IN THE SUPREME COURT OF FLORIDA

JACK RILEA SLINEY,

Appellant,

v. **CASE No. SC05-13**
Lower Tribunal No. 92-451 CF

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References in this brief are as follows:

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STATEMENT OF THE CASE AND FACTS

I. TRIAL

A. Trial Facts

On direct appeal, this Court affirmed appellant's convictions, setting forth the following summary of facts:

> 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 [n1] 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.

> [n1] 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, [n2] Sliney and Witteman disposed of several incriminating items and transferred the jewelry they obtained from the shop, as well as a .41 caliber revolver, [n3] 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, "We can't just leave now. Somebody will find out or something. We got to kill him." (notes omitted).

Sliney v. State, 699 So. 2d 662 (Fla. 1997). The jury convicted appellant of first degree murder.

B. Penalty Phase

Prior to the penalty phase, Sliney discharged his privately retained attorney, Shirley. The Court granted a one month delay in the penalty phase and reappointed the initial assistant public defender assigned to the case, Mark Cooper. During the penalty phase, defense counsel presented the testimony of a number of family members, teachers, and friends of Sliney.

Jessie Burgess was called by the defense and testified that he lived across the street from Appellant and had known him for about 13 years. (R 386) He characterized Appellant as "well—mannered," and a "good neighbor," with whom he had never had any problems. (R 387) Burgess had only seen Appellant at home, and had not had any opportunity to observe him out in the community. (R 387)

Greg Krupa had been a teacher and coach in the Charlotte County School Systems for 11 years. (R 388) He had known Appellant for about three or four years, as Appellant ran track at Lemon Bay High School during his junior and senior years. (R 388) Appellant was a hard-working athlete who was not a discipline problem. (R 390)

William Strickland was principal of Lemon Bay High School, and had known Appellant for several years. (R 392-393) Appellant was involved in many school activities, was well—liked by his peers, and was not a particular discipline problem. (R 393) In his senior year, Appellant was one of the recipients of the Principal's Award, which was given to deserving students so that they might further their education. (R 393-394)

Timothy Shane Sliney, an Airborne Ranger stationed in Georgia, was Appellant's brother. (R 395) Appellant was very active in school and extracurricular activities, such as

sporting events and student council. (R 397) Appellant was an above-average student, who was interested in the court system, and planning on a career in criminology. (R 396-397) Timothy recounted an incident when Appellant helped an elderly woman change the tire on her car, and refused to take money for the deed. (R 396) Appellant also helped a neighbor who was ill and whose wife had died by mowing his lawn and buying groceries for him. (R 397-398) Appellant likewise assisted another man named Bill Smith, who was paralyzed from the waist down. (R 398) Smith was active in helping children participate in sports, and Appellant would help Smith by getting hot dogs and sodas for him, getting his paperwork out of the back, etc. (R 398) Timothy and his brother had a very good relationship, without any particular problems, and Timothy loved his brother very much. (R 398)

Appellant's father, Timothy James Sliney, testified that he had an extremely close relationship with Sliney. (R 400) The family always did things together, such as going to the beach, and were involved in many school activities, particularly sports, such as football, basketball, baseball and track. (R 400) Family vacations were based around the boys and water activities, and included trips to Busch Gardens and Wet N' Wild. (R 400) Sliney and his brother were well-behaved as children. (R

400) Everything was looking good for Sliney's future, and his family had the highest dreams for him and his career. (R 401) Sliney planned to live near his family. (R 401) Mr. Sliney was proud of his son's accomplishments, and loved him. (R400-401)

Appellant's mother, Nancy Sliney, testified that Appellant was born on December 23, 1972, had a normal childhood and was a good son. (R 407-409) Mrs. Sliney was thrilled and very proud of her son, whom she loved, when he received the Principal's award at graduation. (R 409-410) She had high hopes for Sliney's career in his chosen field of criminology. (R 408-409) Mrs. Sliney's own father had been murdered when she was four or five, and she had lived with her grandparents. (R 408) Her mother had been dead for 12 years, and Mrs. Sliney's husband and two sons were the only family she had left. (R 408)

A friend of Sliney's from basketball, Chris Weir, who had some kind of handicap, had been calling to find out how Sliney was doing. (R 409) Weir told the Slineys that Appellant had been very good to him, and that he really cared about Sliney. (R 409-410)

The final defense penalty phase witness was Corporal Michael Farmer of the Charlotte County Sheriff's Department, Corrections Division. (R 411) He had known Sliney since he was incarcerated in June, 1992. (R 412) Sliney always listened to

directions that he was given by the jailers, and, despite having spent a considerable amount of his time in jail in B Block--a tough wing for "lock down" prisoners who had to be segregated because of the nature of their charges, behavioral problems etc., Sliney had no disciplinary reports which was especially unusual for someone in that setting. (R 412—414)

II. POST-CONVICTION EVIDENTIARY HEARING

While the State generally accepts the statement of facts contained in Appellant's Brief, it adds the following.

Ms. Sliney testified that other than finding Sliney passed out drunk twice, she did not notice any behavioral changes in him in the year prior to his arrest for the murder of Mr. Blumberg. (V-6, 1018). Sliney still played sports and she saw him daily. (V-6, 1018-19). Neither she nor Sliney's stepfather were abusive toward Sliney in any way. (V-6, 1019). He was not physically or sexually abused and he always had a roof over his head and food on the table. (V-6, 1020). Although Sliney's stepfather drank dailey, "no less than a six pack," he could handle that amount of alcohol and was "fine." (V-6, 1020). He never became physically or even verbally abusive because of the alcohol consumption. (V-6, 1020-21). Mrs. Sliney testified that when she came home from work she would "have a couple

glasses of wine." (V-6, 1021). She was verbally abusive to her husband when she drank, but, not to Sliney. Id.

