIS COURT AFFIRMED PETITIONERS CONVICTION AND SENTENCE ON DIRECT APPEAL, SLINEY V. STATE, 699 So.2d 662 (FLA. 1997).

PETITIONERS PETITION FOR WRIT OF CERTIORARI TO THE UNITED

STATES SUPREME COURT WAS DENIED ON FEBRUARY 23, 1998. SLINEY V. FLORIDA, 522 U.S. 1129, 118 S.CT. 1079 (1998).

ON JUNE 19, 2001 PETITIONER FILED HIS SINGLE CONSOLIDATED AMENDED 3.850 MOTION FOR POST CONVICTION RELIEF. ASSERTING SIX CLAIMS FOR RELIEF AND FOLLOWING AN EVIDENTIARY HEARING ON THOSE CLAIMS. ON JUNE 19, 2003 FILED AN AMENDMENT TO THE AMENDED MOTION ALLEGING TRIAL COUNSEL LABORED UNDER A CONFLICT OF INTEREST.

FOLLOWING AN EVIDENTIARY HEARING ON THE CLAIM ALLEGED IN THE AMENDMENT TO THE AMENDED 3.850 MOTION, THE LOWER TRIBUNAL ISSUED AN ORDER DENYING 'ALL' CLAIMS AND PETITIONER APPEALED.

ON NOVEMBER 9, 2006 THIS COURT AFFIRMED THE LOWER TRIBUNALS ORDER DENYING POST CONVICTION RELIEF, SLINEY V. STATE, 944 So.2d 270 (FLA. 2006) IN WHICH PETITIONER ASSERTED ONLY TWO CLAIMS ON APPEAL AND ALSO PETITIONERS STATE HABEAS PETITION ASSERTING THREE CLAIMS.

ON DECEMBER 18, 2006 PETITIONER FILED HIS 28 U.S.C. SECTION 2254 HABEAS PETITION RAISING SIX GROUNDS FOR RELIEF CONSISTING OF CLAIMS TWO AND SIX WHICH WERE ASSERTED IN THE BRIEF ON APPEAL IN THIS COURT AND CLAIMS ONE, THREE, FOUR, AND FIVE WHICH WERE OMITTED FROM THE BRIEF ON APPEAL IN THIS COURT.

ON SEPTEMBER 29, 2010 THE FEDERAL COURT DENIED PETITIONERS GROUNDS ONE, THREE, FOUR, AND FIVE AS PROCEDURALLY DEFAULTED AND GROUNDS TWO AND SIX ON THE MERITS. SLINEY V. SEC'Y DEPT. OF CORR., 2:06-CV-670-FTM-36SPC.

FOLLOWING CONCLUSION OF HABEAS CORPUS PROCEEDINGS IN THE FEDERAL COURT MR. THOMAS OSTRANDER (FOR THE FIRST TIME) IN A CORRESPONDENCE ADVISED PETITIONER THAT CONSTITUTIONAL CLAIMS THAT WERE ASSERTED IN THE INITIAL AND AMENDED 3.850 MOTION WERE NOT INCLUDED IN THE BRIEF ON APPEAL OF THE DENIAL OF PETITIONERS 3.850 MOTION IN THIS COURT.

THE OMITTED CLAIMS CONSIST OF:

1) INEFFECTIVE ASSISTANCE FOR FAILURE TO INVESTIGATE AND DEVELOP VOLUNTARY INTOXICATION;

2) THE TRIAL COURT ERRED BY UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING; 3) TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO EXERCISE JURY CHALLENGE DURING VOIR DIRE; AND 4) THE CUMULATIVE EFFECT OF TRIAL COUNSELS INEFFECTIVE ASSISTANCE AND THE TRIAL COURTS ERRORS RESULTED IN AN UNRELIABLE CONVICTION.

SPECIFICALLY, MR. OSTRANDER IN SAID CORRESPONDENCE ATTRIBUTED THE OMISSION OF THE AFOREMENTIONED CONSTITUTIONAL CLAIMS TO THE FACT THAT MRS. SUSAN DYEHOUSE (WHO MR. OSTRANDER EMPLOYED TO APPEAR ON PETITIONERS BEHALF IN THIS COURT IN THE APPEAL OF THE DENIAL OF HIS 3.850 MOTION) WAS DEEPLY DEPRESSED AND DISTRACTED.

IN PARTICULAR, IN LIGHT OF MRS. DYEHOUSE'S APPARENT MENTAL INSTABILITY MR. OSTRANDER ACKNOWLEDGES THAT DESPITE DISCUSSING THE ISSUE OF THE OMISSION OF CLAIMS PRIOR TO THE FILING OF THE INITIAL BRIEF WITH MRS. DYEHOUSE, HE DEFERRED TO HER EXPERTISE THAT THE OMITTED CLAIMS WERE OF NO MERIT.

IT IS NOTEWORTHY THAT ALTHOUGH MR. OSTRANDER WENT ON TO ASSERT HIS FAMILIARITY WITH FEDERAL COURT RULES REGARDING THE EXHAUSTION REQUIREMENT HE ATTEMPTED TO PRESENT THOSE CONSTITUTIONAL CLAIMS, THAT AS A RESULT OF HIS DEFERRING TO MRS. DYEHOUSE'S EXPERTISE IN OMITTING THOSE CLAIMS IN THE STATE COURT ON APPEAL WERE PROCEDURALLY DEFAULTED, IN THE FEDERAL COURT.

NEVERTHELESS, MR. OSTRANDER CONCLUDED HIS CORRESPONDENCE ADVISING PETITIONER THAT HE WAS CONTINUING TO DO RESEARCH SO AS TO FIND AN AVENUE OF REDRESS WITH RESPECT TO THE FOREGOING ISSUE. (SEE APPENDIX, EXHIBIT "A")

PETITIONER ON AUGUST 5, 2013 AFTER RECEIVING NO RESPONSE FROM MR. OSTRANDER, DESPITE NUMEROUS CORRESPONDENCES TO ASCERTAIN THE STATUS OF REDRESS IN THE COURT WITH RESPECT TO THE ISSUE OF THE PROCEDURALLY DEFAULTED CONSTITUTIONAL CLAIMS, SUBMITTED

A CORRESPONDENCE TO THE LOWER TRIBUNAL EXPRESSING HIS DESIRE TO HAVE SUBSTITUTE COUNSEL APPOINTED HOWEVER, NO ACTION WAS TAKEN BY THE LOWER TRIBUNAL WITH RESPECT THERETO.

ON FEBRUARY 20, 2014 PETITIONER FILED A MOTION TO DISCHARGE MR. OSTRANDER AND REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL PREMISED UPON SPECIFIC AND MERITORIOUS ALLEGATIONS PURSUANT TO SECTION 27.711 (12), FLORIDA STATUTES.

SPECIFICALLY, THE GRAVAMEN OF PETITIONERS COMPLAINT WAS THE BREACH OF PROFESSIONAL AND ETHICAL DUTY AND GROSS INCOMPETENCE OF MR. OSTRANDER WHICH IMPEDED PETITIONERS ABILITY TO HAVE HIS CONSTITUTIONAL CLAIMS RESOLVED THROUGH ONE COMPLETE ROUND OF COLLATERAL LITIGATION THEREBY DEPRIVING PETITIONER OF WHAT WAS MOST LIKELY THE ONE OPPORTUNITY FOR REVIEW OF THE LAWFULNESS OF HIS CONVICTIONS AND OF HIS SENTENCE OF DEATH. (SEE APPENDIX, EXHIBIT "B")

ON FEBRUARY 25, 2014 THE LOWER TRIBUNAL ISSUED AN ORDER DIRECTING DEFENSE COUNSEL TO SCHEDULE A NELSON[1] HEARING.

IT IS NOTEWORTHY THAT THE LOWER TRIBUNAL IN SAID ORDER REFERENCES PETITIONERS AFOREMENTIONED AUGUST 5, 2013 LETTER EXPRESSING HIS DESIRE TO HAVE SUBSTITUTE COUNSEL APPOINTED. (SEE APPENDIX, EXHIBIT "C")

ON MARCH 5, 2014 PETITIONER IN RESPONSE TO THE FEBRUARY 25, 2014 ORDER FILED A 'NOTICE TO THE COURT' ADVISING THAT: 1) NELSON WAS NOT APPLICABLE IN POST CONVICTION PROCEEDINGS; 2) THE SOLE METHOD OF ASSURING ADEQUACY OF REPRESENTATION PROVIDED IS IN ACCORD WITH SECTION 27.711 (12), FLORIDA STATUTES; AND 3) PETITIONERS MOTION TO DISCHARGE COUNSEL SENT BY U.S. MAIL TO MR. OSTRANDER WAS RETURNED TO PETITIONER AS UNABLE TO BE FORWARDED.

IT IS NOTEWORTHY AS ADVISED IN SAID NOTICE THAT PETITIONER, IN LIGHT OF MR. OSTRANDERS FAILURE TO RESPOND TO NUMEROUS CORRESPONDENCES AS STATED ABOVE, PERCEIVED MR. OSTRANDERS

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(1) NELSON V. STATE, 274 So.2d 256 (FLA. 4TH DCA 1973)

FAILURE TO ADVISE PETITIONER OR, FOR THAT MATTER, THE LOWER TRIBUNAL OF AN ADDRESS CHANGE AN ABANDONMENT OF COUNSEL. (SEE APPENDIX, EXHIBIT "D")

ON MAY 23, 2014 THE LOWER TRIBUNAL CONDUCTED A HEARING ON PETITIONERS MOTION TO DISCHARGE MR. OSTRANDER PURSUANT TO NELSON V. STATE, 274 So.2d 256 (FLA 1ST DCA 1973) AND AFTER CONSIDERING PETITIONERS MOTION AND TESTIMONY ISSUED AN ORDER ON MAY 23, 2014 DENYING MOTION TO DISCHARGE COUNSEL.(2)

THE LOWER TRIBUNAL IN SAID ORDER FOUND THAT ALTHOUGH MRS. DYEHOUSES PERFORMANCE MAY HAVE BEEN DEFICIENT MR. OSTRANDERS WAS NOT AND THAT MR. OSTRANDERS REPRESENTATION OF PETITIONER WAS COMPETENT AND EFFECTIVE.

IT IS NOTEWORTHY THAT MR. OSTRANDER, AS IS STATED IN THE MAY 23, 2014 ORDER, PROVIDED TESTIMONY AND ADVISED FOR THE FIRST TIME THAT MRS. DYEHOUSE BECAUSE OF A CONFLICT COULD NOT APPEAR ON PETITIONERS BEHALF IN ANY FEDERAL PROCEEDINGS. (SEE APPENDIX, EXHIBIT "E")

THIS BREACH OF PROFESSIONAL AND ETHICAL DUTY BY MR. THOMAS OSTRANDER, PETITIONER ASSERTS, WAS SUFFICIENT TO INFECT THE WHOLE OF PETITIONERS POST CONVICTION PROCEEDINGS AND UNDERMINE CONFIDENCE IN THE OUTCOME.

IN LIGHT THEREOF MR. OSTRANDER CAN NOT REPRESENT PETITIONER ZEALOUSLY IN ANY SUBSEQUENT PROCEEDINGS AND WITHOUT THIS COURTS INTERVENTION JUSTICE CAN NOT, AND WILL NOT, BE SERVED.

III.

NATURE OF THE RELIEF SOUGHT

THE NATURE OF THE RELIEF SOUGHT BY THIS PETITION IS:

(2) PETITIONER ADVISES THAT HE HAS FILED A NOTICE OF APPEAL WITH RESPECT TO THE MAY 23, 2014 ORDER DENYING MOTION TO DISCHARGE COUNSEL.

1) CONDUCT A HEARING UNDER SECTION 27.711(12), FLORIDA STATUTES TO DETERMINE WHETHER APPOINTED REGISTRY COUNSEL MR. THOMAS OSTRANDER PROVIDED COHERENT, COMPETENT REPRESENTATION IN PETITIONERS POST CONVICTION PROCEEDINGS TO DATE; AND IF NOT

2) ISSUE A CONSTITUTIONAL WRIT DIRECTING THE CIRCUIT COURT, TWENTIETH JUDICIAL CIRCUIT TO APPOINT NEW POST CONVICTION COUNSEL TO REPRESENT PETITIONER; AND

3) GRANT ANY OTHER SUBSTANTIVE RELIEF THIS COURT MAY DEEM APPROPRIATE IN THE INTERESTS OF JUSTICE.

IV.

ARGUMENT

AT THE OUTSET PETITIONER FEELS OBLIGED TO COMMENT ON THE STATUTORY SCHEME IN PLACE TO PROVIDE COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL COLLATERAL POST CONVICTION PROCEEDINGS. SECTION 27.7001 - 27.711, FLORIDA STATUTES.

PROVISIONS WITHIN THE STATUTE CONTEMPLATE THAT DEFENDANTS MAY SOMETIMES SUBSTITUTE COUNSEL. IT NOTES THAT AN ATTORNEY APPOINTED UNDER THIS SECTION MAY BE REPLACED BY SIMILARLY QUALIFIED COUNSEL UPON THE ATTORNEYS OWN MOTION OR UPON MOTION BY THE DEFENDANT.

FOR EXAMPLE, SECTION 27.702(2), PROVIDES:

> THE CAPITAL COLLATERAL REGIONAL COUNSEL SHALL REPRESENT PERSONS CONVICTED AND SENTENCED TO DEATH WITHIN THE REGION IN COLLATERAL POST CONVICTION PROCEEDINGS, UNLESS A COURT APPOINTS OR PERMITS OTHER COUNSEL TO APPEAR AS COUNSEL OF RECORD.

SECTION 27.710(3), PROVIDES:

> AN ATTORNEY ... IF APPOINTED TO REPRESENT A PERSON IN POST CONVICTION CAPITAL COLLATERAL PROCEEDINGS, SHALL CONTINUE SUCH REPRESENTATION ... UNLESS PERMITTED

TO WITHDRAW FROM REPRESENTATION BY THE TRIAL COURT.

SECTION 27.711(8), PROVIDES:

> ... HOWEVER, IF AN ATTORNEY IS PERMITTED TO WITHDRAW OR IS OTHERWISE REMOVED FROM REPRESENTATION PRIOR TO FULL PERFORMANCE OF THE DUTIES SPECIFIED IN THIS SECTION...

