IN THE SUPREME COURT OF FLORIDA

JACK R. SLINEY,

Appellant,

v. **CASE NO. SC22-700**
L.T. No. 1992-CF-000451
STATE OF FLORIDA, **DEATH PENALTY CASE**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIEH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record on direct appeal will be designated as "R" followed by the volume and page numbers. The successive post-conviction record on appeal here, will be designated as "SPR" followed by the appropriate page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal of the denial of post-conviction relief. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Procedural History

The Charlotte County Grand Jury indicted Appellant, Jack Rilea Sliney, and co-defendant, Keith Wittemen, Jr., on September 3, 1992, each for one count of first-degree premeditated murder, one count of first-degree felony murder and one count of robbery with a deadly weapon. (R1/4-5). The cause proceeded to jury trial before Judge Pellecchia on September 27-October 1, 1993. (R4-R12). Sliney was found guilty as charged.

During the penalty phase which was held on October 4 and December 10, 1993, defense counsel presented the testimony of a number of family members, teachers, and friends of Sliney. (R12; R13). Judge Pellecchia ordered a presentence investigation and scheduled sentencing for February 10, 1994. At Sliney's sentencing, the trial judge followed the jury's seven to five death recommendation and also imposed an upward departure sentence of life on the robbery count. (R2/221-228; 235-240; R3/462-480).

As aggravation in Sliney's case, the trial court found that: 1) the murder was committed while Sliney was engaged in or was an accomplice in the commission of a robbery; and 2) the murder was committed for the

purpose of avoiding or preventing a lawful arrest. In mitigation, the trial court found the statutory factors of: 1) no significant prior criminal history (substantial weight); 2) youthful age (little weight). As to non-statutory mitigators, the trial court found: 1) good prisoner (some weight); 2) politeness (little weight); 3) good neighbor (little weight); 4) caring person (little weight); 5) good school record (little weight); and 6) gainful employment (little weight). (R2/221-227; R3/462-480).

Further, the trial court rejected Sliney's request to consider his confession as a mitigating factor because Sliney had claimed that the confession was involuntary. And, finally, the trial court found that co-defendant Wittemen's life sentence for the same offenses was not a mitigating factor in Sliney's case because the two defendants were not equally culpable. (R2/221-227).

The Florida Supreme Court affirmed Sliney's convictions and sentences on direct appeal. Sliney v. State, 699 So. 2d 662 (Fla. 1997). The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on February 23, 1998. Sliney v. Florida, 522 U.S. 1129 (1998); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and

sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

Sliney filed his single consolidated Amended Motion to Vacate Judgments of Conviction and Sentence on June 19, 2001, wherein he asserted six claims for relief. Following amendment to that motion and an evidentiary hearing, circuit court judge Donald E. Pellecchia entered an Order Denying Defendant's Amended Motion to Vacate Judgment of Conviction and Sentence on December 14, 2004. (C6, 933-960) The circuit court's order denying Sliney post-conviction relief was affirmed on appeal to the Florida Supreme Court. Sliney v. State, 944 So. 2d 270 (Fla. 2006). Sliney unsuccessfully sought federal habeas relief. Sliney v. Sec'y, Dep't of Corr., 2010 WL 3768373 (M.D. Fla. Sept. 24, 2010). The Eleventh Circuit Court of Appeals denied Sliney's Application for a Certificate of Appealability on December 21, 2010. Sliney v. Sec'y, Dep't of Corr., No. 10-14965-P (11th Cir. Dec. 21, 2010).

After the Supreme Court issued its opinion in Hurst v. Florida[1], Sliney filed a successive motion for post-conviction relief seeking to vacate his

[1] Hurst v. Florida, 136 S. Ct. 616 (2016).

death sentence. The circuit court denied his motion and this Court affirmed on appeal. Sliney v. State, 235 So. 3d 310 (Fla. 2018).

Sliney filed his second successive motion that is the subject of this appeal on January 14, 2022. Following the State's response and a case management hearing, the trial court summarily denied the motion on March 24, 2022.[2] (SPR 132-139).