For the most part, Ms. Sliney testified that Sliney was a good kid and behaved at home. (V-6, 1028-29). Sliney told Ms. Sliney that Witteman murdered Mr. Blumberg. (V-6, 1023). Sliney did not tell her that alcohol affected him the day Mr. Blumberg was murdered. (V-6, 1024). It is also true that Sliney told her that steroid use did not affect him on the day Blumberg died. Id. Her memory from 1992 and 1993 is not too good; she has had electro shock therapy for depression and has been taking medications for anxiety and depression. (V-6, 1026-27).

Timothy Sliney testified that he was the defendant's brother and that he had previously testified during the penalty phase. (V-6, 1036). He talked with public defender Cooper who prepared him to testify as a "character witness." (V-6, 1036). He did not talk to him about drug or alcohol abuse. (V-6, 1036). In 1992, Timothy heard that his brother was getting into fights and "you know, his aggressiveness increased." (V-6, 1038). However, he moved out of the family home in 1990, about two years prior to the murder. (V-6, 1039-40). He did see Sliney on the weekends. (V-6, 1040). Timothy was drinking a lot back then. (V-6, 1041). During that period he only drank

alcohol about three or four times with Sliney. (V-6, 1041). However, even on those occasions that he observed his brother drink to excess he was able to walk, talk and function. He did not fall over or pass out. (V-6, 1041). Sliney did not use drugs. Id. In the year prior to his arrest, Sliney was still attending school and running track. (V-6, 1043). He did not testify during the penalty phase that Sliney was aggressive and short tempered – he left that out. (V-6, 1045). He wanted to put his brother's character in the best light for the jury. (V-6, 1045). In talking with Sliney, Timothy testified that he maintains he was not responsible for Blumberg's murder and blames Witteman. (V-6, 1046).

Jack Sliney testified that he rehearsed his proposed trial testimony "[n]ot only through talks but quite a few videotapes, looking at the camera." (V-6, 1067). According to Sliney, Shirley told him that at worst he would be convicted of second degree murder and spend at most around ten years in prison. (V-6, 1068). Sliney claimed he told Mark Cooper that not only did he use steroids but that he was dealing them. (V-6, 1078). Sliney acknowledged that Cooper sent a doctor to evaluate him, Dr. Silver. (V-6, 1078). Sliney did not tell Dr. Silver that he used alcohol to excess or that he used steroids. (V-6, 1079). Sliney admitted that he told Dr. Silver that he made up

a story about steroid use because some police officer told him the courts would go easier on him if he had a steroid defense. (V-6, 1079). In fact, Sliney admitted on cross-examination telling Dr. Silver, that he only planned to use steroids but had not used them before the crime. (V-6, 1087). However, Sliney claimed he did not answer Dr. Silver's questions as "truthfully" or "honestly" as he could. (V-6, 1079-80). Cooper discussed the theme of his penalty phase presentation which was to present him as a "[c]lean cut, all American kid." (V-6, 1080). And, that was a tactic he agreed with. (V-6, 1085). Mr. Cooper told Sliney that there was a very real possibility the jury could come back with the death penalty in this case. (V-6, 1081).

Sliney stated that he was deceiving Dr. Spellman when he told him he did not recall the events surrounding the murder of Mr. Blumberg. (V-6, 1082-83). When asked if he murdered Mr. Blumberg on cross-examination, Sliney testified: "No, I didn't. Well, after what, the situation between Mr. Blumberg and I, I didn't know whether I had killed him or not." (V-6, 1086). Sliney admitted that during trial he had an argument with Blumberg and they grappled and fell to the floor. (V-6, 1086). However, Sliney denied placing scissors in the victim's neck. (V-6, 1086). Sliney also denied caving in the victim's head and using a "karate" move to break Mr. Blumberg's back. (V-6,

1086). However, Sliney admitted that in his taped confession given on June 28, 1992 he told detectives in great detail what happened when Mr. Blumberg was killed. He told detectives that he was the one who got "orange-handled" scissors from a drawer and placed them in Mr. Blumberg's neck. (V-6, 1089). And, he admitted telling the police that he was the one, not Witteman, who "then caved in the head of Mr. Blumberg." (V-6, 1089). He also told police that he was the one who used the karate move to break Mr. Blumberg's back. (V-6, 1090). However, Sliney admitted telling Dr. Spellman that he couldn't remember the details of what happened to Mr. Blumberg. (V-6, 1090). Sliney admitted he drove to the pawn shop in his truck the day of the murder and drove after the murder. (V-6, 1091). Sliney also admitted that when he was arrested and gave his confession to the police he did not tell them anything about steroid or alcohol use on the day of the murder. (V-6, 1092). Nor, did Sliney tell the jury when he testified that he had been drinking the day of the murder or had been using steroids. (V-6, 1093-94).

Kevin Shirley testified that he was retained by Sliney's father and that the public defender's office had already done a lot of work on the case at the time he made his appearance. (V-6, 1103-04). He told the father that he had tried two first

degree murder cases and been involved in others – in the preparation phase -- during his time with the State Attorney's Office. (V-6, 1103-04). He had also tried every serious type of felony case at the point, including kidnappings and sexual batteries. (V-3, 1104). Although Mr. Marryott with his firm would not be trying the case with him, he felt he could rely on his assistance by providing materials, references, and potential expert witnesses. (V-3, 1105). He never told the Slineys that Marryott would be directly participating, but that he would be acting in an "advisory capacity." (V-6, 1105).