SECTION 27.711, SETS FORTH THE SOLE METHOD OF ASSURING ADEQUACY OF REPRESENTATION PROVIDED AND ADJUDICATING DEFENDANTS ALLEGATIONS REGARDING COUNSELS PERFORMANCE, IN PARTICULAR, SECTION 27.711(12), PROVIDES:

> THE COURT SHALL MONITOR THE PERFORMANCE OF ASSIGNED COUNSEL TO ENSURE THAT THE CAPITAL DEFENDANT IS RECEIVING QUALITY REPRESENTATION. THE COURT SHALL ALSO RECEIVE AND EVALUATE ALLEGATIONS THAT ARE MADE REGARDING THE PERFORMANCE OF ASSIGNED COUNSEL....

BUT HERE LIES THE RUB; SUBSECTION(12), FAILS TO PROVIDE DEFINITIVE DEFINITION TO "GIVE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW PROCESS IS TO BE ACCORDED AND FAILS TO PROVIDE EXPLICIT STANDARDS FOR THOSE WHO MUST APPLY IT". SEE GRAYNED V. CITY OF ROCKFORD, 408 U.S. 104 (1972)

FOR EXAMPLE, HOW IS THE COURT TO 'MONITOR' COUNSEL AND WHAT DOES THIS 'MONITORING PROCESS' CONSIST OF AND WHAT STANDARD SHOULD A COURT APPLY WHEN ADJUDICATING DEFENDANTS MOTION TO ASSESS ALLEGATIONS MADE REGARDING COUNSELS PERFORMANCE OR, FOR THAT MATTER, TO SUBSTITUTE COUNSEL.

THIS MANDATED DUTY UNDER 27.711(12), PETITIONER ASSERTS, IS CRITICALLY IMPORTANT IN THE CAPITAL POST CONVICTION APPELLATE CONTEXT SINCE THIS COURTS CONSTITUTIONAL AND ADMINISTRATIVE RESPONSIBILITIES WITH RESPECT TO THE DEATH PENALTY DEPENDS SUBSTANTIALLY UPON THE QUALITY OF REPRESENTATION PROVIDED BY ASSIGNED COLLATERAL COUNSEL. AS PROVIDED BY THIS COURT IN

GORDON V. STATE, 75 So.3d 200, 202 (FLA. 2011):

"WE RECOGNIZE THAT" WE HAVE A CONSTITUTIONAL RESPONSIBILITY TO ENSURE THE DEATH PENALTY IS ADMINISTERED IN A FAIR, CONSISTENT, AND RELIABLE MANNER, AS WELL AS HAVING AN ADMINISTRATIVE RESPONSIBILITY TO WORK TO MINIMIZE THE DELAYS INHERENT IN THE POST CONVICTION PROCESS." . . . THIS RESPONSIBILITY ARISES IN PART FROM THE UNITED STATES SUPREME COURTS" INSISTENCE THAT CAPITAL PUNISHMENT BE IMPOSED FAIRLY, AND WITH REASONABLE CONSISTENCY, OR NOT AT ALL". . . . THESE PRINCIPLES ARE BEST SERVED IN THE CAPITAL POST CONVICTION APPELLATE CONTEXT WHEN DEATH SENTENCED APPELLANTS ARE REPRESENTED BY COUNSEL. (CITATIONS OMITTED)

THIS 'MONITORING PROCESS' UNDER 27.711(12), AND A CAPITAL DEFENDANTS STATUTORY RIGHT TO EFFECTIVE AND COMPETENT REPRESENTATION IN POST CONVICTION PROCEEDINGS WAS DISCUSSED BY THIS COURT IN PEEDE V. STATE, 748 So.2d 253, 256 n.5 (FLA. 1999):

. . . WE NOTE THAT IN THIS PAST LEGISLATIVE SESSION, THE LEGISLATURE AMENDED SECTION 27.710(3), FLORIDA STATUTES BY ADDING SUBSECTION (12) WHICH STATES: "THE COURT SHALL MONITOR THE PERFORMANCE OF ASSIGNED COUNSEL TO ENSURE THE CAPITAL DEFENDANT IS RECEIVING QUALITY REPRESENTATION". . . . WE REMIND COUNSEL OF THE ETHICAL OBLIGATION TO PROVIDE COHERENT AND COMPETENT REPRESENTATION, ESPECIALLY IN DEATH PENALTY CASES, AND WE URGE THE TRIAL COURT UPON REMAND TO BE CERTAIN THAT PEEDE RECEIVES EFFECTIVE REPRESENTATION.

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(3) PETITIONER SUBMITS THAT 27.710 WAS NOT AMENDED RATHER THE LEGISLATURE AMENDED 27.711, FLORIDA STATUTES BY ADDING SUBSECTION (12)

SEE ALSO SPALDING V. DUGGER, 526 So.2d 71, 72 (FLA. 1988) (WE RECOGNIZE THAT, UNDER SECTION 27.702, EACH DEFENDANT UNDER SENTENCE OF DEATH IS ENTITLED, AS A STATUTORY RIGHT, TO EFFECTIVE LEGAL REPRESENTATION BY THE CAPITAL COLLATERAL REPRESENTATIVE IN ALL COLLATERAL RELIEF PROCEEDINGS); MAAS V. OLIVE, 992 So.2d 196, 205 (FLA. 2008) (AS LONG AS THE STATUTES ARE BEING INTERPRETED AND APPLIED IN A WAY THAT ENSURES EFFECTIVE AND COMPETENT REPRESENTATION IN COMPLEX AND UNUSUAL CAPITAL POST CONVICTION PROCEEDINGS, FLORIDA DEATH ROW INMATES ARE BEING AFFORDED MEANINGFUL ACCESS TO COUNSEL IN THEIR COLLATERAL PROCEEDINGS).

AS THESE CASES REFLECT, THE COURTS MANDATED DUTY UNDER SECTION 27.711(12), FLORIDA STATUTES IN THE CAPITAL POST CONVICTION APPELLATE CONTEXT IS MAGNIFIED. THUS, THE ATTENDANT DANGERS EXISTS AS WITHOUT GUIDANCE REGARDING THE PROPER APPLICATION OF SECTION 27.711(12), ANY 'MONITORING' OF ASSIGNED COUNSEL AND/OR FINDINGS BY THE COURT WITH RESPECT TO DEFENDANTS MOTION TO ASSESS ALLEGATIONS MADE REGARDING COUNSELS PERFORMANCE OR, FOR THAT MATTER, TO SUBSTITUTE COUNSEL BECOMES QUESTIONABLE AND PERHAPS INVALID. ID. GRAYNED

NOTWITHSTANDING, AS THE RECORD BEFORE THIS COURT REFLECTS, WHEN PRESENTED WITH PETITIONERS MOTION TO DISCHARGE COLLATERAL COUNSEL PURSUANT TO SECTION 27.711(12), FLORIDA STATUTES AND REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL ID (APP. EXH. B') THE LOWER TRIBUNAL CONDUCTED A HEARING PURSUANT TO NELSON V. STATE, 274 So.2d 256 (FLA. 4TH DCA 1973)

WHETHER OR NOT THIS STANDARD IS EVEN APPLICABLE IN POST-CONVICTION PROCEEDINGS SEE JONES V. STATE, 69 So.3d 329, 333-34 (FLA. 4TH DCA 2011) (HOLDING THAT THE REQUIREMENTS OF NELSON WHICH ARE FOUNDED ON THE SIXTH AMENDMENT, DO NOT APPLY IN POST-CONVICTION RELIEF PROCEEDINGS) OR, FOR THAT MATTER, WHETHER THE

LOWER TRIBUNAL HAD THE AUTHORITY TO EXCEED THE FRAMEWORK OF THE STATUTE AND APPLY NELSON, SEE ALLEN V. BUTTERWORTH, 756 So.2d 52, 63 (FLA. 2000) (IN FLORIDA, ARTICLE V, SECTION 2(A) OF THE FLORIDA CONSTITUTION GRANTS THIS COURT THE EXCLUSIVE AUTHORITY TO ADOPT RULES OF PROCEDURE), ENABLED THE LOWER TRIBUNAL TO TAKE ACCOUNT OF MR. OSTRANDERS EFFECTIVENESS.

ALTHOUGH THE LAW PROHIBITS A COURT FROM GRANTING SUBSTANTIVE RELIEF ON THE BASIS OF AN ATTORNEYS INEFFECTIVENESS IN CAPITAL POST-CONVICTION PROCEEDINGS SEE KOKAL V. STATE, 901 So.2d 766, 777-78 (FLA. 2005) ("WE HAVE REPEATEDLY HELD THAT CLAIMS OF INEFFECTIVE ASSISTANCE OF POST CONVICTION ARE NOT COGNIZABLE") THIS DOES NOT PROHIBIT THE COURT, PETITIONER ASSERTS, FROM SUBSTITUTING COUNSEL ON THAT GROUND.

THIS COURT RECOGNIZED IN WEAVER V. STATE, 894 So.2d 178, 189 (FLA. 2004)

"A COURTS DECISION INVOLVING WITHDRAWAL OR DISCHARGE OF COUNSEL IS SUBJECT TO REVIEW FOR ABUSE OF DISCRETION".

(QUOTED IN HOWELL V. STATE, 109 So.3d 763, 772 (FLA. 2013))

AS PROVIDED BY THIS COURT IN WEAVER:

A TRIAL JUDGE MAY IN THE INTEREST OF JUSTICE, SUBSTITUTE ONE COUNSEL FOR ANOTHER. A COURT WOULD BE SERVING SUCH AN INTEREST IF IT SUA SPONTE REMOVED COUNSEL WHO WAS GROSSLY INCOMPETENT, PHYSICALLY INCAPACITATED, OR CONDUCTED HIMSELF IN AN INAPPROPRIATE MANNER THAT COULD NOT BE CURED BY CONTEMPT PROCEEDINGS". ID.

WEAVER, 894 So.2d AT 189. (CITATION OMITTED)

PETITIONER ADVISES THAT THE "INTEREST OF JUSTICE" IS THE STANDARD CURRENTLY UTILIZED IN ADJUDICATING MOTIONS TO SUBSTITUTE COUNSEL IN HABEAS PROCEEDINGS UNDER SECTION 2254 IN THE FEDERAL COURT, SEE MARTEL V. CLAIR, 132 S.CT. 1286 AND N.3 (U.S. 2012)

AS THE RECORD BEFORE THIS COURT REFLECTS, THE GRAVAMEN OF PETITIONERS COMPLAINT REGARDING MR. THOMAS OSTRANDERS PERFORMANCE WAS THE BREACH OF PROFESSIONAL AND ETHICAL DUTY

AND GROSS INCOMPETENCE WHICH IMPEDED PETITIONERS ABILITY TO HAVE THE CONSTITUTIONAL CLAIMS INCORPORATED SUPRA. RESOLVED THROUGH ONE COMPLETE ROUND OF COLLATERAL LITIGATION THEREBY DEPRIVING PETITIONER OF WHAT WAS MOST LIKELY HIS ONE OPPORTUNITY FOR REVIEW OF THE LAWFULNESS OF HIS CONVICTIONS AND SENTENCE OF DEATH IN BOTH THE STATE AND FEDERAL COURT.

SECTION 27.711, F.S. ESTABLISHES THE TERMS AND CONDITIONS OF APPOINTMENT OF ATTORNEYS AS COUNSEL IN POSTCONVICTION CAPITAL COLLATERAL PROCEEDINGS, IN PARTICULAR, SECTION 27.711(1)(B) PROVIDES THAT AS USED IN SECTION 27.710 AND SECTION 27.711, THE TERM "POST-CONVICTION CAPITAL COLLATERAL PROCEEDINGS" IS DEFINED AS FOLLOWS:

> POST CONVICTION CAPITAL COLLATERAL PROCEEDINGS MEANS ONE SERIES OF COLLATERAL LITIGATION OF AN AFFIRMED CONVICTION AND SENTENCE OF DEATH, INCLUDING THE PROCEEDINGS IN THE TRIAL COURT THAT IMPOSED THE CAPITAL SENTENCE, ANY APPELLATE REVIEW OF THE SENTENCE BY THE SUPREME COURT, ANY CERTIORARI REVIEW OF THE SENTENCE BY THE UNITED STATES SUPREME COURT, AND ANY AUTHORIZED FEDERAL HABEAS CORPUS LITIGATION WITH RESPECT TO THE SENTENCE. ...

SECTION 27.710, F.S. PROVIDES FOR THE MAINTENANCE OF A REGISTRY OF PRIVATE ATTORNEYS (SUCH AS MR. THOMAS OSTRANDER) TO REPRESENT DEATH SENTENCED INDIVIDUALS IN POSTCONVICTION PROCEEDINGS. IN PARTICULAR, SECTION 27.710(5)(A) PROVIDES THAT UPON MOTION OF THE CAPITAL COLLATERAL REGIONAL COUNSEL TO WITHDRAW:

> THE EXECUTIVE DIRECTOR SHALL IMMEDIATELY NOTIFY THE TRIAL COURT THAT IMPOSED THE SENTENCE OF DEATH THAT THE COURT MUST IMMEDIATELY APPOINT AN ATTORNEY, SELECTED FROM THE CURRENT REGISTRY, TO REPRESENT SUCH PERSON ... IN MAKING AN ASSIGNMENT, THE COURT SHALL GIVE PRIORITY TO ATTORNEYS WHOSE EXPERIENCE AND ABILITIES IN CRIMINAL LAW,

ESPECIALLY IN CAPITAL PROCEEDINGS, ARE KNOWN BY THE COURT TO BE COMMENSURATE WITH THE RESPONSIBILITY OF REPRESENTING A PERSON SENTENCED TO DEATH. ... (EMPHASIS SUPPLIED)

THUS, ONE CAN ONLY PRESUME MR. OSTRANDER POSSESSED THE EXPERIENCE AND ABILITIES IN CRIMINAL LAW, ESPECIALLY IN CAPITAL PROCEEDINGS, AND THE HIGH ETHICAL STANDARDS NECESSARY TO REPRESENT PETITIONER IN BOTH THE STATE AND FEDERAL COURT.