Sliney first claimed that the Eighth Amendment bars his execution because he was 19 at the time of the murder and cited newly discovered evidence in the form of the AAIDD Manual[3] in support. The court found this claim untimely, procedurally barred and meritless. The court concluded:

> 8. As the State argued, the motion is untimely, and procedurally barred. Further, the change to the manual, even supported by the expert reports attached to the motion, would not constitute newly discovered evidence. The Court is bound by the decisions of the U.S. Supreme Court and the Florida

[2] Sliney includes an appendix to his brief which is largely irrelevant and inappropriate for this appeal and references that extraneous material in his brief. For example, Sliney references his now deceased post-conviction counsel's unrelated bar misconduct. (Amended Initial Brief at 7-8). Rather than move to strike that portion of the brief and appendix, the State will simply respond to the legal arguments presented and trust that this Court will disregard such extraneous material. The State notes that Sliney has been represented by CCRC since August 26, 2016, therefore his prior attorney's representation provides no grounds, legal or factual, for the untimeliness of this claim.

[3] American Association on Intellectual and Developmental Disabilities.

> Supreme Court rejecting this type of claim. The change to the manual is not specific to Defendant. While the expert reports attached to the motion are specific to Defendant's background, the motion was not filed within one year of those reports, and the reports merely provide greater detail to mitigating factors already presented during the penalty phase. Therefore, Claim I is DENIED.

As to Claim II, challenging the proportionality of Sliney's death sentence, the court concluded:

> The Florida Supreme Court held that courts are prohibited from conducting a proportionality review. *Lawrence v. State*, 308 So.3d 544 (Fla. 2020). Further, the death penalty has not been abolished in Florida, and remains in effect. This Court is bound by the decisions of the U.S. Supreme Court and Florida Supreme Court that a capital defendant who is 18 years old or older is subject to the death penalty, regardless of any decisions made by other states and regardless of any alleged "national consensus." Therefore, Claim II is DENIED.

(SPR 137-138).

This appeal follows.

Facts of the Blumberg Murder

In upholding the convictions and death sentences, the Florida Supreme Court set forth the following factual summary:

> 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 Miranda [FN1] 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.

[FN1] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

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, [FN2] Sliney and Witteman disposed of several incriminating items and transferred the jewelry they obtained from the shop, as well as a .41 caliber revolver, [FN3] 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.

> [FN2] Both Sliney and Witteman lived with Sliney's parents.
>
> [FN3] This gun was not listed on the firearm register found in the Blumbergs' shop.

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, "We 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 v. State, 699 So. 2d 662, 664-66 (Fla. 1997).

SUMMARY OF THE ARGUMENT

ISSUE I—Sliney's claim that the Eight Amendment bars his execution because he was only 19 at the time of his crime was properly denied without a hearing below. This claim is untimely, procedurally barred and lacks merit as a matter of well established law.

ISSUE II—Sliney's attempt to revisit the proportionality of his death sentence was procedurally barred and patently without merit. Accordingly, it was properly denied without a hearing below.

ARGUMENT

ISSUE I

SLINEY'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF WAS PROPERLY DENIED WITHOUT A HEARING BEAUSE IT WAS UNTIMELY, PROCEDURALLY BARRED, AND WITHOUT MERIT AS A MATTER OF ESTABLISHED LAW

Sliney claims that brain mapping studies and the AAIDD Manual, published on January 15, 2021, citing those studies in the context of assessing Intellectual Disability, constitute newly discovered evidence that warrants vacating his death sentence.[4] He contends that the court erred by denying his claim without holding a hearing. The State disagrees. This claim is untimely, procedurally barred, and foreclosed by binding precedent. Accordingly, the lower court did not err in finding that the claims involved "legal argument" and did not require a hearing. (SPR 136).

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the summary denial of a successive motion for post-conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Williamson v.

[4] The State is attempting to respond to the legal argument made in the initial brief and offers no rebuttal to the curious recitation of Peter Pan in Appellant's introduction. (Appellant's Initial Brief at xiv).

State, 961 So. 2d 229, 234 (Fla. 2007). Post-conviction claims may be summarily denied when they are facially or legally insufficient, procedurally barred, or refuted by the record. Connor v. State, 979 So. 2d 852, 868 (Fla. 2007). The standard of review on appeal for summary denial of a post-conviction motion is *de novo*. Boyd v. State, 324 So. 3d 908, 913 (Fla. 2021) (citing Tompkins v. State, 994 So. 2d 1072, 1081 (Fla. 2008)).

A. The Claim is Untimely and Procedurally Barred

i) The Motion Is Time Barred

The lower court properly found this claim time barred. This successive post-conviction claim has been filed well beyond the one-year time limit for filing such motions under Florida Rule of Criminal Procedure 3.851(d)(2). Since this was a successive motion, Sliney had to show that he exercised due diligence in bringing his claim. As noted by this Court in Hunter v. State, 29 So. 3d 256, 267 (Fla. 2008):

> Rule 3.851 requires motions filed beyond the time limitations to specifically allege that the facts on which the claim is predicated were unknown or could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.851(d)(2)(A). Furthermore, the rule requires successive motions to articulate the reasons why a claim was not raised previously and why the evidence used in support of the claim was not previously available. Fla. R. Crim. P. 3.851(e)(2)(B), (e)(2)(C)(iv).