Shirley began preparing for the penalty phase right away; he got background information from family and friends. (V-6, 1117). He discussed issues such as educational background with Sliney's mother and father. (V-6, 1119). He was not able to turn over his defense file in this case because all of his files from that time period were destroyed by fire. (V-6, 1119-20).

Sliney was examined by Dr. Spellman but Shirley felt he would not be useful. Sliney did not relate details of the offense to Dr. Spellman which contrasted with Sliney's statements to Shirley. (V-6, 1107). He felt it would compromise Sliney's integrity to put him on the stand. (V-6, 1107-08). Moreover, as far as steroid rage defense, such a defense would contradict the facts which were related to Shirley

by Sliney. (V-6, 1108). Moreover, Shirley had concerns that Dr. Spellman had questioned Sliney's truthfulness based upon the MMPI test showing deception. (V-6, 1109).

Shirley did not recall Sliney telling him that he was intoxicated on the day of the murder. (V-6, 1110). He did mention that at points prior to the homicide he had been taking steroids. (V-6, 1110). He did have discussions about Sliney drinking in general, but, not as it relates to that day. Moreover, he moved to suppress the confession on the basis that he was intoxicated. (V-6, 1110). He also thought that a diminished capacity defense would require an admission and avoidance and that Sliney's position was that he "did not commit" the offense. (V-6, 1108). Sliney claimed that he did not go there with the intention of stealing or harming the victim and that Mr. Witteman had done it. (V-6, 1108-09).

As for use of steroids in mitigation, Shirley testified that he might have explored it and was debating whether or not to ask for a continuance to retain another expert. (V-6, 1125). He had talked with Sliney regarding his background, his mother, his father, and if he could have found an expert to testify that the murder was the result of steroid rage, then "obviously, that would have been useful." (V-6, 1126). But, Shirley added, you know at this point "it's speculation as to whether or not

anybody would have been prepared to testify to the fact that he was experiencing steroid rage at the time of the events." (V-6, 1126). He had reviewed articles on steroid rage and turned them over with the file to Mr. Cooper after he was discharged. (V-6, 1127-28).

Mark Cooper, who represented Sliney during the penalty phase was the Assistant Deputy Public Defender in Charlotte County. (V-7, 1143). He was initially assigned to the case and conducted most of the depositions before the Slineys hired Kevin Shirley. (V-7, 1144). When he first met with Sliney he explained the two parts of a capital murder trial. (V-7, 1145). He had Sliney examined by Dr. Spellman but did not recall Sliney having any difficulty recalling the facts of the events to him. Nor did he observe any evidence of impairment from the account of the murder given by Sliney. (V-7, 1149). In other words, there was no evidence of alcohol or steroid abuse. (V-7, 1149-50).

Cooper was initially given only two weeks to prepare for the penalty phase after being appointed but was ultimately given four weeks by Judge Pellecchia. (V-7, 1151). He talked to Dr. Bob Silver and used a social worker with the Public Defender's Office, Beverly Waters. (V-7, 1151). From his notes, Dr. Cooper listed meetings or conversations he had with Sliney, his

parents, the social worker, and Dr. Silver. (V-7, 1151). He read the trial transcript and saw Timothy Sliney, talked with the social worker and a jailer who was prepared to testify that Sliney was a well behaved prisoner. (V-7, 1151-52).

Cooper delivered some materials to Dr. Silver's office and had a conversation with "Dr. Kling." (V-7, 1153). Cooper's notes of a jail conversation with Sliney on October 6, 1993 state: "I'll quote, never took steroids, only sold them, only took one or two orally weeks before the offense, end quote." (V-7, 1154-55). He assumed he talked about alcohol abuse with Sliney but did not have a specific recollection. His penalty phase theory was that "he was a good, clean-cut kid." (V-7, 1155). Alcohol abuse would have contradicted his theory that Sliney was a good, very clean cut young man. (V-7, 1155).

Cooper consulted with three doctors in this case, Dr. Spellman, Dr. Kling, and Dr. Silver. (V-7, 1156). As to Dr. Kling, Cooper testified that he did not want a written report, just an oral report. (V-7, 1156). His notes of the report from Dr. Kling states: "...MMPI, story changes, secretive amoral. He maintains a public appearance of being moral, explosive person, over-controlled, no alcohol, no steroids, a friend did the crime, angry person wants to look normal, amoral, no internal moral constraints, now remembers all, no excuse, like a

bungee type inside, no morals, does what he wants, wheeler, dealer is in denial, does not understand, model prisoner, performs to what is expected without committing appearance, very intuitive, practical, did not learn much in school, a classic con man, no goals, accumulates stuff." (V-7, 1156-57). As a result of this report, Cooper did not want to use Dr. Kling for mitigation. Nor, did he want a written report "anywhere in circulation." (V-7, 1157).

From the booking report when he was jailed, it appears Sliney weighed 170 pounds. (V-7, 1157-58). He appeared tall and slim when Cooper represented him during the penalty phase. (V-7, 1158).

Cooper was sure he met with Shirley when he turned the case over to him but had no specific recollection of the conversation. (V-7, 1160). Since Cooper's notes of the October conversation reflected that Sliney was not using steroids he did not pursue the issue. (V-7, 1161). Even though the defendant was arrested with steroid paraphernalia, Cooper did not explore the issue further based upon his conversation with Sliney. (V-7, 1162). He never explored the steroid defense because Sliney told him "he didn't use them." (V-7, 1163). Nor, would he use steroid use in the penalty phase because Sliney denied using them to him and to Dr. Kling. (V-7, 1170). Dr. Kling said "no

alcohol and no steroids." (V-7, 1167). And, even if Sliney had steroids in his possession, Sliney claimed that he was "selling" steroids. (V-7, 1171).