TO THE CONTRARY HOWEVER, PETITIONER ASSERTS THAT DESPITE ADVISING OF HIS FAMILIARITY WITH FEDERAL LAW REGARDING THE EXHAUSTION REQUIREMENT, MR. OSTRANDER WITH FAILING TO ENSURE ALL CLAIMS ASSERTED IN PETITIONERS 3.850 MOTION WERE PRESENTED IN THE BRIEF ON APPEAL TO THIS COURT MUST HAVE KNOWN THOSE OMITTED CLAIMS WOULD BE PROCEDURALLY DEFAULTED IN THE FEDERAL COURT. ID. (APP, EXH. "A") SEE O'SULLIVAN V. BOERCKEL, 129 S.CT. 1728, 1732, 526 U.S. 838 (U.S. III 1999):

> STATE COURTS, LIKE FEDERAL COURTS, ARE OBLIGED TO ENFORCE FEDERAL LAW. COMITY THUS DICTATES THAT WHEN A PRISONER ALLEGES THAT HIS CONTINUED CONFINEMENT FOR A STATE COURT CONVICTION VIOLATES FEDERAL LAW, THE STATE COURTS SHOULD HAVE THE FIRST OPPORTUNITY TO REVIEW THIS CLAIM AND PROVIDE ANY NECESSARY RELIEF. ... BECAUSE THE EXHAUSTION DOCTRINE IS DESIGNED TO GIVE THE STATE COURTS A FULL AND FAIR OPPORTUNITY TO RESOLVE FEDERAL CONSTITUTIONAL CLAIMS BEFORE THOSE CLAIMS ARE PRESENTED TO THE FEDERAL COURTS, WE CONCLUDE THAT STATE PRISONERS MUST GIVE THE STATE COURTS ONE FULL OPPORTUNITY TO RESOLVE ANY CONSTITUTIONAL ISSUES BY INVOKING ONE COMPLETE ROUND OF THE STATES ESTABLISHED APPELLATE REVIEW PROCESS. ... (EMPHASIS SUPPLIED)

SEE ALSO PRUITT V. JONES, 348 F.3d 1355, 1358-59 (11TH CIR. 2003); POPE V. RICH, 358 F.3d 852, 853 (11TH CIR. 2004) (QUOTING BOERCKEL).

HOWEVER, DESPITE DEFERRING TO MRS. DYEHOUSES EXPERTISE THAT THE OMITTED CONSTITUTIONAL CLAIMS WERE OF NO MERIT ID. (APP., EXH 'A' AND 'E'), MR. OSTRANDER ATTEMPTED TO PRESENT THOSE CLAIMS IN THE FEDERAL COURT.

NEVERTHELESS, THIS CONSCIOUS DECISION TO FOREGO ADVISING PETITIONER OF THE FOREGOING ISSUE UNTIL AFTER CONCLUSION OF HIS FEDERAL PROCEEDINGS DEPRIVED PETITIONER OF 'ANY' OPPORTUNITY TO EFFECTUATE THOSE RIGHTS MR. OSTRANDERS ACTIONS DEPRIVED HIM OF, SEE STATE EX REL. BUTTERWORTH V. KENNY, 714 So.2d 404, 408 (FLA. 1998) ("ALL THAT IS REQUIRED IN POST CONVICTION RELIEF PROCEEDINGS, WHETHER CAPITAL OR NON-CAPITAL, IS THAT THE DEFENDANT HAVE MEANINGFUL ACCESS TO THE JUDICIAL PROCESS"), FOR EXAMPLE, THE INSTANT ACTION TO INVOKE THIS COURTS SUPERVISORY AUTHORITY UNDER SECTION 27.711(12), F.S. SO AS TO ENSURE ALL CONSTITUTIONAL CLAIMS ASSERTED IN PETITIONERS 3.850 MOTION WERE PRESENTED IN HIS BRIEF ON APPEAL OF THE DENIAL OF HIS 3.850 MOTION.

MOREOVER, PETITIONER FEELS CONSTRAINED TO COMMENT ON THE GROSS INCOMPETENCE ON THE PART OF MR. OSTRANDER IN THE LOWER TRIBUNAL DURING PETITIONERS POST CONVICTION PROCEEDINGS. IN PARTICULAR, WITH POSSESSING THE EXPERIENCE AND ABILITIES IN CRIMINAL LAW, ESPECIALLY IN CAPITAL PROCEEDINGS, AND THE HIGH ETHICAL STANDARDS COMMENSURATE WITH THE RESPONSIBILITY OF REPRESENTING PETITIONER ID. 27.710(5)(A) SUPRA., MR. OSTRANDER MUST HAVE KNOWN THAT FAILING TO CALL WITNESSES AND PRESENT EVIDENCE IN SUPPORT OF PETITIONERS CONSTITUTIONAL CLAIMS WOULD RESULT IN THOSE CLAIMS BEING WAIVED. SEE FERRELL V. STATE, 918 So.2d 163, 173 (FLA. 2005) (WHERE A DEFENDANT MAKES AN AFFIRMATIVE DECISION NOT TO PRESENT EVIDENCE ON HIS CLAIM AT AN EVIDENTIARY HEARING, THE CLAIMS MAY BE DEEMED WAIVED).

THE LOWER TRIBUNAL IN ITS ORDER DENYING PETITIONERS MOTION TO DISCHARGE MR. OSTRANDER FOUND THAT ALTHOUGH MRS. DYEHOUSES

PERFORMANCE MAY HAVE BEEN DEFICIENT MR. OSTRANDERS PERFORMANCE WAS NOT, AND THAT MR. OSTRANDERS REPRESENTATION OF PETITIONER WAS COMPETENT AND EFFECTIVE. ID. (APP. EXH. E)

ONE CAN ONLY PRESUME THAT MR. OSTRANDER (LEAD COUNSEL), ESPECIALLY IN LIGHT OF HIS FAMILIARITY WITH THE EXHAUSTION RULE, WAS EQUALLY AS CULPABLE AS MRS. DYEHOUSE (EMPLOYED ASSISTANT)

AS THE RECORD BEFORE THIS COURT REFLECTS, THIS BREACH OF PROFESSIONAL AND ETHICAL DUTY AND GROSS INCOMPETENCE BY MR. THOMAS OSTRANDER WAS SUFFICIENT TO INFECT THE WHOLE OF PETITIONERS POST CONVICTION PROCEEDINGS AND UNDERMINE CONFIDENCE IN THE OUTCOME. AS PROVIDED BY THIS COURT IN WILSON V. WAINWRIGHT, 474 SO.2D 1162, 1164 (FLA. 1985):

> HOWEVER, THE BASIC REQUIREMENT OF DUE PROCESS IN OUR ADVERSARIAL LEGAL SYSTEM IS THAT A DEFENDANT BE REPRESENTED IN COURT, AT EVERY LEVEL, BY AN ADVOCATE WHO REPRESENTS HIS CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW. EVERY ATTORNEY IN FLORIDA HAS TAKEN AN OATH TO DO SO AND WE WILL NOT LIGHTLY FORGIVE A BREACH OF THIS PROFESSIONAL DUTY IN ANY CASE; IN A CASE INVOLVING THE DEATH PENALTY IT IS THE VERY FOUNDATION OF JUSTICE.

THUS, THIS COURT WOULD BE SERVING THE INTERESTS OF JUSTICE WITH SUBSTITUTING MR. THOMAS OSTRANDER WITH ANOTHER ATTORNEY. ID. WEAVER SUPRA., WHO WILL ADVOCATE FOR PETITIONER ZEALOUSLY IN ANY SUBSEQUENT LITIGATION SUCH AS STAY PROCEEDINGS OR ANY OTHER NECESSITATED LITIGATION.

WITH RESPECT THERETO, PETITIONER ADVISES THAT SINCE THE OFFICE OF CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE (CCRC-M), WHO WAS INITIALLY ASSIGNED AS COUNSEL FOR PETITIONER, WITHDREW BECAUSE OF AN EXCESSIVE CASELOAD THE REAPPOINTMENT OF THAT OFFICE, SHOULD THIS COURT DEEM NECESSARY, WOULD THEREFORE BE APPROPRIATE.

WHEREFORE, PETITIONER RESPECTFULLY REQUESTS THIS HONORABLE COURT EXERCISE ITS SUPERVISORY AUTHORITY UNDER SECTION 27.711(12), FLORIDA STATUTES AND MONITOR COUNSELS PERFORMANCE AND THEREAFTER, BASED UPON THE FOREGOING, ISSUE A CONSTITUTIONAL WRIT DIRECTING THE CIRCUIT COURT, TWENTIETH JUDICIAL CIRCUIT TO APPOINT CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE AS SUBSTITUTE COUNSEL TO REPRESENT PETITIONER.

Jack Sliney
PROSE

RESPECTFULLY SUBMITTED
JACK SLINEY #905288
UNION CORR. INST.
7819 N.W. 228TH STREET
RAIFORD, FLORIDA 32026

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING WAS SENT BY U.S. MAIL THIS 8 DAY OF July, 2014 TO:

SCOTT BROWN, OFFICE OF ATTORNEY GENERAL, 3507 E. FRONTAGE ROAD, SUITE 200, TAMPA, FLORIDA 33607; THOMAS OSTRANDER, 514 27TH ST. W., BRADENTON, FLORIDA 34205

Jack Sliney
PROSE

RESPECTFULLY
JACK SLINEY
#905288

SUPREME COURT OF FLORIDA

JACK SLINEY,
PETITIONER,

V.

CASE NO.,
L.T. NO. 92-451 CF

STATE OF FLORIDA,
RESPONDENT,

"APPENDIX"

TITLE OF DOCUMENT	EXHIBIT	PAGE(S)
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EXHIBIT 'A'

EXHIBIT 'A'

THOMAS H. OSTRANDER
ATTORNEY AT LAW

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E-Mail skydogesq@aol.com

(1)

Received 1/21/11

Jack R. Sliney #905288
Union Correctional Institution
P-3-1-15
7819 N.W. 228th St.
Raiford, FL 32026-4430

Re: Jack Rilea Sliney vs. Walter A. McNeil
Case No.: 2:06-cv-670-FtM-99SPC

Dear Jack:

Thank you for the Christmas card and your letter dated December 13, 2010.

We had a really rocky road in your representation, not that you have been anything but an excellent client who has been fully cooperative. In your letter, you referenced that I promised that I would come and visit you. I'm sorry for breaking that promise. I do intend to visit you in the near future so that we can try to figure out what to do next.

Our biggest mistake may have been allowing the attorney who took this case to the Supreme Court of Florida to intercede on your behalf. She is eminently qualified to do the work. She has appeared before the Supreme Court on a number of occasions and that was assured to me by the head of the Capitol Resources Office. Her failure, in my estimation, lay in the fact that she may have been deeply depressed and distracted. In the Federal Motion that I filed, they mentioned on a number of occasions that certain issues had not been exhausted at the state Court level. That means that she didn't raise them in the appeal to the Supreme Court of Florida. I did bring those issues up to her attention while we were discussing the Brief and before it was filed. It was her professional opinion that those issues were of no merit, so consequently, she chose not to proceed toward exhaustion of them as they would not reap any benefit on your behalf. I trusted

her to make those decisions, based on her lengthy history.

Additionally, when I received the Opinion from the Supreme Court of Florida, I had to determine which of the issues were viable at the Federal Court level. In other words, the only issues that could be raised at the Federal Court level were issues that identified a Federal claim or violation of a Federal right and that that Federal issue had been exhausted and there was some support for it. The principal issue in my estimation was the fact that your trial attorneys raised nothing as a defense and disbelieved your statements concerning the use of the steroids. The steroid abuse defense is a very clear and cognizable defense. In fact, it would have resulted in a complete defense at least as to keep you from the death penalty. If you were under the influence of the steroids, it is unlikely that any jury could have found you subject to the death penalty. As you are aware, the death penalty punishment came as a result of a seven to five verdict by the jury, which was then supported by Judge Pellechia.

In the Federal system, once you have exhausted your state Court remedies, you have one bite of the apple at the District Court level. That is the Motion that I filed on your behalf that was denied. A second or successive Motion can be filed if we were able to find evidence of a defense which had not been previously raised at the District Court level or at the state Court level. In this case, despite my exhausting investigation of your prior medical conditions, abuse of alcohol and steroids, there is nothing new that could be raised to suggest to the Court that your trial attorneys weren't effective. I believe that we firmly established that the trial attorneys weren't effective for simply ditching those arguments and for not investigating the information which was readily available to them, both through the evidence and through the psychologists that discussed the steroids with them.

Nevertheless, the District Court denied the Motion and they also denied what we refer to as a Certificate of Appealability. Congress enacted a new habeas corpus law. The law said that the Federal Petition must be filed within one year of the affirmance of the conviction. The date is somewhat difficult to explain since the final affirmance of the conviction is only after all of your appeals and state Court remedies have been completed. In fact, the state Court provides in Rule 3.850 or Rule 3.851 that you have two years from the date of the finalization of the conviction to file your 3.850 or 3.851 Petition. The Federal Court Rules say you have only one year from the finalization of the state Court conviction. There appears to be somewhat of a conflict in those filing timeframes. As you know, and I believe you were referring to in your letter, I have always been concerned that we were going to run out of time since the original 3.850 was filed at least two years from the date of your original conviction, leaving us no time to file a 2254 Petition with the Federal Court. Nevertheless, I can assure you that we have not been precluded from proceeding on one of your Motions, due to any failures in times for filing. The Courts have either been lenient or the time had not run on any of the issues and the Federal and state Court Prosecutors have never raised that as an issue, such that it caused us to miss our opportunity to be heard by the Courts.

In any event, the Federal District Court denied our 2254 Motion for a new trial and also

denied us a Certificate of Appealability which would allow us to file an appeal to the Eleventh Circuit Court of Appeals in Atlanta. Having said that, I must advise that I filed a Petition for a Certificate of Appealability to the Eleventh Circuit Court of Appeals, which is the appropriate procedure to pursue under those circumstances. Unfortunately, the Certificate of Appealability was denied by the Eleventh Circuit Court of Appeals, leaving us no additional course in which to petition.

It appears that we have run out of Courts in which to seek justice in your case.

I am going to be out to see you as soon as possible so that we can discuss this matter further and hopefully I can find another avenue of redress.

Enclosed please find a copy of the Order signed by Judge Dubina. You will note that Judge Dubina granted the Motion to file the Petition out of time, but then went on to deny the Certificate of Appealability without an Opinion. This is significant. The significance lay in the fact that since the Judge failed to write an Opinion (by intention) we are not in a position where we can file for a Petition for certiorari to the Supreme Court of the United States. Petitions for cert are only granted for compelling reasons. Significantly, the Supreme Court considers United States Court of Appeals decisions in conflict with the decision of another United States Court of Appeals on the same important matter; or a Court of Appeals has decided an important Federal question in a way that conflicts with a decision by the state Court of last resort; or the Court has so far departed from accepted and usual course of judicial proceedings, or sanction such a departure by lower Court as to call for exercise of this Courts supervisory power. Additionally, the Supreme Court will consider whether a state Court of last resort has decided an important Federal question in a way that conflicts with the decision with another state Court of last resort or the United States Court of Appeals. Finally, the Supreme Court will consider when a State Court or United States Court of Appeals has decided an important question of Federal law that has not been, but should be settled by this Court, or it has decided an important Federal question in a way that conflicts with relevant decisions of this Court. A Petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings on this application of the property stated rule of law. In our case, I believe that the lower Courts have erred in finding that the attorneys who previously represented you were correct in allowing the failure to proceed with the introduction of evidence concerning the steroid and alcohol abuse. The decision they made was a *factual* one. The reason the Court has not issued a written finding is that they rarely interfere with the fact findings of lower Courts.