"To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within **one year** of the date upon which the claim became discoverable through due diligence." Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008) (emphasis added), as revised on denial of reh'g. (Dec. 18, 2008) (citations omitted).

Sliney asserted that he could not have pursued his claim earlier because the information did not exist until the AAIDD released its report extending the age of onset for Intellectual Disability from eighteen to twenty two years old. (SPR 10). However, that report, addressing the diagnosis of Intellectual Disability, has no application to this case where Sliney has an average IQ and is not asserting intellectual disability bars his death sentence. Moreover, the brain studies allegedly underlying this change in the AAIDD Manual are not new and do not qualify as newly discovered evidence. To the contrary, studies and reports and **cases** discussing maturity, age and extension of Roper v. Simmons, 543 U.S. 551 (2005) have been well known in the public domain **years** prior to the 2021 AAIDD Manual upon which Sliney now relies.[5] Indeed, even Sliney's expert report

[5] See Sara B. Johnson, Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. Adolescent Health 216 (September 1, 2009), available at

establishes the complete lack of diligence in bringing this claim. The December 1, 2009 report from James T. O'Donnel, Pharm D., is more than one year prior to the filing of Sliney's successive motion. (SPR 82).

In Morton v. State, 995 So. 2d 233, 245–46 (Fla. 2008), this Court rejected a similar claim for a nineteen year old defendant based upon so-called brain mapping studies:

> Morton also asserts that the trial court erred in denying his claim that newly discovered evidence from a 2004 brain mapping study, which establishes that sections of the human brain are not fully developed until age twenty-five, warrants a reweighing of his age as a mitigating factor. We have previously rejected recognizing "new research studies" as newly discovered evidence if based on previously available data. *See Schwab*, 969 So.2d at 325 (citing *Diaz v. State*, 945 So.2d 1136, 1144 (Fla.2006) (concluding doctor's letter addressing lethal injection research was not newly discovered evidence because conclusions in letter were based on old data)). **Although this 2004 brain mapping study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time that stated that the human brain was not fully developed until early adulthood.** *See* Jay D. Aronson, Brain Imaging, Culpability and the Juvenile Death Penalty, 13 Psychol. Pub. Pol'y & L. 115, 120 (2007) ("In the past few *246 decades ... neuroscientists have discovered that two key developmental processes, myelination ... and pruning of neural connections, continue to take place during adolescence and

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http://www.ncbi.nlm.nih.gov/pmc/articles/pmc2892678/ (noting the difficulty in establishing causal relationships from brain scan studies and observing that subjectivity exists in interpreting and conducting such studies).

> well into adulthood.... [B]rain regions responsible for basic life processes and sensory perception tend to mature fastest, whereas the regions responsible for behavioral inhibition and control, risk assessment, decision making, and emotion maturing take longer (Yakovlev & Lecours, 1967).”). Therefore, the 2004 study would not constitute newly discovered evidence and the trial court correctly denied this claim without an evidentiary hearing.

(emphasis added).

Sliney asserts that Morton is distinguishable because this Court’s opinion was only addressing Morton’s challenge to the method of execution, lethal injection. (Appellant’s Brief at 28). However, this assertion cannot survive even a cursory reading of this Court’s opinion in Morton. The above cited passage clearly cites a brain mapping study in the context of reassessing the appropriateness of Morton’s punishment due to his age under the Eighth Amendment. Consequently, this Court soundly rejected the notion that brain mapping studies of the type Sliney relies upon here to argue that the Eighth Amendment prohibits execution of an individual over the age of 18 constitutes newly discovered evidence---and did so in 2008. Sliney has fallen far short of establishing any diligence in bringing this claim, much less the due diligence that Rule 3.851 requires. This claim is clearly untimely. See Dillbeck v. State, 304 So. 3d 286, 288 (Fla. 2020) (rejecting newly discovered evidence claim as untimely which was based

upon retention of a new defense expert citing a revision in the Diagnostic and Statistic Manual of Mental Disorders and administration of a quantitative electroencephalogram to the defendant), cert. denied sub nom. Dillbeck v. Florida, 141 S. Ct. 2733 (2021). Since no exception to the time limits of Rule 3.851 apply in this case, the circuit court properly denied the motion without a hearing. See Rogers v. State, 327 So. 3d 784, 787 (Fla. 2021) (holding that a motion can be "summarily denied if a timeliness exception does not apply") (citing Fla. R. Crim. P. 3.851(d)(2) (footnote omitted).