Robert Silver testified that he was a clinical psychologist and that he was board certified in Clinical and Family Psychology. (V-7, 1172). He examined Sliney at the request of Mr. Cooper. During the interview, Sliney admitted taking steroids only twice. In terms of the murder, he claimed he had not been using steroids but that he drank the day before and the day and evening before the murder. (V-7, 1173). He was able to relay in great detail the events of the murder. (V-7, 1174). He received a different emphasis on drug and alcohol use than Sliney had provided to Dr. Spellman. (V-7, 1174). Dr. Silver thought that it was difficult to know when Sliney is telling the truth and that he provides information to "suit his purposes." (V-7, 1175). In his report, Dr. Silver noted that Sliney "had planned to use steroids but had never actually taken them before." (V-7, 1175). Dr. Silver confronted Sliney with the apparent contradiction between what he told him and what he told Dr. Spellman on steroid use. Dr. Silver explained: "He [Sliney] told me that he had heard that if he told about or emphasized drug use, he might get off, get a better sentence." (V-7, 1176).

Dr. Silver thought that Sliney was immature and in some denial: "In my opinion, he had up until that time in his life been able to talk himself out of the most of difficulty or troubles which he had gotten himself in, and I think he was relying on the same way of doing things at that point." (V-7, 1178). "I don't know if he was under the influence of steroids or not. My observation was he felt as if he could change reality and the fact to suit his purposes. So, I don't know what the truth is." (V-7, 1178). He was not an expert on the impact of steroid use but would have recommended defense counsel retain another expert if he had reason to believe Sliney had been abusing steroids and that they contributed to his behavior. (V-7, 1180). Dr. Silver asked about syringes in his possession when he was arrested but when asked, "[Sliney] said they were his friends." (V-7, 1181).

Dr. Silver did not believe he was brain injured or impaired and did not feel the need for additional tests: "No, I don't believe so because he evidently was able to graduate high school. He was able to talk rationally and coherently, and there weren't really any unusual behavior indicators of an impaired graduate." (V-7, 1179).

Dr. Silver did not find the defendant remorseful. But, as potential mitigation, he did find no prior history of violence and his relative youth. (V-7, 1176).

SUMMARY OF THE ARGUMENT

ISSUE I: Sliney failed to show an actual conflict of interest which adversely affected his attorney's performance. Consequently, the trial court properly denied this claim after the hearing below.

ISSUE II: Trial counsel conducted a reasonable penalty phase investigation and called friends and family members to testify to Sliney's allegedly positive character traits. Trial counsel's decision to emphasize Sliney's positive character rather than present conflicting and largely negative expert testimony was a reasonable tactical decision. Moreover, there was no credible evidence to suggest that Sliney was actually taking steroids at the time of the murder and collateral counsel failed to present any expert testimony to suggest that steroid use or abuse played any role in the victim's murder.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING SLINEY'S CLAIM THAT DEFENSE COUNSEL'S PRIOR REPRESENTATION OF A STATE WITNESS CREATED A CONFLICT OF INTEREST WHICH REQUIRES REVERSAL OF HIS CONVICTIONS? (STATED BY APPELLEE).

Appellant claims that he was denied the right to conflict free counsel in violation of the Sixth Amendment to the United States Constitution. The State disagrees.

A. Standard Of Review

"The question of whether a defendant's counsel labored under an actual conflict of interest that adversely affected counsel's performance is a mixed question of law and fact." Hunter v. State, 817 So. 2d 786, 792 (Fla. 2002)(citing Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) and Quince v. State, 732 So. 2d 1059, 1064 (Fla. 1999). Consequently, it is subject to *de novo* review on appeal.

B. Appellant Failed To Show That His Attorney Labored Under A Conflict Of Interest Which Adversely Affected His Performance

The trial court denied this claim below, stating:

> 7. With regard to the supplementary claim and collateral counsel's allegation that trial counsel had a conflict of interest through his prior representation of Detective Sisk, the Court finds that there was no "actual conflict of interest," as contemplated by the Sixth Amendment of the United

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

(V-6, 957-58). The court also provided a recitation of the facts adduced on the issue below, noting that only the defendant was called to testify on the conflict issue. (V-6, 948-52).

In Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002), this Court observed that the Sixth Amendment encompasses the right to representation free from "actual conflict." However, to establish a violation of this right "the defendant must 'establish that an actual conflict of interest adversely affected his lawyer's performance.'" (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). This Court stated:

> A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." Cuyler, 446 U.S. 350; *see also* Quince v. State, 732 So. 2d 1059, 1065 (Fla. 1999). To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests

> that his or her interests were compromised. *See* Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998). A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation. *See* Strickland, 466 U.S. at 692, Cuyler, 446 U.S. at 350.

The facts developed below do not demonstrate an actual conflict of interest which compromised the loyalty of Sliney's trial attorney. See Martin v. State, 761 So. 475, 476 (Fla. 4th DCA 2000) (affirming trial court's denial of public defender's motion to withdraw based upon public defender's office previous representation of state witness, noting that "[t]he public defender, as the movant, had the burden of demonstrating the conflict of interest."). As a preliminary matter, Sliney had an evidentiary hearing on the conflict issue below and introduced no evidence to show a conflict of interest between Shirley and Corporal Sisk. His only witness was Sliney who testified that Shirley did not tell him about Shirley's alleged previous representation of Corporal Sisk and who claimed that he passed notes to Shirley during his cross-examination of Sisk. Sliney failed to call either Shirley or Corporal Sisk to establish the nature and extent of the alleged prior attorney client

relationship which is the foundation of the claimed conflict. As the prosecutor noted below in his argument on this issue, Sliney's "pleadings" do not constitute "proof."[1] (V-6, 992).