Again, I believe that your strongest, most viable issue was that Mr. Cooper and Mr. Shirley failed to explore whether in fact the defenses raised were actual defenses and should have been allowed before the jury. There was certainly enough information in the medical records, psychological evaluations and the evidence concerning the existence of the steroids or alcohol abuse.

The failure to make fact findings precludes our going any further with this case. I am, however, continuing to research to see if I can make this problem look like a problem that

the Court will recognize and consider.

Jack, as always I hope this letter finds you well and I will be seeing you very soon.

Sincerely,

Thomas H. Ostrander /s/

Thomas H. Ostrander
THO/sc

SIGNED IN MR. OSTRANDER'S
ABSENCE TO AVOID DELAY

EXHIBIT 'B'

EXHIBIT 'B'

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

JACK SLINEY,
DEFENDANT,

V.

CASE NO. 92-451 CF

STATE OF FLORIDA,
PLAINTIFF,

MOTION TO DISCHARGE COLLATERAL COUNSEL PURSUANT TO SECTION 27.711 (12), FLORIDA STATUTE AND REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL

COMES NOW, DEFENDANT, JACK SLINEY, PRO SE, PURSUANT TO SECTION 27.711(12), FLORIDA STATUTE AND RESPECTFULLY FILES THIS MOTION TO DISCHARGE COLLATERAL COUNSEL AND REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL AND IN SUPPORT THEREOF SHOWS AS FOLLOWS:

DEFENDANT IS A CAPITAL DEFENDANT UNDER SENTENCE OF DEATH AND WAS INITIALLY APPOINTED THE OFFICE OF CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE (CCRC-M) TO REPRESENT HIM IN HIS POST CONVICTION PROCEEDINGS. CCRC-M COUNSEL, UPON ASSIGNMENT BY THAT OFFICE, ADVISED THE COURT THAT DUE TO HIS CURRENT CASELOAD HE WOULD BE UNABLE TO PROVIDE QUALITY REPRESENTATION TO DEFENDANT WHEREUPON, THE COURT DISCHARGED CCRC-M COUNSEL AND APPOINTED REGISTRY COUNSEL MR. THOMAS OSTRANDER TO REPRESENT DEFENDANT.

BECAUSE RULE 3.850, 3.851 IS A POST CONVICTION PROCEEDING DEFENDANTS ONLY RECOURSE TO CHALLENGE THE ADEQUACY OF REPRESENTATION PROVIDED BY MR. OSTRANDER IS IN ACCORDANCE WITH SECTION 27.711(12), FLORIDA STATUTE.

SECTION 27.7002 (2), F.S. PROVIDES:

"WITH RESPECT TO COUNSEL APPOINTED TO REPRESENT DEFENDANTS IN COLLATERAL PROCEEDINGS PURSUANT TO SS. 27.710 AND 27.711, THE SOLE METHOD OF ASSURING ADEQUACY OF REPRESENTATION PROVIDED SHALL BE IN ACCORDANCE WITH THE PROVISIONS OF S. 27.711 (12).

SECTION 27.711 (12), F.S. PROVIDES:

THE COURT SHALL MONITOR THE PERFORMANCE OF ASSIGNED COUNSEL TO ENSURE THAT THE CAPITAL DEFENDANT IS RECEIVING QUALITY REPRESENTATION. THE COURT SHALL ALSO RECEIVE AND EVALUATE ALLEGATIONS THAT ARE MADE REGARDING THE PERFORMANCE OF ASSIGNED COUNSEL.

DEFENDANT SUBMITS THAT COLLATERAL COUNSEL THOMAS OSTRANDER IS GUILTY OF A SERIOUS BREACH OF LOYALTY AND PROFESSIONAL AND ETHICAL DUTY OWED TO DEFENDANT UNDER THE STATUTE GOVERNING HIS REPRESENTATION RESPECTIVELY FOR THE REASONS SET FORTH BELOW.

IT IS AXIOMATIC THAT SECTION 27.7001 - 27.711, F.S. GOVERNS THE REPRESENTATION BY COLLATERAL COUNSEL AND THAT CAPITAL DEFENDANTS UNDER SECTION 27.702, ARE ENTITLED, AS A STATUTORY RIGHT, TO COHERENT AND COMPETENT REPRESENTATION BY COLLATERAL COUNSEL IN ALL CAPITAL RELIEF PROCEEDINGS. SEE PEEDE V. STATE, 748 So. 2d 253, 256 (FLA. 1999) (WHERE THE FLORIDA SUPREME COURT DISCUSSING THE LEGISLATIVE INTENT GOVERNING THIS STATUTE HELD:

> COLLATERAL COUNSEL HAS AN ETHICAL OBLIGATION TO PROVIDE COHERENT, COMPETENT REPRESENTATION, ESPECIALLY IN DEATH PENALTY CASES.

SEE ALSO SPALDING V. DUGGER, 526 So. 2d 71, 72 (FLA 1988) (HOLDING UNDER SECTION 27.702, EACH DEFENDANT UNDER SENTENCE OF DEATH IS ENTITLED, AS A STATUTORY RIGHT, TO EFFECTIVE LEGAL REPRESENTATION BY THE CAPITAL COLLATERAL REPRESENTATIVE IN ALL COLLATERAL RELIEF PROCEEDINGS)

ACCORD MINERVA V. SIMBLETARY 830 F. SUPP. 1426, 1429 (M.D. FLA. 1993) (QUOTING SPALDING V. DUGGER, 526 SO.2d 71, 72 (FLA. 1988))

THE NECESSITY FOR THE COHERENT, COMPETENT, AND EFFECTIVE REPRESENTATION BY COLLATERAL COUNSEL WAS SET FORTH BY THE FLORIDA SUPREME COURT IN ITS DECISION TO REQUIRE COUNSEL IN POST CONVICTION APPEALS IN GORDON V. STATE, 75 SO.3d 200 (FLA. 2011):

> WE RECOGNIZE THAT "WE HAVE A CONSTITUTIONAL RESPONSIBILITY TO ENSURE THE DEATH PENALTY IS ADMINISTERED IN A FAIR, CONSISTENT AND RELIABLE MANNER, AS WELL AS HAVING AN ADMINISTRATIVE RESPONSIBILITY TO WORK TO MINIMIZE THE DELAYS INHERENT IN THE POST CONVICTION PROCESS". ARBELAEZ V. BUTTERWORTH, 738 SO.2d 326, 326-27 (FLA. 1999); SEE ALSO FLA. DEPT. OF CORRECTIONS V. WATTS, 800 SO.2d 225, 232-33 (FLA. 2001) (SAME) (QUOTING ARBELAEZ, 738 SO.2d AT 326-27). THIS RESPONSIBILITY ARISES IN PART FROM THE UNITED STATES SUPREME COURT'S "INSISTENCE THAT CAPITAL PUNISHMENT BE IMPOSED FAIRLY, AND WITH REASONABLE CONSISTENCY, OR NOT AT ALL". EDDINGS V. OKLAHOMA, 455 U.S. 104, 112 (1982). THESE PRINCIPLES ARE BEST SERVED IN THE CAPITAL POST CONVICTION APPELLATE CONTEXT WHEN DEATH SENTENCED APPELLANTS ARE REPRESENTED BY COUNSEL.

THE COURT RELIED UPON JUSTICE ANSTEAD'S OBSERVATIONS IN ARBELAEZ:

> THIS COURT HAS ALSO RECOGNIZED THAT "SINCE THE STATE OF FLORIDA ENFORCES THE DEATH PENALTY, ITS PRIMARY OBLIGATION IS TO ENSURE THAT INDIGENTS ARE PROVIDED COMPETENT, EFFECTIVE COUNSEL IN CAPITAL CASES", AND THAT "ALL CAPITAL CASES BY THEIR VERY NATURE CAN BE CONSIDERED EXTRAORDINARY AND UNUSUAL." THIS COURT HAS RECOGNIZED THE CRUCIAL ROLE OF COUNSEL AT ALL LEVELS OF CAPITAL PROCEEDINGS;

HOWEVER, THE BASIC REQUIREMENT OF DUE PROCESS IN OUR ADVERSARIAL LEGAL SYSTEM IS THAT A DEFENDANT BE REPRESENTED IN COURT, AT EVERY LEVEL, BY AN ADVOCATE WHO REPRESENTS HIS CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW. EVERY ATTORNEY IN FLORIDA HAS TAKEN AN OATH TO DO SO AND WE WILL NOT LIGHTLY FORGIVE A BREACH OF THIS PROFESSIONAL DUTY IN ANY CASE; IN A CASE INVOLVING THE DEATH PENALTY IT IS THE VERY FOUNDATION OF JUSTICE. ID. AT 330 N.10 (CITATIONS OMITTED) AS SUPPORT FOR THE DECISION PROHIBITING CAPITAL DEFENDANTS FROM APPEARING PRO SE IN POST CONVICTION APPEALS. ID.

DEFENDANT SUBMITS THAT MR. OSTRANDER WITH FAILING TO ASSERT CONSTITUTIONAL CLAIMS IN DEFENDANTS 3.850, 3.851 MOTION OR, FOR THAT MATTER, TO ENSURE THE CLAIMS ASSERTED IN SAID MOTION WERE INCLUDED IN THE BRIEF ON APPEAL TO THE FLORIDA SUPREME COURT WAS GUILTY OF THE BREACH OF PROFESSIONAL AND ETHICAL DUTY RECOGNIZED BY THE FLORIDA SUPREME COURT AS REQUIRED UNDER THE STATUTE.

CLAIMS OF INEFFECTIVE ASSISTANCE OF POST CONVICTION COUNSEL ARE NOT COGNIZABLE. SEE GORE V. STATE 24 So.3d 1, 16 (FLA 2009); KOKAL V. STATE 901 So.2d 766, 777 (FLA. 2005); WATERHOUSE V. STATE, 792 So.2d 1176, 1193 (FLA. 2001); LAMBRIX V. STATE, 698 So.2d 247, 248 (FLA. 1996) DEFENDANT HOWEVER, SUBMITS THAT INEFFECTIVE ASSISTANCE OF POST CONVICTION COUNSEL IS NOT THE GRAVAMEN OF HIS COMPLAINT. RATHER HE ASSERTS THAT THE ACTIONS, OR LACK THEREOF, BY MR. OSTRANDER PRESENT A FAR MORE SERIOUS INSTANCE OF ATTORNEY MISCONDUCT THAT INFECTED THE WHOLE OF DEFENDANTS POST CONVICTION PROCEEDINGS AND UNDERMINED THE INTEGRITY OF THE PROCESS.

SPECIFICALLY, MR. OSTRANDER ALTHOUGH READILY AWARE OF THE OMISSION OF NUMEROUS MERITORIOUS CLAIMS IN DEFENDANTS BRIEF ON APPEAL AND THAT EMPLOYED ASSISTANT COUNSEL MRS. SUSAN DYEHOUSE

WHO PREPARED THE INSUFFICIENT AND INADEQUATE BRIEF WAS SUFFERING A MENTAL DEFICIENCY, FAILED TO ADVISE NOT ONLY DEFENDANT BUT ALSO THE FLORIDA SUPREME COURT.

SIMPLY PUT, THIS MOST SERIOUS BREACH OF DUTY BY MR. OSTRANDER DEPRIVED DEFENDANT OF HIS ONE FULL AND FAIR OPPORTUNITY TO RESOLVE THE CLAIMS ASSERTED IN HIS 3.850, 3.851 MOTION REGARDING THE MAJOR FLAWS WHICH EXISTED THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF DEFENDANTS TRIAL PROCEEDINGS. AS NOTED BY JUSTICE AMSTEAD IN ARBELAEZ, SUPRA.:

> A PROVISION FOR COUNSEL IN CAPITAL COLLATERAL PROCEEDINGS IS DESIGNED TO INSURE THAT ONCE THE INITIAL PROCEEDINGS RESULTING IN A DEATH SENTENCE HAVE CONCLUDED THERE BE A PROMPT AND EFFECTIVE REVIEW OF THOSE PROCEEDINGS TO BE CERTAIN THAT NO MAJOR FLAWS EXIST . . . THAT WOULD SERIOUSLY UNDERMINE OUR CONFIDENCE IN THE OUTCOME OF THOSE PROCEEDINGS.
>
> ARBELAEZ, 738 SO 2d AT 332.

AS A RESULT THEREOF, THOSE CLAIMS WERE PROCEDURALLY DEFAULTED IN THE FEDERAL COURT ON HABEAS REVIEW. SEE O'SULLIVAN V. BOERCKEL, 119 S.CT. 1728, 1731-32, 526 U.S. 838 (U.S. ILL. 1999):

> BEFORE A FEDERAL COURT MAY GRANT HABEAS RELIEF TO A STATE PRISONER, THE PRISONER MUST EXHAUST HIS REMEDIES IN STATE COURT. . . . BECAUSE THE EXHAUSTION DOCTRINE IS DESIGNED TO GIVE THE STATE COURTS A FULL AND FAIR OPPORTUNITY TO RESOLVE FEDERAL CONSTITUTIONAL CLAIMS BEFORE THOSE CLAIMS ARE PRESENTED TO THE FEDERAL COURTS, WE CONCLUDE THAT THE STATE PRISONERS MUST GIVE THE STATE COURTS ONE FULL OPPORTUNITY TO RESOLVE ANY CONSTITUTIONAL ISSUES BY INVOKING ONE COMPLETE ROUND OF THE STATES ESTABLISHED APPELLATE REVIEW PROCESS.

SEE ALSO PRUITT V. JONES, 348 F.3d 1355, 1359 (C.A. 11 (ALA) 2003); POPE V. RICH, 358 F.3d 852, 853 (C.A. 11 (GA) 2004) (QUOTING BOERCKEL).

DEFENDANT ASSERTS THAT AS A RESULT OF THE CONSCIOUS DECISION BY MR. OSTRANDER TO ADVISE HIM AT THE CONCLUSION OF HIS FEDERAL PROCEEDINGS RATHER THAN AT THE OUTSET OF THE APPEAL PROCEEDINGS IN THE FLORIDA SUPREME COURT OF THE ISSUES REGARDING THE BRIEF AND MENTAL INCAPACITY OF MRS. SUSAN DYEHOUSE IN CONJUNCTION WITH THE BLANKET PROHIBITION ON CAPITAL DEFENDANTS APPEARING PROSE ADOPTED BY THE FLORIDA SUPREME COURT IN GORDON, SUPRA, DEFENDANT WAS DEPRIVED OF ANY OPPORTUNITY TO COMPLY WITH STATE PROCEDURAL RULES.