ii) Procedural bar

The circuit court also properly found this claim procedurally barred. Sliney's age at the time he chose to murder the victim in this case was found as a mitigator by the trial court. (SPR 127). Sliney did not challenge this finding either on direct appeal or in his previously filed motions for post-conviction relief. In Branch v. State, 236 So. 3d 981, 986 (Fla. 2018), under similar circumstances, this Court found a claim for the expansion of Roper to bar the execution of a nineteen year old defendant procedurally barred from review in a successive motion for post-conviction relief. See also Carroll v. State, 114 So. 3d 883, 886 (Fla. 2013) ("Thus, Carroll's claim,

even if proper under 3.851(d)(2)(B) seeking extension of Atkins and Roper, is procedurally barred because it could have been or was raised on appeal or in other postconviction motions.") (citing Simmons v. State, 105 So. 3d 475, 511 (Fla. 2012)). Sliney did not need to wait for the AAIDD Manual to make a claim that the Eighth Amendment bars his execution because of his age at the time of the crime. This claim should have been raised, if at all, on direct appeal or in his timely filed motion for post-conviction relief.

B. The Claim is Foreclosed by Binding Precedent

While Sliney asserts that the Eighth Amendment bars his execution because he was only 19 at the time he committed the murder, this is not the view of either the Supreme Court or this Court. This claim is foreclosed by binding precedent and was properly denied without a hearing.

As this Court noted in Branch, research studies on the brain's development are not "new," as the United States Supreme Court was well aware of this information at the time of the Roper decision. Whatever studies were available then, and, a number were clearly available to the Court (contrary to appellant's argument), the Court was aware that a line needed to be drawn somewhere and was aware it would face criticism for doing so. Nevertheless, the United States Supreme Court drew a bright-line

at the age of eighteen for death eligibility. Branch, 236 So. 3d at 985 (quoting Roper, 543 U.S. at 574). The Roper Court was well aware of the research studies indicating that maturity levels differ between juveniles and young adults and discussed the research supporting the three areas of differences between juveniles and adults. Juveniles have a lack of maturity and underdeveloped sense of responsibility, are more easily influenced by peer pressure and negative influences, and their character is not as well formed as adults. Roper, 543 U.S. at 568-71. Regardless, the Roper Court found that a categorical line had to be drawn and, for Eighth Amendment purposes, the Court drew the line at individuals under the age of eighteen.[6] Id. at 571, 574.

In Branch, this Court further noted that the United States Supreme Court had not altered its Eighth Amendment jurisprudence in this regard

[6] Appellant's labeling of the age group 18 to 22 as "late" adolescence (Appellant's Brief at 25) is curious and also irrelevant. Neither statutory nor case law recognizes such a distinction. Perhaps Appellant would argue for the juvenile justice system to extend its jurisdiction to the age of 22 in this State. That of course, would be a matter for the legislature, and such a proposal would be subject to the open debate of the democratic process. It is not a matter for the courts to decide. C.f Roper v. Simmons, 543 U.S. 551, 574 (2005) ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").

even after Roper, and still identifies eighteen as the critical age for purposes of Eighth Amendment jurisprudence. Branch, 236 So. 3d at 987 (citing Miller v. Alabama, 567 U.S. 460, 465 (2012)) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of eighteen); Graham v. Florida, 560 U.S. 48, 74–75 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of eighteen). Here, Sliney's more recent AAIDD Manual and its reliance on similar research studies does not alter the rationale underlying Roper and subsequent cases. As such, this claim lacks merit as the Eighth Amendment does not prohibit a death sentence for a defendant, like Sliney, who was nineteen at the time of the murder.[7]

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[7]Aside from the binding precedent foreclosing this claim, Sliney would present a poor case for extending Roper. In only providing little weight to Sliney's age as a mitigator, the trial court stated:

> 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.

(SPR 127).

Moreover, the sentencing order reflects that Sliney's "gainful" employment was that of half manager/owner of a teen club and he was earning approximately $500 per week. (SPR 129).