At the evidentiary hearing below, Sliney failed to present any evidence to suggest, much less establish, that Shirley declined to vigorously challenge or cross-examine Corporal Sisk at the expense of Sliney. Indeed, counsel failed to present any evidence at all to show that an area of legitimate cross-examination or challenge was not made to Corporal Sisk at the expense of Sliney. See Smith v. White, 815 F.2d 1401 (11th Cir. 1987), cert. denied, 484 U.S. 863 (1987)("Smith has failed to show 'inconsistent interests' in this case where he has failed to adduce proof of substantial relationship or relevant confidential information or any other proof of inconsistent interests.")[2]. In any case, the fact that Shirley may have

[1] Sliney's post-conviction counsel asked the court to take judicial notice of the attachments to his Motion to Amend during his closing argument on the conflict issue. The record does not reflect the judge ruled on the request contained within defense counsel's closing argument. (V-6, 952).

[2] In Smith, 815 F.2d 1401, 1404 (11th Cir. 1987), the court utilized a test to distinguish between actual and hypothetical conflict of interest:

> We will not find an actual conflict [of interest] unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests... Appellants must make a factual showing of inconsistent interests and must demonstrate

represented Corporal Sisk in a divorce and civil proceeding for reinstatement to the police department, **prior** to his representation of Sliney, does not establish that he "actively represented" competing interests at the time of trial. See Cuyler, 446 U.S. at 350 ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."). Snelgrove v. State, 2005 Fla. LEXIS 2206 (Fla. November 10, 2005) (finding no error in refusing public defender's motion to withdraw based upon brief simultaneous representation of a state witness where the public defender withdrew from the state witness's case when the conflict became apparent and did not represent him at the time of the defendant's trial and the former client [state witness] agreed to waive the conflict).

Sliney's case proceeded to trial in late September of 1993. Shirley's alleged representation of Corporal Sisk, according to documents attached to his motion to amend but not introduced as evidence during the hearing below, was in a civil divorce matter in March of 1990 and in an earlier civil action in an effort to

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> that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical.

regain his position with the police department, dated December 1988. (V-5, 854-59; 869-70). Thus, even if Sliney's documents are accepted as true and as competent "evidence," it is clear that defense counsel was not actively representing Corporal Sisk at the time of Sliney's trial. See Barnham v. United States, 724 F.2d 1529, 1532 (11th Cir.), cert. denied, 467 U.S. 1230 (1984) (affirming lower court's determination that no conflict existed, noting that the lawyer testified his prior representation of a state witness did not have "the remotest connection" with defendant's trial). Shirley had previously represented Corporal Sisk on unrelated matters and petitioner failed to show, much less allege, that Shirley declined to use relevant evidence or material to impeach his former client. See Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994) (Although Porter alleged a "potential conflict" based upon his public defender's previous representation of a state witness, he failed to "prove an actual conflict of interest" at the evidentiary hearing; that is, petitioner failed to "point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party.").

In Bouie v. State, 559 So. 2d 1113 (Fla. 1990), this Court addressed a situation where a member of the Public Defender's Office moved to withdraw based on the office's prior

representation of a State witness. This Court stated that in order for a defendant to show a violation of the right to conflict-free counsel, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Id. at 1115 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). This Court found that the defendant failed to meet this burden because the public defender's representation of the State witness concluded prior to the witness' testimony. Id. Additionally, Bouie's counsel conducted an extensive cross-examination of the State witness at trial, and zealously guarded Bouie's interests at the expense of the witness/prior client. Id. See also Mills v. Singletary, 161 F.3d 1273, 1287-88 (11th Cir. 1998) (public defender's prior representation of testifying co-defendant [Ashley] did not violate the Sixth Amendment where the "public defender's alleged loyalties did not force him to forego cross-examination of Ashley; instead, Greene [defense counsel] cross-examined Ashley extensively and attempted to elicit the statements that caused Ashley to invoke the attorney client privilege.").

Sliney opines that "Shirley was forced to choose between discrediting his former client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve Sisk's attorney/client privilege." However,

Sliney does not provide any cite to support such an assertion, and, none appears in the record. Sliney failed to present any evidence at all to establish that Shirley was in possession of relevant or useful information which could have been used to cross-examine Detective Sisk. Again, Sliney failed to call Detective Sisk or even Shirley to establish the nature of their previous attorney client relationship and whether or not any useful or relevant impeachment information existed. Sliney's claim is exactly the type of attenuated or hypothetical conflict which cannot form the basis for a conflict of interest claim, much less establish reversible error. See Owen v. Crosby, 854 So. 2d 182, 193-94 (Fla. 2003) ("A possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.'"); Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (reversible error cannot be predicated on "conjecture.") (citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)).

It must also be remembered that Corporal Sisk was not the lead Detective who took Sliney's written or taped confession.[3]

[3] Sliney asserts that Sisk's alleged misconduct which led to his dismissal from the police department in the late nineteen eighties would somehow have been admissible as impeachment evidence in Sliney's trial. However, aside from the fact that Sliney failed to establish the nature and extent of the alleged misconduct, it is clear that the events occurred years prior to Sliney's trial and were completely unrelated to his work on

The lead Detective, Twardzick, testified at length regarding the arrest of Sliney, and the taking of his written and taped confessions. (TR 922-1034). Detective Sisk assisted in arresting Sliney and was only called in rebuttal, testifying that Sliney did not appear intoxicated and that he did not throw up in the station. Sisk admitted on cross-examination by Shirley that he was not in the interview room during the taped statement and that he was not present with Sliney at all times during the morning of his arrest. (TR 1174-75). Thus, aside from failing to offer any testimony below to establish what potential impeachment was forgone by Shirley based upon the alleged conflict, it is clear that Detective Sisk was simply not a critical witness for the State. He provided brief, cumulative testimony to that offered by Detective Twardzick. Consequently, based upon this record, it cannot be said that Sliney