SIMPLY PUT, HAD DEFENDANT BEEN TIMELY ADVISED OR, FOR THAT MATTER, BEEN ALLOWED TO REPRESENT HIMSELF, THE PREJUDICE THAT RESULTED FROM THE CIRCUMSTANCES SURROUNDING THE APPEAL IN THE FLORIDA SUPREME COURT, IE., THE ABSENCE OF A FULL AND FAIR OPPORTUNITY TO RESOLVE THE CONSTITUTIONAL ISSUES THROUGH THE APPELLATE REVIEW PROCESS THAT RESULTED IN THE PROCEDURAL DEFAULT OF THOSE ISSUES, WOULD NO DOUBT HAVE BEEN PRECLUDED.

THE FLORIDA SUPREME COURT RECOGNIZED IN GORDON, SUPRA: THAT THE ABILITY TO CARRY OUT ITS CONSTITUTIONAL OBLIGATIONS REGARDING THE IMPOSITION OF THE DEATH PENALTY DEPENDS SUBSTANTIALLY UPON THE QUALITY OF REPRESENTATION BY COLLATERAL COUNSEL. OBVIOUSLY THIS CONSTITUTIONAL DUTY WAS HAMPERED BY THE BREACH OF PROFESSIONAL AND ETHICAL DUTY BY BOTH MR. OSTRANDER AND MRS. DYEHOUSE TO BRING FORTH THOSE CONSTITUTIONAL CLAIMS DURING THE APPEAL PROCEEDINGS IN THE FLORIDA SUPREME COURT.

THUS, DEFENDANT ASSERTS THAT, IN LIGHT OF THE FOREGOING, BECAUSE THE STATE APPOINTED AND SUPERVISED COLLATERAL COUNSEL AND PREVENTED DEFENDANT FROM REPRESENTING HIMSELF, IT IS RESPONSIBLE FOR THE ATTORNEYS FAILURE TO MEET THE STATES PROCEDURAL REQUIREMENTS.

IN CONCLUSION, DEFENDANT SUBMITS THAT THE FOREGOING ALLEGATIONS DEMONSTRATE SUFFICIENT GOOD CAUSE REQUIRED UNDER

SECTION 27.710 (3), F.S. FOR THIS COURT TO REMOVE APPOINTED REGISTRY COUNSEL THOMAS OSTRANDER AND APPOINT SUBSTITUTE COUNSEL SO AS TO ENABLE DEFENDANT TO PURSUE FURTHER LITIGATION OF ISSUES GERMANE TO THE INSTANT COMPLAINT.

ADDITIONALLY, AND WITH REGARD TO THE APPOINTMENT OF SUBSTITUTE COUNSEL DEFENDANT RESPECTFULLY ADVISES THIS COURT THAT ALTHOUGH THE OFFICE OF CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE (CCRC-M), INITIALLY ASSIGNED AS COUNSEL FOR THE DEFENDANT, WAS REMOVED FOR REASONS UNRELATED TO A CONFLICT OF INTEREST AS STATED AT THE OUTSET OF THE INSTANT MOTION, THE REAPPOINTMENT [redacted] OF THE OFFICE OF CCRC-M WOULD THEREFORE BE APPROPRIATE.

WHEREFORE, DEFENDANT, BASED UPON THE FOREGOING, RESPECTFULLY REQUESTS THIS HONORABLE COURT CONDUCT A HEARING TO ASSESS THE ALLEGATIONS MADE REGARDING THE PERFORMANCE OF ASSIGNED COUNSEL AND THAT THIS COURT ISSUE AN ORDER FOR DEFENDANT TO BE TRANSPORTED TO APPEAR IN PERSON OR IN THE ALTERNATIVE FOR DEFENDANT TO APPEAR VIA VIDEO CONFERENCE[1] AT SAID HEARING.

Jack Sliney #905288
PRO SE

RESPECTFULLY SUBMITTED
JACK SLINEY #905288
UNION CORR. INST.
7819 N.W. 228TH STREET
RAIFORD, FLORIDA
32026

[1] FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.071(b), ALLOWS FOR TELEPHONIC AND TELECONFERENCING COMMUNICATION EQUIPMENT TO BE UTILIZED FOR A MOTION HEARING, PRETRIAL CONFERENCE, OR A STATUS CONFERENCE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING HAS BEEN SENT BY U.S. MAIL THIS 20th DAY OF FEBRUARY, 2014 TO:

SCOTT A. BROWNE, OFFICE OF ATTORNEY GENERAL, CONCOURSE CENTER 4, 3507 EAST FRONTAGE ROAD, SUITE 200, TAMPA, FLORIDA 33607-7013; THOMAS H. OSTRANDER, 2701 MANATEE AVENUE WEST, UNIT A, BRADENTON, FLORIDA 34205

Jack Sliney
PRO SE

RESPECTFULLY
JACK SLINEY #905288
UNION CORR. INST.
7819 N.W. 228TH STREET
RAIFORD, FLORIDA
32026

EXHIBIT 'C'

EXHIBIT 'C'

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 92-CF-451**

JACK SLINEY,
Defendant.
_____/

ORDER DIRECTING DEFENSE COUNSEL TO SCHEDULE NELSON HEARING

THIS CAUSE comes before the Court on Defendant's "Motion To Discharge Collateral Counsel," filed February 20, 2014 under the mailbox rule according to the stamp indicating when the motion was placed into the hands of corrections officials. The Clerk has not yet filed a copy of this motion in the court file. Defendant wishes to discharge current counsel, and have the office of Capital Collateral Regional Counsel, Middle (CCRC-M) appointed. The Court notes that Defendant filed a letter to the Court on August 5, 2013, expressing his desire to have substitute counsel appointed.

Accordingly, it is

ORDERED AND ADJUDGED that attorney Thomas H. Ostrander, Esq. shall, within ten days, coordinate with the Court and State to schedule a hearing on Defendant's motion for the purpose of inquiring as to Defendant's specific reason or reasons for requesting that counsel be discharged and, if necessary, to conduct a full inquiry pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). Counsel shall prepare the notice of hearing, and shall submit a proposed order to transport Defendant.

DONE AND ORDERED in Chambers at Punta Gorda, Charlotte County, Florida this 25 day of Feb, 2014.

George C. Richards
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Jack Sliney**, DC#905288, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **Carol M. Dittmar, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; **Thomas H. Ostrander, Esq.**, 2701 Manatee Ave. West, Ste. A, Bradenton, FL 34205; **Capital Collateral Regional Counsel – Middle**, 3801 Corporex Park Dr., Ste. 210, Tampa, FL 33619; and **Administrative Office of the Courts** (XIV), 1700 Monroe St., Ft. Myers, FL 33901; this 25 day of February, 2014.

BARBARA T. SCOTT
Clerk of Court

By: _____
Deputy Clerk

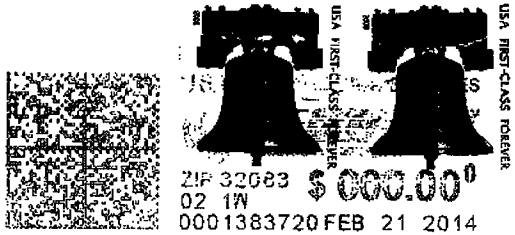
EXHIBIT 'D'

EXHIBIT 'D'

Jack Stiney #405288
Union Correctional Institution
P-1-2-10
7819 N.W. 228th St.
Raiford, Fl.
32026-4410

P1210

Mailed from A
State Correctional
Institution



Mr. Thomas H. Ostrander
Attorney At Law
2701 Manatee Avenue West (Unit A)
[illegible]

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Legal Mail

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
PLAINTIFF,

V.

CASE NO. 92-CF-451

JACK SLINEY,
DEFENDANT,

NOTICE TO THE COURT

COMES NOW, DEFENDANT, JACK SLINEY, PRO SE, AND RESPECTFULLY FILES THIS NOTICE TO THE COURT AND STATES AS FOLLOWS:

AT THE OUTSET DEFENDANT ADVISES THAT ALTHOUGH HE PROVIDED A COPY OF THE MOTION TO DISCHARGE COLLATERAL COUNSEL VIA U.S. MAIL TO COUNSEL OF RECORD MR. THOMAS H. OSTRANDER, SAID MOTION WAS RETURNED TO DEFENDANT ON MARCH 3, 2014 AS UNABLE TO BE DELIVERED AND/OR FORWARDED.

(IT SHOULD BE NOTED THAT MR. OSTRANDER NEITHER ADVISED DEFENDANT OF LEAVING THE 2701 MANATEE AVE. WEST, SUITE A, BRADENTON, FLA. 34205 ADDRESS NOR OF ANY NEW FORWARDING ADDRESS)

AS AN ADDITIONAL MATTER, DEFENDANT, IN LIGHT OF THIS COURTS FEBRUARY 25, 2014 ORDER DIRECTING DEFENSE COUNSEL TO SCHEDULE A NELSON HEARING, NELSON V. STATE, 274 So.2d 256 (FLA. 4TH DCA 1993), IS NOT THE PROPER STANDARD TO BE UTILIZED IN ASSESSING ALLEGATIONS MADE REGARDING THE ADEQUACY OF REPRESENTATION PROVIDED BY ASSIGNED COLLATERAL COUNSEL.

NEITHER THE FIFTH OR THE SIXTH AMENDMENT RIGHTS OF A CRIMINAL DEFENDANT APPLY IN POSTCONVICTION RELIEF PROCEEDINGS. ARBELAEZ V. STATE, 898 So.2d 25, 42 (FLA. 2005) SEE ALSO PENNSYLVANIA V. FINLEY, 481 U.S. 551, 107 S.CT. 1990, 95 L.Ed. 2d 539 (1987) (HOLDING THAT PRISONER HAS NO FEDERAL CONSTITUTIONAL DUE PROCESS OR EQUAL PROTECTION RIGHT TO COUNSEL IN POST CONVICTION PROCEEDINGS); MAYOLO V. STATE, 714 So.2d 1124, 1124 (FLA 4TH DCA 1998) (RECOGNIZING THAT A POSTCONVICTION MOVANT HAS NO SIXTH AMENDMENT RIGHT TO APPOINTED COUNSEL)

THE PROCEDURES SET OUT IN NELSON ID. AND FARETTA V. CALIFORNIA, 422 U.S. 806, 95 S.CT. 2525, 45 L.Ed.2d 562 (1975) ARE INTENDED TO SAFEGUARD THE CRIMINAL DEFENDANTS SIXTH AMENDMENT RIGHT TO REPRESENTATION BY COMPETENT COUNSEL IN THE CRIMINAL PROSECUTION. A DEFENDANT HAS NO SUCH RIGHTS IN POST CONVICTION PROCEEDINGS. KOKAL V. STATE, 901 So.2d 766, 777 (FLA. 2005) (DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO REPRESENTATION IN POST CONVICTION PROCEEDINGS)

THUS, THE REQUIREMENTS OF NELSON AND FARETTA SUPRA., WHICH ARE FOUNDED ON THE SIXTH AMENDMENT, DO NOT APPLY IN POST-CONVICTION RELIEF PROCEEDINGS. SEE MARTINEZ V. COURT OF APPEAL OF CAL., FOURTH APPELLATE DIST., 528 U.S. 152, 163, 120 S.CT. 684, 145 L.Ed 2d 597 (2000)

IT IS NOTEWORTHY THAT BARBARA DAVIS, ASSISTANT ATTORNEY GENERAL IN STATE V. ENGLAND, CASE NO. 03-35769 CFAES (7TH JUD. CIR. VOLUSIA CO. FLA) ON NOVEMBER 5, 2010, TOOK THE POSITION THAT NELSON DOES NOT APPLY IN POST CONVICTION RELIEF PROCEEDINGS WHEN A DEFENDANT SEEKS TO DISCHARGE COLLATERAL COUNSEL AND HAVE SUBSTITUTE COUNSEL APPOINTED.

DEFENDANT AT THE OUTSET OF HIS MOTION TO DISCHARGE COLLATERAL COUNSEL ADVISED THIS COURT THAT WITH RESPECT TO COUNSEL APPOINTED TO REPRESENT DEFENDANTS IN COLLATERAL PROCEEDINGS

PURSUANT TO SECTION 27.710 AND 27.711, F.S., THE SOLE METHOD OF ASSURING ADEQUACY OF REPRESENTATION PROVIDED IS IN ACCORDANCE WITH SECTION 27.711(12), F.S.. IE SECTION 27.702(2), F.S.

ASSUMING WITHOUT DECIDING WHETHER THIS COURT HAS THE AUTHORITY TO EXCEED THE FRAMEWORK OF THE STATUTE AND EMPLOY A NELSON TYPE INQUIRY, THE COURT IN NELSON, HELD THAT:

> "IF INCOMPETENCY OF COUNSEL IS ASSIGNED BY THE DEFENDANT AS THE REASON FOR DISCHARGE, THE TRIAL JUDGE SHOULD MAKE A SUFFICIENT INQUIRY OF THE DEFENDANT AND HIS APPOINTED COUNSEL TO DETERMINE WHETHER OR NOT THERE IS REASONABLE CAUSE TO BELIEVE THAT THE COURT APPOINTED COUNSEL IS NOT RENDERING EFFECTIVE ASSISTANCE TO THE DEFENDANT. IF REASONABLE CAUSE FOR SUCH BELIEF APPEARS, THE COURT SHOULD MAKE A FINDING TO THAT EFFECT ON THE RECORD AND APPOINT A SUBSTITUTE ATTORNEY . . ."

NELSON, 274 So.2d AT 258-59

DEFENDANTS ALLEGATIONS ARE DIRECTED TO MR. OSTRANDER'S COMPETENCE OR LACK THEREOF AND BREACH OF PROFESSIONAL AND ETHICAL DUTY OWED TO DEFENDANT WHICH RESULTED IN, AND CONTINUES TO, DEPRIVE DEFENDANT OF HIS STATUTORY RIGHT TO EFFECTIVE LEGAL REPRESENTATION. SPALDING V. DUGGER, 526 So.2d 71, 72 (FLA. 1988) (RECOGNIZING THAT, UNDER SECTION 27.702, EACH DEFENDANT UNDER SENTENCE OF DEATH IS ENTITLED, AS A STATUTORY RIGHT, TO EFFECTIVE LEGAL REPRESENTATION BY THE CAPITAL COLLATERAL REPRESENTATIVE IN ALL COLLATERAL RELIEF PROCEEDINGS). AS SUCH, A FULL INQUIRY WITH RESPECT THERETO IS MOST CERTAINLY NECESSITATED.