Since Branch, this Court has consistently rejected appeals to expand Roper to defendants over the age of eighteen. Deviney v. State, 322 So. 3d 563, 573 (Fla. 2021) ("This Court has repeatedly rejected defendants' *Roper* claims where the defendant was not under the age of eighteen at the time of his or her capital offense."), cert. denied sub nom. Deviney v. Florida, No. 21-6429, 2022 WL 199494 (U.S. Jan. 24, 2022) (citations omitted); Foster v. State, 258 So. 3d 1248, 1254 (Fla. 2018) (declining to extend Roper). Nor does Sliney offer any compelling reasons for this Court to depart from this settled precedent. Indeed, even had Sliney offered a compelling or persuasive argument for revisiting this settled precedent, the conformity clause would preclude this Court from doing so.[8] Correll v. State, 184 So. 3d 478, 489 (Fla. 2015); (Observing that "[t]he prohibition against cruel or unusual punishment shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.") (citing art. I, § 17, Fla.

[8] Florida defendants have fared no better in federal court in their attempts to extend Roper beyond the bright line set by the Supreme Court. See e.g. Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239, 1258–59 (11th Cir. 2015); Kearse v. Fla. Sec'y, Dep't of Corr., No. 15-15228, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (unpublished).

Const.).[9] Accordingly, this Court should affirm the denial of Sliney's successive post-conviction motion.

ISSUE II

SLINEY'S PROPORTIONALITY CLAIM WAS PROCEDURALLY BARRED, UNTIMELY AND WITHOUT MERIT

Sliney argues that he should have received a new proportionality review based upon his age of 19 at the time he chose to brutally murder the victim for financial gain. However, he fails to explain the procedural mechanism for such proportionality review in a successive post-conviction motion, where his direct appeal sentence was reviewed for proportionality some twenty five years ago. This claim is procedurally barred from review in this successive motion for post-conviction relief. See Schoenwetter v. State, 46 So. 3d 535, 561–62 (Fla. 2010) (Finding defendant's claim "that this Court should reweigh the aggravating and mitigating circumstances

[9] Sliney misapprehends the application and effect of the conformity clause in the Florida Constitution. (Appellant's Brief at 51). This clause does not override the Eighth Amendment of the United States Constitution as he suggests; but it does restrict this Court from interpreting the Eighth Amendment in a manner inconsistent with that of the Supreme Court.

surrounding his death sentence in light of the United States Supreme Court's decision in *Roper* []" procedurally barred)[10].

Furthermore, as cited by the circuit court below, even on direct appeal this Court does not assess comparative proportionality. Lawrence v. State, 308 So. 3d 544, 550 (Fla. 2020), cert. denied sub nom. Lawrence v. Florida, 142 S. Ct. 188 (2021) (Post-conformity clause, we have wrongly continued to enforce a state-law requirement for comparative proportionality review and have wrongly written this requirement into our procedural rules governing the scope of our appellate review.") (citation omitted).

Regardless, Sliney appears to suggest a right to some free standing proportionality review in this Court untethered to any precedent or statutory authority for this Court to do so. This Court has enforced the procedural bar

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[10] This Court also observed that the claim was without merit, explaining:

> Additionally, even if this claim were not barred for procedural reasons, appellant would not be entitled to relief on the merits under either *Roper* or *Atkins*. As explained above, *Roper* only prohibits the execution of defendants whose chronological age was below eighteen at the time of their capital offense. *See Reese*, 14 So.3d at 920. Because appellant was eighteen years and nine months of age at the time of his offense, Roper does not render his death sentence unconstitutional.

Schoenwetter, 46 So. 3d at 562.

for attempts to reraise proportionality in light of post-conviction evidence.[11] See Covington v. State, No. SC21-1077, 2022 WL 3651594, at *18 (Fla. Aug. 25, 2022) (finding a post-conviction claim to a new proportionality review based upon post-conviction evidence procedurally barred). Accordingly, this claim was properly denied below.

[11] Sliney's cryptic attempt to raise comparative culpability from his minor co-defendant (Appellant's Brief at 46), is not properly before this Court, and, is also untimely and procedurally barred. See Hannon v. State, 228 So. 3d 505, 510 (Fla. 2017) (finding procedural bar applied to defendant's attempt to revisit comparative culpability in a successive motion for post-conviction relief).

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of September, 2022, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Heather A. Forget and Julissa R. Fontán, Assistants Capital Collateral Counsel – Middle, Capital Collateral Counsel – Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **forget@ccmr.state.fl.us**, **fontan@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, and the word count is 4,837 words in compliance with Fla. R. App. P. 9.045.

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