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Sliney's case. There is no chance, that even **if** Sliney had presented actual evidence below to show the nature of the misconduct, that such allegations would have been admissible to impeach Detective Sisk. See Reed v. State, 875 So. 2d 415, 431 (Fla. 2004) (noting investigation of officer for unrelated misconduct [use of cocaine from evidence room] was not material under Brady because such evidence would not have been admissible at trial); Accord Breedlove v. State, 580 So. 2d 605 (Fla. 1991).

established a "conflict of interest" which adversely affected counsel's performance.[4]

In conclusion, it is clear that a conviction should not be overturned without a showing that a defense counsel ***actively*** represented conflicting interests. Quince v. State, 732 So. 2d 1059, 1065 (Fla. 1999). Shirley did not have an active attorney client relationship with Detective Sisk at the time of Sliney's trial. Sliney adduced no evidence to establish that his attorney's alleged prior representation of Detective Sisk on unrelated civil matters in any way compromised his loyalty to Sliney.

[4] Sliney's claim that Shirley might have divided loyalty based upon his representation of Detective Sisk's son in 1993 is pure speculation. No evidence was introduced below to show that Jeffrey Sisk, was indeed, Detective Sisk's son. The most Sliney could say is that it "appears" Shirley represented Sisk's son in a divorce case. (V-5, 873). However, even if we assume this to be true, Sliney failed to show that any cross-examination or impeachment material existed, which, counsel chose not to use as a result of the alleged conflict.

ISSUE II

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE? (STATED BY APPELLEE).

Sliney asserts that his defense attorneys failed to adequately prepare or present mitigating evidence during the penalty phase. The State disagrees. The trial court properly rejected these claims after an evidentiary hearing below.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

This Court has stated that "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001) Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984) (citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506 (11th Cir.) (*en banc*), cert. denied, 516 U.S. 856 (1995) (citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the

proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

C. The Trial Court Properly Rejected Appellant's Ineffective Assistance Claims After The Hearing Below

After hearing the evidence below, the trial court rejected Sliney's argument that he received ineffective assistance during the penalty phase of his trial. The trial court stated:

> 2. With regard to Claim II and collateral counsel's claim that trial counsel failed to investigate, and present evidence of statutory and nonstatutory mitigating factors, once again, the Court finds that the Defendant has failed to demonstrate that counsel's performance was deficient, or that the alleged deficient performance prejudiced the defense such that the result of this trial has been rendered unreliable.
>
> Again, counsel were hamstrung by the facts of the case and the actions of the Defendant himself. The Court notes here with particularity the testimony of Mr. Cooper in regard to what he was told informally by Dr. Kling about his own client. Reduced to its essence, Dr. Kling essentially described Mr. Sliney as a young man with a classic sociopathic personality. No evidence was presented by collateral counsel to rebut the testimony of Mr. Cooper, and both Mr. Shirley and Mr. Cooper had obtained the opinions of two psychologists and a psychiatrist in anticipation of a possible penalty phase proceeding.
>
> In addition, the Court will again note here that no expert testimony was presented during either evidentiary hearing held in this matter in support of the claim that counsel failed to investigate, develop

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

(V-6, 954-55).

Sliney's ineffective assistance claims are somewhat difficult to decipher. He quotes from Dr. Spellman's report, an expert not called to testify during the evidentiary hearing below, noting that Sliney claimed he had taken steroids and abused drugs and alcohol. (Appellant's Brief at 42). Dr. Spellman was the initial expert retained by public defender Cooper. Although Dr. Spellman admitted he was not an expert in steroids or capital litigation and recommended another expert be retained, this was in fact done. When Mr. Cooper was reappointed, he had two additional experts examine Sliney. These experts had some decidedly unfavorable opinions about Sliney.

Cooper consulted with three doctors in this case, Doctors Spellman, Kling, and Silver.[5] (V-7, 1156). As to Dr. Kling, Cooper specifically did not want a written report. Upon his receiving Dr. Kling's oral report, Cooper took notes which he placed in the file. These notes reflected the following

[5] Shirley did not think Dr. Spellman would be useful to the defense. Sliney claimed to have little or no recollection of the events surrounding the victim's murder to Dr. Spellman, which contrasted with the story Sliney was providing to Shirley. (V-6, 1107).

observations, among others; that Sliney's story "changes" and that he is "secretive, amoral." (V-7, 1156). He maintains a public appearance of being moral, but, he is an "explosive person" and "over-contolled." (V-7, 1156). He is an "angry person" who "wants to look normal" but is "amoral" with "no internal moral constraints" and is a "wheeler dealer" and a "classic con man." (V-7, 1156-57). Cooper testified that after receiving the report, he did not want to use Dr. Kling as a mitigation witness, and, did not even want a written report in circulation. (V-7, 1157).

Dr Silver, the only expert called to testify below, was called by the State. He examined Sliney at the request of Mr. Cooper and testified that Sliney only admitted taking steroids twice. In relation to the murder, he claimed that he had not been using steroids. (V-7, 1173). Dr. Silver also testified that Sliney relayed in great detail the events of the murder. (V-7, 1174). Dr. Silver noted that he was provided a different "emphasis" on drug and alcohol use than what Sliney had provided to Dr. Spellman. (V-7, 1174). He noted that it was difficult to know when Sliney was telling the truth and that Sliney provides information to "suit his purposes." (V-7, 1175). In his report, Dr. Silver noted that Sliney "had planned to use steroids but had never actually taken them before." (V-7,

1175). When confronted with the contradiction between what Sliney told Dr. Silver and what he had earlier told Dr. Spellman, Sliney explained: "[T]hat he had heard that if he told about or emphasized drug use, he might get off, get a better sentence." (V-7, 1176). When Dr. Silver asked about syringes in his possession at the time he was arrested, Sliney claimed that "they were his friends." (V-7, 1181). Dr. Silver thought that Sliney had been able to talk himself out of most of his difficulties or troubles in the past and was hoping to do so again. (V-7, 1178).