DEFENDANT FURTHER ADVISES THAT AS A RESULT OF MR. OSTRANDER'S ACTIONS STATED AT THE OUTSET OF THE

INSTANT NOTICE, WHICH DEFENDANT PERCEIVES AS THE ABANDONMENT BY COUNSEL, NO COPY OF THIS NOTICE HAS BEEN FORWARDED TO COUNSEL.

IN CONCLUSION, DEFENDANT SUBMITS THAT ALTHOUGH THIS COURT IN ITS FEBRUARY 25, 2014 REQUESTED COUNSEL TO PREPARE A PROPOSED ORDER TO TRANSPORT DEFENDANT, JUDICIAL ECONOMY WOULD BEST BE SERVED WITH THIS COURT ISSUING AN ORDER FOR DEFENDANT TO APPEAR VIA VIDEO CONFERENCE IN ACCORD WITH FLA. R. JUD. ADMIN. 2.071(b).

Jack Sliney
PROSE

RESPECTFULLY SUBMITTED
JACK SLIMEY #905288
UNION CORR. INST.
7819 N.W. 228TH STREET
RAIFORD, FLORIDA 32026

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING HAS BEEN SENT BY U.S. MAIL THIS 5TH DAY OF MARCH, 2014 TO:

CAROL M. DITTMAR, OFFICE OF ATTORNEY GENERAL, 3507 E. FRONTAGE ROAD, SUITE 200, TAMPA, FLORIDA 33607; CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE, 3801 CORPOREX PARK DR., SUITE 210, TAMPA, FLORIDA 33619

Jack Sliney
PROSE

RESPECTFULLY
JACK SLIMEY
#905288

EXHIBIT 'E'

EXHIBIT 'E'

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 92-CF-451**

JACK SLINEY,
Defendant.
_____/

ORDER DENYING MOTION TO DISCHARGE COUNSEL

THIS CAUSE comes before the Court on Defendant's "Motion To Discharge Collateral Counsel," filed February 20, 2014 under the mailbox rule according to the stamp indicating when the motion was placed into the hands of corrections officials. Defendant wishes to discharge current counsel, and have the office of Capital Collateral Regional Counsel, Middle (CCRC-M) appointed. Having reviewed the motion, the case file, the applicable law, and having heard argument by the parties on May 23, 2014, the Court finds as follows:

1. In his motion, Defendant argued that collateral counsel, Thomas Ostrander, was ineffective in hiring attorney Susan Dyehouse, who "prepared the insufficient and inadequate" appellate brief. At the hearing, Defendant submitted a letter to him from Mr. Ostrander following the denial of his appeal, stating Mr. Ostrander's belief that Ms. Dyehouse may have been depressed, and that, in his opinion, she had not raised all the issues during the appeal that could have been raised. Defendant argued he had been denied a full and fair opportunity to have his issues addressed.

2. Mr. Ostrander stated at the hearing that following the denial of the postconviction motion, he was contacted by Ms. Dyehouse regarding her interest in handling the appeal, and that she was well known and well qualified. In his opinion, she filed a limited, but scholarly,

brief, and sufficiently argued the brief during oral arguments. Mr. Ostrander believed there could have been additional issues addressed in the brief, but had deferred to Ms. Dyehouse's expertise. Following the denial of the appeal, Ms. Dyehouse stated she had a conflict and could not handle any federal proceedings for Defendant. When Mr. Ostrander filed federal proceedings, his petition was denied because the issues had not been raised by Ms. Dyehouse on appeal, and thus were not exhausted at the state level.

3. Scott Brown, Assistant Attorney General, argued that Defendant was complaining of proceedings from 2005 or 2006, and had expressed no reason to discharge current counsel. He believed counsel was competent and had represented Defendant diligently.

4. The Court finds that Defendant's arguments show Ms. Dyehouse's performance may have been deficient, but has demonstrated no deficiency on the part of Mr. Ostrander. Mr. Ostrander relied on the expertise of a well known and well qualified appellate attorney to handle the appeal, and he was not ineffective for that reliance. The Court finds that Mr. Ostrander's representation of Defendant has been competent and has not been ineffective. After considering the motion and testimony, the Court finds there is no basis for discharge of Mr. Ostrander.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to discharge counsel is DENIED.

DONE AND ORDERED in Chambers at Punta Gorda, Charlotte County, Florida, this 23 day of May, 2014.

George C. Richards
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Jack Sliney**, DC#905288, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026; **Scott Brown, Esq.**, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; **Cynthia Ross, Esq.**, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33902-0399; **Thomas H. Ostrander, Esq.**, skydogesq@aol.com, 514 27th St. W., Bradenton, FL 34205; **Capital Collateral Regional Counsel – Middle**, 3801 Corporex Park Dr., Ste. 210, Tampa, FL 33619; and **Administrative Office of the Courts** (XIV), 1700 Monroe St., Ft. Myers, FL 33901; this 23 day of May, 2014.

BARBARA T. SCOTT
Clerk of Court

By: _____
Deputy Clerk

_____ Probation Violator

_____ Community Control Violator

_____ Retrial

_____ Resentence

In the Cir urt, 20th Judicial Circuit,

in and for CHARLOTTE County, Florida

Division FELONY

Case Number 92-451 F

State of Florida
v.

JACK RILEA SLINEY
Defendant

JUDGMENT

The defendant, JACK RILEA SLINEY, being personally before this court represented by ~~MARK COOPER, ASST PUBLIC DEFENDER~~, the attorney of record, and the state represented by JENNIFER HARRINGTON, and having

XXX been tried and found guilty by jury/by court of the following crime(s)

___ entered a plea of guilty to the following crime(s)

___ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
ONE	FIRST DEGREE PREMEDITATED MURDER	782.04	CAPITAL	92-451 F	5288236
TWO	FIRST DEGREE FELONYMURDER	782.04	CAPITAL	92-451 F	
THREE	ROBBERY WITH A DEADLY WEAPON	812.13	FIRST FEL	92-451 F	

XX and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

___ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submit blood specimens.

___ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

State of Florida

v.

JACK RILEA SLINEY

Defendant

Case Number 92-451

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

Fingerprints taken by: PETE Gallego 672 BAILIFF

Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, JACK RILEA SLINEY, and that they were placed thereon by the defend in my presence in open court this date.

DONE AND ORDERED in open court in Charlotte County, Florida this 14 day of FEB, 19 94.

Judge

Defendant JACK RILEA SLINEY Case Number 92-451 F TS Number 5288236

SENTENCE

(As to Count one)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, MARK COOPER, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

___ and the Court having on _____ (date) deferred imposition of sentence until this date

___ and the Court having previously entered a judgment in this case on _____ (date) now resentences the defendant

___ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court that:

___ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 960.25, Florida Statutes.

XX The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of _____ County, Florida.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

XX For a term of ~~natural life~~ DEATH

___ For a term of _____.

___ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

___ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

___ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defendant JACK RILEA SLIN[T] Case Number 92-451 F 'S Number 5288236

SENTENCE

(As to Count three)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, MARK COOPER, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

___ and the Court having on _____ (date) deferred imposition of sentence until this date

___ and the Court having previously entered a judgment in this case on _____ (date) now resentences the defendant

___ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court that:

___ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 960.25, Florida Statutes.

XXX The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of _____County, Florida.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

XXX For a term of natural life.

___ For a term of_____.

___ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

___ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

___ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defendant JACK RILEA SLIN. Case Number 451 F

SPECIAL PROVISIONS

(As to Count 1,3)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm ___ It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking ___ It is further ordered that the _____ mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School ___ It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender ___ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender ___ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act ___ It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with section 775.0823, Florida Statutes.

Capital Offense ___ It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun ___ It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.

Continuing Criminal Enterprise ___ It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction ___ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

Jail Credit XX It is further ordered that the defendant shall be allowed a total of 607 days as credit for time incarcerated before imposition of this sentence.

Prison Credit ___ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

Defendant JACK RILEA SLI. Case Number 92- F

Other Provisions, continued:

Consecutive/Concurrent As To Other Counts

~~xx~~ It is further ordered that the sentence imposed for this count shall run (check one) ____ consecutive to xx concurrent with the sentence set forth in count one of this case.

Consecutive/Concurrent As To Other Convictions

___ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ____ consecutive to ____ concurrent with the following: (check one)

___ any active sentence being served.

___ specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of CHARLOTTE County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends _____

DONE AND ORDERED in open court at CHARLOTTE County, Florida, this 14th day of FEBRUARY, 19 94.

Judge

HONORABLE DONALD E. PELLECCHIA

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

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 92-451 CF

JACK RILEA SLINEY,

Defendant. /

SENTENCING ORDER

The trial of this Defendant began on September 27, 1993. The jury found the Defendant guilty of all three counts of the Indictment (Count I - First Degree Premeditated Murder; Count II - First Degree Felony Murder; Count III - Robbery with a Deadly Weapon) on October 1, 1993. The jury was scheduled to reconvene on Monday, October 4, 1993 for the penalty phase of the trial. However, prior to commencing, the Defendant sought to discharge his privately retained counsel. At the hearing the Court permitted the withdrawal and discharge of his trial counsel. The Court appointed the Public Defender to represent him and continued the penalty phase for thirty days in order to permit appointed counsel time to prepare.

On November 4, 1993, the same jury reconvened and evidence in support of aggravating factors and mitigating factors was heard. On the same date, the jury returned a 7 to 5 recommendation that the Defendant be sentenced to death. The Court requested memoranda from both counsel for the State and counsel for the Defendant. The memoranda were received from the State on November 29, 1993 and from counsel for the Defendant on December 1, 1993. On December 10, 1993, the Court held a further sentencing hearing where both sides made further legal argument. Counsel for the Defendant presented additional evidence in mitigation of sentence and the State presented victim-impact testimony.

Filed In Open Court 2-14-94 GL

The Court continued sentencing until after the trial of the Co-Defendant, Keith Hartley Wittemen, Jr.. The Co-Defendant Wittemen was tried before this

Court on the same charges. The jury in that case found the Co-Defendant guilty of all three counts in the Indictment (Count I - First Degree Premeditated Murder; Count II - First Degree Felony Murder; Count III - Robbery with a Deadly Weapon) on January 15, 1994. The jury in the Wittemen case reconvened on January 18, 1994 for the penalty phase. After hearing evidence in support of aggravating factors and mitigating factors, the jury returned a recommendation that a life sentence be imposed. This Court sentenced Mr. Wittemen to Life for First Degree Premeditated Murder on January 18, 1994.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition of the death penalty, finds as follows:

A) AGGRAVATING FACTORS

1. "The capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of, or attempt to commit the crime of robbery. ..."

The Defendant was charged and convicted of committing robbery. The evidence established that the Defendant and Co-Defendant, Keith Wittemen, entered Ross' Pawn Shop, the business establishment of George Blumberg and took gold jewelry and firearms from George Blumberg.

The Defendant's confession clearly established that the Defendant knocked the victim to the floor injuring him. The Defendant further elaborated that while he was attacking the victim, repeatedly stabbing him in the neck with a pair of scissors and ultimately striking the victim in the head with a hammer, inflicting the fatal wounds, Co-Defendant, Keith Wittemen, was cleaning out the victim's display cases of jewelry and firearms.

The Defendant later sold the firearms taken from the victim's pawn shop. Further, the gold jewelry taken at the robbery was recovered from the Defendant's bedroom at his residence.

The capital felony was committed while the Defendant was engaged in the commission of a robbery. This aggravating circumstance was proved beyond a reasonable doubt.

2. "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."

Clear proof was adduced at trial establishing that the Defendant's dominant or only motive for the killing of George Blumberg was to eliminate him as a witness. The Defendant confirmed in his written and taped confessions that after knocking the victim, George Blumberg, to the floor of his establishment, Ross' Pawn Shop, he turned to his Co-Defendant, Keith Wittemen, and asked what he should do? Wittemen replied: "'You've got to kill him now! We can't, you know, just leave now.' He said something about 'identifying us' or something. He goes 'we gotta kill him, we gotta do this.'" Thereafter the Defendant left the victim and found a pair of scissors with which he repeatedly used to stab George Blumberg in the neck, leaving them ultimately buried in the victim. Since the victim was still making sounds, the Defendant left him, found a hammer and returned to repeatedly strike blows to the victim's skull. The Defendant persisted in beating the victim, breaking the victim's back and fracturing several ribs. In addition, the Defendant in his own testimony during the trial confirmed that George Blumberg was familiar with the Defendant as a result of the numerous times he'd been to Ross' Pawn Shop prior to the date of this crime. This aggravating circumstance was proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute is applicable to this case and no others were considered by this Court.

B) MITIGATING FACTORS

STATUTORY MITIGATING FACTORS

1. "The Defendant has no significant history of prior criminal activity."

The evidence has established that the Defendant has no significant history of prior criminal activity. The Court has given this factor substantial weight.

2. "The Defendant acted under extreme duress or under the substantial domination of another person."

This Court allowed the Defendant to argue this circumstance to the jury but finds that neither the totality of the facts, nor any expert or non-expert testimony suggests the Defendant was under the influence of extreme duress or under the substantial domination of another person when he committed this murder. This mitigating circumstance does not exist and therefore this Court can accord the Defendant's request to consider it little weight.

3. "The age of the Defendant at the time of the crime."

At the time this murder was committed, the Defendant was 19 years old. He was an adult, not a juvenile. No evidence was presented that his emotional age was different than his actual age. He had graduated from high school, and was gainfully employed. The Defendant's youthful age at the time of the crime is a mitigating factor, but accorded little weight by this Court.

NON-STATUTORY MITIGATING FACTORS

The Defendant has asked this Court to consider several non-statutory mitigating circumstances reflecting upon the Defendant's character. As enumerated in the memorandum submitted by the Defendant, these factors are that the Defendant is or was:

1. "...polite and mild-mannered."
2. "...a good neighbor."
3. "...not a disciplinary problem in school."
4. "...a good prisoner who always listens to directions."
5. "...gainfully employed."
6. "...a caring person."

1, 2 and 6. The Court is asked to weigh testimony by the Defendant, his mother, his brother, his father and a neighbor, that the Defendant is polite and mild-mannered, a good neighbor and a caring person. Testimony was presented that the Defendant enjoyed a close relationship with members of his family and had a "normal" childhood. It should be noted that this is not an individual who came from a troubled background, or who had a disadvantaged childhood.

This Court gives little weight to this testimony. On the day of the crime, the Defendant's actions demonstrated from his initial verbal confrontation with George Blumberg to his killing, that the Defendant is not always a polite, mild-mannered, good neighbor, or caring person.

3. Testimony was presented by the Defendant's principal, and his teacher/track coach while he was in high school, that the Defendant was a popular, average student involved in a lot of school activities and was not a discipline problem. Further, upon graduation from high school, the Defendant received a scholarship award. Little weight is given this circumstance for the reasons discussed above.

4. It has been established by the evidence that the Defendant was a good prisoner, respectful, and followed directions, and was not the subject of any disciplinary referrals or reprimands while in custody awaiting trial. Good conduct in jail is a mitigating factor and a reflection upon his character. This Court has given some weight to this factor in arriving at its decision.

5. The evidence has established that at the time of the crime the Defendant was gainfully employed. Gainful employment is a mitigating circumstance. The Defendant worked at the Club Manta Ray and was half owner of the club. He was paid for his managerial interests, earning approximately $500.00 per week. The Club Manta Ray was a teen club and only non-alcoholic beverages were sold or served at the club. However, evidence established the Defendant permitted upon the premises alcoholic beverages. On the day of his arrest he was drinking alcoholic beverages at the club. The Court gives only little weight to the fact that the Defendant was gainfully employed because the Defendant has demonstrated a lack of responsibility to his employment.

At the sentencing hearing, the Defendant requested this Court consider as an additional mitigating circumstance, the fact that the Defendant confessed in this case. Voluntary confession is recognized as a mitigating circumstance. However, in this case the Defendant claims the confession of his killing of George Blumberg is involuntary. He has rejected it at trial, testifying that his Co-Defendant, Keith Hartley Wittemen, committed the murder. Therefore, the fact that he was once forthright involving his role in this case no longer can be considered as character evidence which is entitled to consideration in mitigation.

As set forth above, this Court sentenced the Co-Defendant in this case to a life sentence and recognizes that the sentence of a co-defendant to a life sentence as a lesser term can be considered by it as a non-statutory mitigating circumstance when the defendants are equally culpable

co-defendants. This Court is not presented with such a case because the Defendant's participation in the crime is significantly different than that of his Co-Defendant. They are not equally culpable therefore their sentences are different.

Having carefully considered and weighed the aggravating circumstances and mitigating circumstances in this case, this Court finds, as did the jury, that the aggravating circumstances present outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED and ADJUDGED that the Defendant, Jack Rilea Sliney, is hereby sentenced to death for the murder of the victim, George Blumberg. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for the execution of this sentence as provided by law.

May God have mercy on his soul.

DONE and ORDERED in Punta Gorda, Charlotte County, Florida this 14 day of February, 1994.

DONALD E. PELLECCHIA
Circuit Judge

Copies furnished to:

The Honorable Joseph P. D'Alessandro, State Attorney
The Honorable Douglas Midgley, Public Defender
Mr. Jack Rilea Sliney, Defendant.
Florida Department of Corrections

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

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 92-451 CF

JACK RILEA SLINEY,

Defendant. /

SENTENCING ORDER
COUNT III ROBBERY WITH A DEADLY WEAPON

This Court is departing from the sentencing guidelines in its sentence and as a basis for departure from the guidelines, the Court finds that this Defendant has committed first degree murder during the commission of the robbery. The Defendant clearly utilized more force in committing the offense of robbery than was necessary to commit the offense. The Defendant murdered an elderly man. The evidence clearly established that the Defendant attacked his victim, repeatedly stabbing him in the neck with a pair of scissors. Additionally, having failed to kill his victim with the scissors, the Defendant found a hammer, struck several blows to his victim's skull and further beat his victim, breaking the victim's back and fracturing several of his ribs. In light of these facts, the Court finds that a guideline sentence in this case would not be appropriate, and therefore sentences the Defendant to life imprisonment.

DONE and ORDERED at Punta Gorda, Charlotte County, Florida this 14th day of February, 1994.

Filed In Open Court 4:09 pm 2-14-94 J.M.Y

DONALD E. PELLECCHIA
Circuit Judge

Copies furnished to:
The Honorable Joseph P. D'Alessandro, State Attorney
The Honorable Douglas Midgley, Public Defender
Mr. Jack Rilea Sliney, Defendant.
Florida Department of Corrections

APPENDIX

D

Filing # 62862084 E-Filed 10/16/2017 11:41:00 AM

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-1074

JACK SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

RESPONSE TO ORDER TO SHOW CAUSE

MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744

CHELSEA SHIRLEY
Assistant CCRC
Florida Bar No. 112901
Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
(813)558-1600

TABLE OF CONTENTS

INTRODUCTION

The death sentence on then nineteen-year-old Jack Sliney was imposed after a 7-5 jury recommendation pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). But for the date of his crime, Mr. Sliney would be one of the many death row prisoners in Florida who have been granted new penalty phase proceedings.

The issue left at least partially unresolved in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Mr. Sliney *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in numerous collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral review cases. Mr. Sliney maintains that those cases were wrongly decided on both state and federal grounds. The *Ring*-based cutoff is unconstitutional and should not be applied to Mr. Sliney. Denying Mr. Sliney *Hurst* relief because his sentence

became final in 1998, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Sliney is entitled to *Hurst* retroactivity as a matter of federal law.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal addresses whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than limiting *Hurst* relief to only post-*Ring* death sentences. Mr. Sliney respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Mr. Sliney also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.[1]

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[1] The Florida Constitution references the right to appeal and habeas corpus in a number of provisions.

Under the Florida Constitution, Article I, Section 13, provides,

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

Under the Florida Constitution, Article I Section 21, provides,

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article V Section 3(b)(1), goes on to provide that this Court "Shall hear appeals from final judgments of trial courts imposing the death penalty . . .." Sub-Section 9 also provides that this Court, "May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge." Moreover, in the context of an appeal as a matter of right, the United States Supreme Court held in *Anders v. State of Cal.*, 386 U.S.

Depriving Appellant the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

RELEVANT PROCEDURAL HISTORY AND FACTS

Mr. Sliney's original trial counsel challenged the constitutionality of Florida's death penalty scheme prior to trial, specifically filing a motion for all findings of facts to be made by a jury. TR ROA Vol. 1, p. 13-14. Counsel also filed a "Motion to Dismiss the Indictment Re: Constitutionality of the Death Penalty." *Id.* at 34-36. Appellate counsel also raised a similar challenge. *Sliney v. State*, 699 So.2d 662,

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738,87 S. Ct. 1396 (1967) that,

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.

Anders v. State of Cal., 386 U.S. 738, 744 (1967). Denying full briefing denies Mr. Sliney the opportunity have "an active advocate" plead his case. It is also an additional violation of the right to Due Process and Equal Protection under the Florida and United States Constitution, and a violation of the right to seek habeas corpus. This Court has long held that due process requires an individual determination in a case.

671-72. (Fla. 1997).

Trial counsel was discharged after the guilt phase, and the Public Defender's Office was appointed for the penalty phase, which was set approximately 30 days later. The public defender moved for a continuance to adequately prepare for the penalty phase, and also moved for the appointment of a mitigation specialist. TR ROA Vol. 1, p. 174-177. Both motions were denied. *Id.* at 179. The penalty phase took place on November 4, 1993. Trial counsel presented the testimony of 7 witnesses. The presentation took less than one hour and takes up less than 30 pages in the transcript. *Id.* at 181-186; TR ROA Vol. 3, p. 385-414. The jury returned an advisory sentence of 7-5 after approximately one hour of deliberation. TR ROA Vol. 1, p. 185-86.

On direct appeal, in a 4-3 decision, this Court affirmed Mr. Sliney's convictions and sentences of death. *Sliney v. State*, 699 So.2d 662 (Fla. 1997). Three members of the Court found Mr. Sliney's sentence to be disproportionate, and would have reduced Mr. Sliney's sentence to life with the possibility of parole after 25 years. Mr. Sliney's co-defendant was sentenced to life. The United States Supreme Court denied certiorari on February 23, 1998. *Sliney v. Florida*, 118 S.Ct. 1079 (1998).

ARGUMENT

I. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Mr. Sliney.

As will be discussed further below, to deny Mr. Sliney retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Sliney's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law "cutoff" at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral cases. *See, e.g.*, *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Mr. Sliney the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Mr. Sliney *Hurst* retroactivity because his death sentence became final in 1998, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

A. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty.

It has long been established that the death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). This Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief.

Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring*—and thus whether this Court has held *Hurst* retroactive based on its bright-line cutoff—has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal;[2] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release;[3] whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

In one striking example, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day,

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[2] *See, e.g., Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).
[3] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Mr. Booker's death sentence would have become final after *Ring*.

October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff.[4]

Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst* should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine, which the Court has previously applied in other contexts, *see,*

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[4] Adding to the "fatal or fortuitous accidents of timing", Mr. Card's Petition for Writ of Certiorari was actually docketed 28 days before Mr. Bowles' Petition and was scheduled to go to conference first. However, for reasons unknown, Mr. Card's Petition was redistributed to a later conference, thus placing his denial within the *Ring* cut-off. Compare *Card v. Florida*, Case No. 01-9152, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm with *Bowles v. Florida*, Case No. 01-9716, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm (last visited October 3, 2017).

e.g., *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this preservation approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived."). As noted above, Mr. Sliney's trial and appellate counsel preserved *Ring*-like challenges.

B. This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process.

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without "some ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). When two classes are created to receive different treatment by a state actor like this Court, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . . ." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin*, 379 U.S. at 191. The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences.

See Lockett v. Ohio, 438 U.S. 586, 604 (1978). This Court's *Hurst* retroactivity cutoff lacks a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Mr. Sliney violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See id.* at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring), *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Instead, defendants have "a substantial and legitimate expectation that

[they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g., Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring). In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

C. Mr. Sliney's death sentence also violates the Eighth Amendment.

This Court held in *Hurst v. State* that enhanced reliability required by the Eighth Amendment in capital cases requires a jury to unanimously find all facts before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury

recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment.[5]

II. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review.

A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis.

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[5] Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001. When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Sliney's death sentence compounds the unreliability of his death recommendation. *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)("As I stated in Hitchcock, "I would conclude that the right to a unanimous jury recommendation of death announced in Hurst under the Eighth Amendment requires full retroactivity." Id. at *4. "Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." Id. at *3. The statute under which Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.).

In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, the Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or

Graham." *Miller*, 132 S. Ct. at 2471. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Appellant under the Supremacy Clause.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Sliney by this Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*.

First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure

that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).[6]

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[6]In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And, in the context of a *Welch* analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in *Welch* makes clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed by a finding of fact that at least one aggravating factor

existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. [7] This Court has an obligation to address Sliney's federal retroactivity arguments.[8]

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[7] *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").

[8] Because this Court is bound by the federal constitution, it has the obligation to address Sliney's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-42 (1816). This requires full

III. Mr. Sliney's death sentence violates *Hurst*, and the error is not "harmless."[9]

Mr. Sliney was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by the United States Supreme Court and this Court. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22.

On remand in *Hurst v. State*, this Court applied the holding of *Hurst v. Florida*, to mean that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a *unanimous* recommendation by the jury to impose the death penalty. 202 So. 3d at 53-59.

Despite trial counsel's request, Mr. Sliney's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for

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briefing and oral argument. The federal constitutional issues were raised to this Court in *Hitchcock*, but this Court ignored them. To dismiss this appeal on the basis of *Hitchcock* would be to compound that error.

[9] Although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, it should be noted that the United States Constitution precludes application of the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentence Mr. Sliney to death.

This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.").[10]

To the extent any of the aggravators applied to Mr. Sliney were based on contemporaneous convictions, this Court has consistently rejected the idea that a judge's finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., Franklin v. State,* 209 So. 3d 1241, 1248 (Fla. 2016).

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Mr. Sliney, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

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[10] This Court has declined to find harmless error in every case where the pre-*Hurst* jury's recommendation was not unanimous. *See, e.g Calloway v. State*, 210 So.2d 1160 (Fla. 2017)(7-5 jury vote); *Guzman v. State*, 214 So. 3d 625 (Fla. 2017)(7-5 jury vote); *Robards v. State*, 214 So. 3d 568 (Fla. 2017)(7-5 jury vote); and *Peterson v. State*, 221 So.3d 571 (Fla. 2017)(7-5 jury vote).

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 16th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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APPENDIX

E

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IN THE SUPREME COURT OF FLORIDA

JACK R. SLINEY
Appellant,

v.

SC17-1074

STATE OF FLORIDA
Appellee.

RESPONSE TO STATE'S REPLY TO ORDER TO SHOW CAUSE

The State asserts that Mr. Sliney is not entitled to any *Hurst*[1] relief under this Court's current precedent because his sentence became final before *Ring v. Arizona*[2]. This *Ring*-based cutoff is unconstitutional and should not be applied to Sliney. Denying Sliney *Hurst* relief because his sentence became final in 1998, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. This Court should allow full briefing and oral argument.

As Mr. Sliney asserted in his initial response, depriving him of full briefing would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015);

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

see also Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In fact, it appears that this Court's truncated procedure in cases in Mr. Sliney's posture is being held against capital defendants who have complied with this Court's limitation on the scope and substance of the Responses on the Orders to Show Cause. *See Hannon v. State*, --So. 3d. ---, 2017 WL 4944899, *13 (November 1, 2017)(Faulting Hannon for purportedly failing to raise a *Caldwell* claim, though he, like Sliney, was similarly limited in scope and substance. "The dissent asserts that Hannon raises a *Caldwell* claim in this Court. It is true that Hannon challenged his sentences under *Caldwell* in the circuit court, however, he did not raise that claim here.").

Mr. Sliney respectfully renews his requests for the opportunity to file a full, untruncated brief in this mandatory-jurisdiction appeal pursuant to the standard Florida Rules of Appellate Procedure, and for the opportunity to present oral argument pursuant to Rule 9.320. He does not waive or abandon any of his claims.

2. The State is incorrect in asserting that *Hitchcock* addressed the federal retroactivity arguments Mr. Sliney raised in this proceeding.

The State is incorrect that Mr. Sliney "makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in Hitchcock, and more recently in the death warrant litigation of Asay...and Lambrix." (Response, p. 5)(citations omitted). This Court's decision in

Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), did not explicitly address or reject *any* of the federal retroactivity arguments that Mr. Sliney raised in response to this Court's Order to Show Cause.

This Court's opinion in *Hitchcock* relied exclusively on the reasoning in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). As the State acknowledges, *Asay* rested entirely on the *state* retroactivity law articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* State's Resp. at 4 ("In Asay . . . . [t]his Court performed a retroactivity analysis under state law using the standard set forth in Witt v. State, 387 So.2d 922 (Fla. 1980)."). The exclusive reliance on state law is evident from *Asay* itself. *See* 210 So. 3d at 16 ("To apply a newly announced rule of law to a case that is already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*.").[3]

Asay did not address whether federal law required the *Hurst* decisions to be applied retroactively, and certainly did not address the federal retroactivity arguments raised in Mr. Sliney's response to the Order to Show Cause in this proceeding. Namely, *Asay* did not address whether a retroactivity "cutoff" drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious

[3] As this Court has repeatedly emphasized, *Witt* addressed retroactivity as a matter of state law, which is separate and distinct from federal retroactivity analysis. *See, e.g.*, *Falcon v. State*, 162 So. 3d 954, 955-56 (Fla. 2015).

imposition of the death penalty, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are "substantive" within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Hitchcock*, in relying totally on *Asay*, also did not explicitly address or reject Mr. Sliney's federal retroactivity arguments. *See Hitchcock*, 2017 WL 3431500, at *1 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *id.* at *2 ("Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.").

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, numerous *Hurst* defendants raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* had not resolved those matters in its exclusively-state-law analysis, and imploring the courts to explicitly address federal law. Those defendants, appellants, and petitioners, as Sliney has here, advanced federal retroactivity arguments under the Eighth and Fourteenth Amendments, as well as the Supremacy Clause and *Montgomery*. If this Court had intended to put those federal arguments to rest in *Hitchcock*, it could have done so. But any fair reading of *Hitchcock* leads to the conclusion that those issues remain unresolved in light of the Court's wholesale reliance on *Asay*. Indeed, *Hitchcock*

does not even mention the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor does *Hitchcock* cite *Montgomery*, or otherwise explain why the Supremacy Clause does not require the substantive rules announced in the *Hurst* decisions to be retroactively applied by state courts. The State's Response to the Order to Show Cause here does not contend otherwise.

To the extent the State suggests that Mr. Sliney's federal arguments have been addressed in other cases, those decisions are not applicable here. The Eleventh Circuit's decision in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), is not precedential in this Court and was decided in the context of the current federal habeas statute, which dramatically restricts federal review of state-court decisions. This Court's application of federal constitutional protections, on the other hand, is not circumscribed.

More importantly, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not squarely address the retroactivity of the constitutional rules arising from the *Hurst* decisions. Similar idiosyncratic presentations also render inapplicable to Mr. Sliney this Court's recent active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), and *Lambrix v. State*, No. SC17-1687, 2017 WL 4320637 (Fla. Sep. 29, 2017).

3. The State's cursory arguments in opposition that *Hurst* should not be applied retroactively to Sliney under federal law are not persuasive.

The State asserts that *Hurst* is not retroactive under federal law and states that Mr. Sliney's reliance on *Montgomery* is misplaced. (Response, p. 10). However, the State fails to address Mr. Sliney's argument that in *Montgomery*, the United States Supreme Court held that because *Miller v. Alabama*, 567 U.S. 460 (2012), "determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him." 136 S. Ct. at 734 (internal citations omitted).

Additionally, "*Miller*, it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile

offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Id.*

Likewise, *Hurst* determined that a defendant sentenced to death without a jury unanimously finding all statutorily necessary facts is an unconstitutional penalty. Like *Miller*, *Hurst* did not bar capital punishment for all defendants, but it did bar the sentence for all but the rarest of defendants. *Hurst* drew a line between those defendants whose murders do not rise to the most aggravated and least mitigated, and those whose capital offenses do. And, "the fact that the [death penalty] could still be a proportionate sentence for the latter kind of offender does not mean that all other [capital defendants] imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Montgomery*, 136 S. Ct. at 734.

Lastly, and importantly for purposes of *Hurst* retroactivity analysis, the U.S. Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. One cannot conflate "a procedural requirement necessary to implement a substantive guarantee with a rule that

regulates only the manner of determining the defendant's culpability." *Id.* at 734-35. Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

4. Mr. Sliney's non-unanimous death sentence violates the Eighth Amendment.

The State fails to adequately address Mr. Sliney's claim that his bare majority 7-5 recommendation violates the Eighth Amendment. This Court held in *Hurst v. State* that enhanced reliability required by the Eighth Amendment in capital cases requires a jury to unanimously find all facts before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment.

Drawing a line at June 24, 2002, is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001. When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced

individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Sliney's death sentence compounds the unreliability of his death recommendation. *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)("As I stated in Hitchcock, "I would conclude that the right to a unanimous jury recommendation of death announced in Hurst under the Eighth Amendment requires full retroactivity." Id. at *4. "Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." Id. at *3. The statute under which Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.).

5. The State abandons any harmless error arguments.

The State abandons any argument that the *Hurst* error in Mr. Sliney's case was harmless by failing to even reference harmless error in its Response. *See Hoskins*, 75 So. 3d at 257 ("An issue not raised in an initial brief is deemed abandoned")(citing *Hall*, 823 So.2d at 763 (Fla. 2002)). As Mr. Sliney argued in his initial filing, the *Hurst* error is not harmless under this Court's precedent in light of the advisory jury's non-unanimous recommendation. *Dubose v. State*, 210 So.3d

641, 657 (Fla. 2017)("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.").

CONCLUSION

This Court should hold that state and federal law requires the *Hurst* decisions to be applied retroactively to Sliney, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 6th day of November, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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APPENDIX

F

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of First Degree Premeditated Murder and First Degree Felony Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

READ INSERT ATTACHED

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

2. The crime for which the defendant is to be

sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:

1. JACK RILEA SLINEY has no significant history of prior criminal activity;

2. The defendant acted under extreme duress or under the substantial domination of another person;

3. The age of the defendant at the time of the crime;

4. Any other aspect of the defendant's character or record, and any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that JACK RILEA SLINEY should be sentenced to death, your advisory sentence will be:

> A majority of the jury, by a vote of _____, advise and recommend to the court that it impose the death penalty upon JACK RILEA SLINEY.

On the other hand, if by six or more votes the jury determines that JACK RILEA SLINEY should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon JACK RILEA SLINEY without possibility of parole for 25 years.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the court.

Jury\921.141

EXHIBIT

"Your advisory sentence as to what sentence should be imposed on this defendant is entitled by law and will be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend."

APPENDIX

G

7.11 FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

This instruction should be given after the closing arguments in the penalty phase of a death penalty trial. The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.

In making your decision, you must first unanimously determine whether the aggravating factor[s] alleged by the State [has] [have] been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.

Aggravating factors. § 921.141(6), Fla. Stat.
The aggravating factor[s] alleged by the State [is] [are]:

Give only those aggravating factors noticed by the State which are supported by the evidence.

1. (Defendant) **was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**

2. (Defendant) **was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

Give 2a or 2b as applicable.

a. The crime of (previous crime) **is a capital felony.**

b. The crime of (previous crime) **is a felony involving the [use] [threat] of violence to another person.**

3. (Defendant) **knowingly created a great risk of death to many persons.**

4. The First Degree Murder was committed while (defendant) **was [engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]**

any

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

[robbery].
[sexual battery].
[aggravated child abuse].
[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].
[arson].
[burglary].

[kidnapping].
[aircraft piracy].
[unlawful throwing, placing or discharging of a destructive device or bomb].

5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The First Degree Murder was committed for financial gain.

7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

8. The First Degree Murder was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold,

calculated, or premeditated nature of the murder.

10. (Decedent) **was a law enforcement officer engaged in the performance of [his] [her] official duties.**

11. (Decedent) **was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to** (decedent's) **official capacity.**

12. (Decedent) **was a person less than 12 years of age.**

13. (Decedent) **was particularly vulnerable due to advanced age or disability, or because** (defendant) **stood in a position of familial or custodial authority over** (decedent).

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The First Degree Murder was committed by a criminal street gang member.

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],
[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],
[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating circumstance. Castro v. State, 597 So. 2d 259 (Fla. 1992).

Pursuant to Florida law, the aggravating factors of *(insert aggravating factor)***and** *(insert aggravating factor)* **are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of** *(insert aggravating factor)* **and**

(insert aggravating factor) **have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.**

Victim-impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.

You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent). **This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by** (decedent's) **death. However, you may not consider this evidence as an aggravating factor.**

Give in all cases.

As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond a reasonable doubt and you must not consider it in providing a verdict.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that [the] [each] presented aggravating factor exists. You will be provided a form to make this finding [as to each alleged aggravating factor] and you should indicate whether or not you find [the] [each] aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.

If, however, you unanimously find that [one or more] [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Mitigating circumstances. § 921.141(7), Fla. Stat.

If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance is anything that supports a sentence of life imprisonment without the possibility of parole, and can be anything which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.

It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.

Among the mitigating circumstances you may consider are:
Give only those mitigating circumstances for which evidence has been presented.

1. (Defendant) **has no significant history of prior criminal activity.**

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) **is not an aggravating factor to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

2. The First Degree Murder was committed while (defendant) **was under the influence of extreme mental or emotional disturbance.**

3. (Decedent) **was a participant in** (defendant's) **conduct or consented to the act.**

4. (Defendant) **was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.**

5. (Defendant) **acted under extreme duress or under the substantial domination of another person.**

6. The capacity of (defendant) **to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**

7. (Defendant's) **age at the time of the crime.**

The judge should also instruct on any additional mitigating circumstances as requested.

8. The existence of any other factors in (defendant's) **character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings.

The next step in the process is for each of you to determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different

weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.

You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.

The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict.

Weighing the evidence.

When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. **Did the witness seem to have an opportunity to see and know the things about which the witness testified?**

2. **Did the witness seem to have an accurate memory?**

3. **Was the witness honest and straightforward in answering the attorneys' questions?**

4. **Did the witness have some interest in how the case should be decided?**

5. **Did the witness's testimony agree with the other testimony and other evidence in the case?**

Give as applicable.

6. **Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?**

7. **Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?**

8. **Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?**

9. **Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?**

10. **Does the witness have a general reputation for [dishonesty] [truthfulness]?**

Law enforcement witness.

The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.

Expert witnesses.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Accomplices and Informants.

You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [her] testimony with more caution than the testimony of other witnesses.

Child witness.

You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

Give only if the defendant testified.

The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.

Witness talked to lawyer.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.

Give in all cases.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Give only if the defendant did not testify.

The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by [his] [her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.

Rules for deliberation.

These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.

2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence,] and these instructions.

3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.

Give #5 if applicable.

5. The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the Court, and must not hold that against either party.

6. Your decisions should not be influenced by feelings of prejudice or racial or ethnic bias. Your decisions must be based on the evidence and the law contained in these instructions.

Submitting case to jurors.

In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. When you have reached decisions in conformity with these instructions, the appropriate form[s] should be signed and dated by your foreperson.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.

Give if judge has allowed jurors to keep their electronic devices during the penalty phase.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the [court deputy] [bailiff] while you deliberate.

Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].

Give if applicable.

During this trial, [an item] [items] [was] [were] received into evidence as [an] exhibit[s]. You may examine whatever exhibit[s] you think will help you in your deliberations.

Give a or b as appropriate.

a. The[se] exhibit[s] will be sent into the jury room with you when you begin to deliberate.

b. If you wish to see an[y] exhibit[s], please request that in writing.

I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

Comment

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2018.

7.12 DIALOGUE FOR POLLING THE JURY (DEATH PENALTY CASE)

Members of the jury, we are going to ask each of you individually about the verdict[s] that you have just heard. The question[s] pertain to whether the verdict[s], as read by the clerk, [was] [were] correctly stated.

The following question is to be asked of each juror if the verdict is for the death penalty:
Do you, [*(name of juror)***] [juror number** *(number of juror)***], agree that each of the findings in the verdict form is yours?**

The following question is to be asked of each juror if the verdict is for a life sentence:
Do you, [*(name of juror)***] [juror number** *(number of juror)***], agree that at least one member of the jury voted for a sentence of life imprisonment without the possibility of parole?**

Comment

This instruction was adopted in 1981 and was amended in 1997, 2017 [214 So. 3d 1236], and 2018.

APPENDIX

H

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

vs.

CASE NO. 92-451-CF-A-DEP

JACK RILEA SLINEY,

Defendant.

PENALTY PROCEEDINGS - ADVISORY VERDICT

WE, THE JURY, FIND AS FOLLOWS, AS TO THE DEFENDANT JACK RILEA SLINEY (complete one paragraph only):

[X] A majority of the jury, by a vote of 7 to 5, advise and recommend to the Court that it impose the death penalty upon JACK RILEA SLINEY.

[ ] The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon JACK RILEA SLINEY without possibility of parole for 25 years.

SO SAY WE ALL, DATED THIS 4 DAY OF NOVEMBER, 1993.

Paul Tincher
FOREPERSON

APPENDIX

I

INMATE REQUEST

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

Mail Number: P-1-2-09
Team Number: #6
Institution: U.C.I.

TO: (Check One) ☐ Warden ☐ Asst. Warden ☑ Classification ☐ Security ☐ Medical ☐ Mental Health ☐ Dental ☐ Other To: Mrs. Mahoney

P1-209

FROM:	Inmate Name	DC Number	Quarters	Job Assignment	Date
	Jack Sliney	#905288	P-1-2-09	—	6/23/16

REQUEST

Check here if this is an informal grievance ☐

Mrs. Mahoney,
I am currently involved in proceedings, with the Federal District Court. Can you please check the "Corrections Data Center", & let me know the exact date that my attorney (Mr. Thomas H. Ostrander) came to see me last, so I may inform the Court? He abandoned me many years ago, so - I'd appreciate your help & concern in this matter, immensely. Thank You.

Respectfully Submitted,
Jack Sliney
Jack Sliney

All requests will be handled in one of the following ways: 1) Written Information or 2) Personal Interview. All informal grievances will be responded to in writing.

Inmate (Signature): Jack Sliney DC#: #905288

DO NOT WRITE BELOW THIS LINE

RECEIVED
JUN 24 2016
UNION C.I.
CLASSIFICATION

RESPONSE

DATE RECEIVED:

Finally, after searching your records I located a document when he came to interview you on Thursday, January 10, 2002.

[The following pertains to informal grievances only:
Based on the above information, your grievance is _____. (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]

Official (Print Name): M. Mahoney Sr. Classification Officer | Official (Signature): M. Mahoney | Date: 7-1-16

Original: Inmate (plus one copy)
CC: Retained by official responding or if the response is to an informal grievance then forward to be placed in inmate's file
This form is also used to file informal grievances in accordance with Rule 33-103.005, Florida Administrative Code.

Informal Grievances and Inmate Requests will be responded to within 10 days, following receipt by staff.
You may obtain further administrative review of your complaint by obtaining form DC1-303, Request for Administrative Remedy or Appeal, completing the form as required by Rule 33-103.006, F.A.C., attaching a copy of your informal grievance and response, and forwarding your complaint to the warden or assistant warden no later than 15 days after the grievance is responded to. If the 15th day falls on a weekend or holiday, the due date shall be the next regular work day.

DC6-236 (Effective 12/14)

Incorporated by Reference in Rule 33-103.005, F.A.C.