Dr. Silver's report reflects that he agreed with Dr. Kling that Sliney was basically amoral or a sociopath: "...Mr. Sliney's MMPI suggests he is an individual who is friendly, smooth, persuasive, daring, opportunistic, but basically amoral. He is the kind of person who wants to achieve things fast, so if he cannot get something through conventional means he will try non-conventional or even illegal means." (V-2, 217). Further, he observed, Sliney had "no moral ballast or substance" that "[a]t his core he is basically hedonistic, exploitive, manipulative, and expedient." (V-2, 217). "He bragged he was able to get false I.D's, knew how to buy and sell guns, and fence stolen goods." (V-2, 216). Sliney, despite his youth, "has always been a wheeler dealer, with contacts in the fringe

underworld, who nonetheless maintained an image of respectability and gave the appearance of being the all-American boy." (V-2, 216). Moreover, Dr. Silver did not think that Sliney was "particularly anxious or remorseful" and that he "was primarily concerned with saving himself." (V-2, 217-18).

Curiously, while Sliney faults the doctors retained by defense counsel as unqualified to render an opinion in a capital case, he provides no support for that proposition. Sliney boldly asserts that Dr. Silver "was not competent" to assist in the penalty phase, but cites no support for that statement. (Appellant's Brief at 51). Indeed, there is no record support for his assertion that Dr. Silver was not qualified to render an opinion in this case. Notably, Sliney did not call any experts to testify during the hearing below to challenge the doctors' opinions.[6] Consequently, there is no basis for finding the experts retained by defense counsel were either ineffective or unqualified.

While Collateral counsel cryptically claims Dr. Silver was not competent to assist in the penalty phase, he curiously asserts that Dr. Silver should have been called to testify on Sliney's behalf. (Appellant's Brief at 52). Sliney claims Dr. Silver should have been called to testify that Sliney could be

[6] Sliney does not apparently challenge the qualifications of Dr. Kling who Cooper consulted with prior to the penalty phase.

deterred by punishment, that he would be a model prisoner and is not the type to make "waves in jail, or fight the system" and that the offense was out of character. However, this mitigation was in effect presented by defense counsel though lay witnesses during the penalty phase, who testified to Sliney's allegedly good character and a guard who testified that he was a model prisoner while awaiting trial. This was a much more effective presentation than the one collateral counsel now contends should have been presented. While Dr. Silver did have some good things to say about Sliney, the vast majority was negative. Sliney was basically a sociopath, amoral, a wheeler dealer, who lacked remorse. Sliney also told Dr. Silver that he lied to another doctor about using steroids because he heard the law might go easier on him.

The decision not to use expert testimony below was clearly a reasonable tactical decision. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ("Counsel's strategic decisions will not be second guessed on collateral attack."). "This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." Spencer, 842 So. 2d at 62; accord Valle v. State, 778 So. 2d 960 (Fla. 2001). The potential benefit of the expert testimony was far outweighed by its

potential negative impact. Indeed, in this case, it would have destroyed the favorable image that Sliney's counsel was able to portray through family members and friends, of a clean cut "all-American boy."[7] See Gaskin v. State, 822 So. 2d 1243, 1248 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.") (citing Ferguson v. State, 593 So. 2d 508 (Fla. 1992) and State v. Bolender, 503 So. 2d 1247 (Fla. 1987)).

Sliney also asserts that counsel was ineffective in failing to present evidence of his use of alcohol and steroids during the penalty phase. However, Sliney gave Cooper no reason to believe steroids played any role in the murder. And, as noted above, Sliney denied abusing steroids to Dr. Silver. Indeed, Sliney admitted during the evidentiary hearing below that he did not tell Dr. Silver he was abusing alcohol or that he used steroids. (V-6, 1079). And, Sliney admitted telling Dr. Silver he made up a story about steroid abuse because some police officer told him the courts would go easier on him if he had a steroid defense. (V-6, 1079). Moreover, Mr. Cooper testified

[7] Sliney admitted on cross-examination that Cooper discussed the strategy with him of presenting him as a clean cut, "all American kid" and that it was a tactic he agreed with. (V-6, 1080, 1085).

that from the notes of his jail conversation with Sliney that he "never took steroids" "only sold them" and "only took one or two orally weeks before the offense..." (V-7, 1154-55). Thus, it is clear that Sliney's own denials of using or abusing steroids precluded counsel from presenting that evidence during the penalty phase. See Strickland, 466 U.S. at 691, 104 S.Ct. At 2052 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); Gorby v. State, 819 So. 2d 664, 676 n.11 (Fla. 2002) (finding counsel was not ineffective in failing to present evidence of sexual abuse where defendant denied such abuse). While Sliney notes he was arrested with vials marked "Testosterone Injection," (Appellant's Brief at 40), his denials of using it and the fact that these vials were tested and yielded negative results for the presence of testosterone makes it clear that "roid" rage was simply not available as a potential statutory or non-statutory mitigator.[8]

[8] Although the trial court did not allow the State to reopen the evidentiary hearing to present evidence showing that the vials were in fact tested but did not reveal any testosterone or other controlled substances, this does not mean that Sliney can continue to pursue an argument based upon a premise he knows, or should know, to be false. (V-4, 651-658)(trial court's order

As for Sliney's alleged alcohol abuse, Cooper testified that he had no specific recollection of talking to Sliney about it. However, he assumed that he did discuss it, but, that alcohol abuse would have contradicted his theory that Sliney was a very good "clean cut" young man.[9] (V-7, 1155). Moreover, the trial record reveals that the jury was at least exposed to some of this information regarding Sliney's drinking during the defense case in chief. For example, defense witness Spellman testified that she had seen Sliney out drinking "at parties and stuff, like out at local hangouts." (TR. 1083). Similarly, defense witness Louck testified that Sliney was drinking the evening prior to his arrest and that she had previously seen him under the influence of alcohol. (TR. 1064-65). Nothing presented below suggests that Sliney's alcohol use was a significant or compelling mitigator.

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noting evidence and testimony establishing that the vials did not contain any controlled substances).

[9] The evidence of Sliney's alcohol abuse was hardly compelling. Sliney's mother did not notice any behavioral changes in Sliney prior to the murder and aside from finding him passed out from drinking twice, did not notice anything unusual. Sliney still played sports and she saw him daily. (V-6, 1018-19). Sliney's brother testified that he went drinking with Sliney three or four times after moving out of the family home. Even on those occasions that he observed Sliney drink to excess, he was able to walk, talk, and function. (V-6, 1041). Sliney was still attending school and running track. (V-6, 1043).

While Sliney claims that his parents' alcohol abuse should have been presented to the jury, he made no such claim in his motion for post-conviction relief. And, in any case, his mother testified that even while drinking in the home, neither she nor Sliney's father were physically or verbally abusive to Sliney. There was no expert testimony presented which would have linked his parents' drinking to any detrimental impact upon Sliney. Thus, such evidence would have little or no mitigation value in the penalty phase.

Appellant's reliance upon Ragsdale v. State, 798 So. 2d 713 (Fla. 2001), is misplaced. In Ragsdale, this Court noted that the penalty phase "was not subjected to meaningful adversarial testing" and that defense counsel "essentially rendered no assistance to Ragsdale" during the penalty phase. Ragsdale, 798 So. 2d at 716. This Court noted a large amount of evidence could have been introduced through family members relating to a severe history of child abuse, neglect, and impoverishment. "The Ragsdale brothers were frequently beaten by their father with fists, tree limbs, straps, hangers, hoses, walking canes, boards, and the like, until bruises were left and blood was drawn." Id. at 717. The father even fired a pistol twice at Ragsdale. Without advancing past the seventh grade, Ragsdale ran away from home at the age of fifteen or sixteen.

In addition, defense counsel in Ragsdale presented no mental health evidence during the penalty phase, whereas collateral counsel procured and presented an expert to testify that Ragsdale was psychotic at the time of the offenses and that the statutory mental mitigators applied. The doctor also offered a list of non-statutory mitigators, including "organic brain damage, physical and emotional child abuse, history of alcohol and drug abuse, marginal intelligence, depression, and a developmental learning disability." Ragsdale, 798 So. 2d at 718. This Court noted that even the State mental health expert could have provided some useful mitigation.

In this case, unlike Ragsdale, collateral counsel did not present a single additional family member to testify during the evidentiary hearing below. Trial counsel did a thorough job addressing appellant's childhood and placing a picture of a bright, motivated, good friend, and good son/brother "clean cut" image. See Atwater v. State, 788 So. 2d 223, 233 (Fla. 2001) (rejecting an ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact, presented during the penalty phase). Sliney did not grow up in an abusive atmosphere. Collateral counsel did not uncover any childhood abuse or other significant mitigation which was not presented to the jury as in Ragsdale. Moreover,

while defense counsel in Ragsdale largely ignored potential mental health mitigation, here, defense counsel had Sliney examined by no fewer than three mental health experts. That the experts' findings were not particularly helpful to Sliney cannot be blamed on trial counsel.

In conclusion, trial counsel conducted a reasonable penalty phase investigation and decided upon a reasonable strategy to present Sliney as a "clean cut" "all American" young man for whom this offense was out of character. This strategy succeeded in yielding a 7-5 vote in a case involving a particularly shocking, heinous, atrocious, and cruel murder of an elderly business man for financial gain. See e.g. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (noting that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme..."). This is a rare case where even with the benefit of time, hindsight, and the ability to focus upon a made record that collateral counsel was unable to improve upon the penalty phase presentation presented below. See Hodges v. State, 885 So. 2d 338, 346 (Fla. 2003) (finding counsel was not ineffective although the "mitigating evidence presented during the postconviction proceeding did exceed the quality and quantity of that presented at trial."). Thus, this record

provides no basis for finding counsel's performance deficient much less any resulting prejudice. See Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878 (2001) (With regard to the penalty phase, this Court observed that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'") (quoting Strickland, 466 U.S. at 695); Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (finding no reasonable probability of a different result even though collateral counsel was able to discover and present evidence of an extreme emotional disturbance and a harsh, abusive childhood where the jury's vote for death was 7-5).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the denial of post-conviction relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Sara K. Dyehouse, Esq., 3011 Richview Park Circle South, Tallahassee, Florida 32301; to Thomas H. Ostrander, Esq., 2701 Manatee Avenue West, Suite A, Bradenton, Florida 34205; to the Honorable Donald E. Pellecchia, Circuit Court Judge, Charlotte County Justice Center, 350 E. Marion Avenue, Punta Gorda, Florida 33950; and to Daniel P. Feinberg, Assistant State Attorney, 350 East Marion Avenue, Punta Gorda, Florida 33950-3727, this 22nd day of November, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE