IN THE SUPREME COURT OF FLORIDA

JACK RILEA SLINEY,

Petitioner,

v. **CASE No. SC05-1462**
Lower Tribunal No. 92-451 CF

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

Respondent.
_____/

RESPONSE TO PETITION FOR HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, James V. Crosby, Jr., Secretary of the Department of Corrections for the State of Florida, by and through the Attorney General of the State of Florida and the undersigned counsel, who answers the petition, and states:

PRELIMINARY STATEMENT

Respondent denies Petitioner is being illegally restrained and denies each and every allegation in the instant petition indicating in any manner that Petitioner is entitled to relief from this Court.

In light of the fact that the State has provided a detailed factual recitation in the accompanying brief on the 3.850 appellate brief, Respondent will not burden the Court with repeating those facts again in this Habeas Response.

SLINEY'S DIRECT APPEAL

Sliney's appellate counsel raised ten issues on his direct appeal: (1) Sliney's confession was involuntary and should have been suppressed; (2) the trial court erred in admitting into evidence portions of the transcript of Marilyn Blumberg's 911 call; (3) the trial court erred in allowing the jury to hear taped conversations between Capeles and Sliney which included expletives and racial epithets; (4) the firearms register from the Blumberg's pawn shop constituted inadmissible hearsay; (5) the trial court erred in excluding testimony from several inmates to whom Witteman admitted killing Blumberg; (6) the trial court erred in refusing to appoint an investigator to research mitigating evidence and in failing to allow the public defender adequate time to prepare for the penalty proceeding; (7) the trial court erroneously found both aggravating factors; (8) death is disproportionate; (9) the trial court erred in giving an upward departure sentence for the armed robbery count; and (10) the trial court improperly assessed fees and costs against Sliney. Sliney v. State, 699 So. 2d 662, 667 (Fla. 1997).

This Court determined that there was competent, substantial evidence in the record to support the trial court's findings -– the totality of the circumstances reflected that Sliney's waiver was knowing, intelligent and voluntary. 699 So. 2d at 669. This Court

also stated that although it agreed with Sliney that the trial court's finding as to the hearsay issue on Blumberg's 911 call was somewhat confusing, the statement was admissible as an excited utterance pursuant to section 90.803(2) and the trial court did not abuse its discretion in finding the statement relevant. Sliney's challenge to the transcript was without merit. 699 So. 2d at 669. As to the admission of the tape-recorded conversations between Sliney and Capeles, this Court agreed with the trial court that the taped statements were relevant and their probative value was not outweighed by their prejudicial effect. 669 So. 2d at 670. As to the complaint that the firearms register constituted inadmissible hearsay, this Court concluded that assuming it was improper hearsay, its introduction was harmless error beyond a reasonable doubt in light of the remaining evidence against Sliney and Marilyn Blumberg's testimony. 699 So. 2d at 670. Fifth, the court found substantial competent evidence in the record to support the trial court finding that there were insufficient corroborating circumstances to show the trustworthiness of Witteman's statement. Sliney's contention that the hearsay testimony should be admitted without regard to the Rules of Evidence was rejected. 699 So. 2d at 670.

As to the penalty phase, the Court found no abuse of discretion in denying defense motions for a continuance and for the appointment

of an investigator to research mitigating evidence. 699 So. 2d at 671. Next, this Court held the evidence sufficient to support the aggravating factors of murder committed during a robbery and for the purpose of avoiding arrest. 699 So. 2d at 671-672. The Court found the imposition of a sentence of death to be proportionate and rejected the challenge to the upward departure on the sentence for the armed robbery conviction. The Court agreed with Sliney and set aside the order assessing attorney fees and costs.

Appellate counsel was a capable advocate and his performance did not fall below the standards demanded by the Sixth Amendment.

THE LEGAL STANDARD

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), this Court summarized and reiterated its jurisprudence relating to claims of ineffective assistance of appellate counsel. Subsequent decisions also repeat these principles. Habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Id. at 643; Thomas v. State, 759 So. 2d 650, 660, n. 6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994). The Court's ability to grant relief is limited to those situations where the Petitioner established first that counsel's performance was

deficient because the "omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second that the Petitioner was prejudiced because counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Rutherford at 643. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

If a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render his performance ineffective. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Id. at 643. Appellate counsel is not deficient for failing to anticipate a change in the law. Darden v. State, 475 So. 2d 214, 216-17, (Fla. 1985); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994). Appellate counsel is not ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal and the Court will not consider a claim on habeas that counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Rutherford at 645. Appellate counsel will not be faulted for failing to investigate and

present facts in order to support an issue on appeal since the "appellate record is limited to the record presented to the trial court". Id. at 646. Finney v. State, 660 So. 2d 674, 684 (Fla. 1995).

Procedurally barred claims not properly raised at trial could not form a basis for finding appellate counsel ineffective absent a showing of fundamental error, i.e. error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. at 646; Chandler v. State, 702 So. 2d 186, 191, n. 5 (Fla. 1997).

Moreover, appellate counsel cannot be deemed ineffective for failing to raise on appeal a claim of ineffective trial counsel. Id. at 648. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). The habeas corpus writ may not be used to reargue issues raised and ruled upon because Petitioner is dissatisfied with the outcome on direct appeal. Appellate counsel is not required to raise every conceivable claim. See Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Accord, Waterhouse v. Moore, 838 So. 2d 480 (Fla. 2002); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Sweet v. Moore, 822 So. 2d 1269 (Fla. 2002); P.B. Johnson v. Moore, 837 So. 2d 343 (Fla. 2002); Cherry v. Moore, 829 So. 2d 873 (Fla. 2002); Lawrence v. State/Moore, 831 So. 2d 121 (Fla. 2002); Gilliam v. Moore, 817 So. 2d 768 (Fla. 2002); Carroll v. Moore, 815 So. 2d 601 (Fla. 2002); Downs v. Moore, 801 So. 2d 906 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Jones v. Moore, 794 So. 2d 579 (Fla. 2001); Happ v. Moore, 784 So. 2d 1091 (Fla. 2001).

It is not sufficient simply to assert that deficiency is established by the fact that supporting authority for an alleged error was extant or that prejudice is established if this Court did not address the claim on a previous appeal. Such a formula would render Strickland v. Washington, 466 U.S. 668 (1984) and its progeny a dead letter. Rather, as stated by this Court in Bruno v. State, 838 So. 2d 485 (Fla. 2002), quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986) this Court must determine:

> "...Whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result."

838 So. 2d at 490 (emphasis supplied).

Moreover, a claim of ineffective assistance of appellate counsel may not be used to circumvent the rule that habeas does not serve as a second or substitute appeal, may not be used as a variant to an issue already raised, nor added as an issue raised in the 3.850 motion and appeal. Fotopoulos v. State, 838 So. 2d. 1122 (Fla. 2002).

ARGUMENT

CLAIM I

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO CHALLENGE THE ALLEGED REPEATED INTRODUCTION OF COLLATERAL CRIME EVIDENCE?

Stanley McGinn testified that he took a composite drawing on patrol with him. His stepdaughter's boyfriend Thaddeus was shown the composite and later in the evening called him. McGinn called the detective in charge of the case and told him Thaddeus knew who it was. He arranged for the two to get together. (TR 9, 801-805).

Thaddeus Capeles testified that he knew Sliney, with whom he graduated from high school. (TR 9, 807). McGinn showed him a composite after the homicide occurred and asked to let him know if he knew or heard anything. (TR 9, 809). Capeles went to the Club Manta Ray which the Petitioner managed. Sliney said he had a gun for sale and asked if he was interested. (TR 9, 810). It was a .25 caliber and Sliney wanted sixty dollars for it. (TR 9, 812). Capeles told McGinn and he was contacted by Sgt. Twardzik. (TR 9, 815). Capeles agreed to assist the sheriff's department and consented to have his phone conversations monitored. He agreed to wear a listening device. (TR 9, 816-817). The Court then considered a proffer including the witness's taped conversations with Sliney. (TR 9, 817-862). The defense objected that the purchasing of guns was not relevant and

complained that expletives and racial epithets should be deleted. (TR 9, 862).

Capeles testified in front of the jury that he agreed with the sheriff's office that they would monitor the call to Sliney, would provide money to purchase the gun and that he would wear a body bug. (TR 9, 869). Capeles called Petitioner and they set up a time to meet at the Club Manta Ray. (TR 9, 870). The tape Exhibit 22A was admitted into evidence and published to the jury. (TR 9, 873-877). The sheriff's office gave him money to purchase the weapon, a body bug and a vehicle to go to the club. (TR 9, 878). Capeles gave Sliney the money in return for the gun and the witness asked if he had any more guns for sale; Sliney said he had three or four left. (TR 9, 880). Capeles returned to the sheriff's office and gave the gun to Sgt. Twardzik. (TR 9, 881).

The tape Exhibit 23A was played to the jury. (TR 9, 882-885). The witness identified Exhibit 27 as the gun he purchased from Sliney. (TR 9, 886). Twardzik examined the serial number and told Capeles that he wanted him to set up another meeting to buy the remaining guns Sliney had. (TR 9, 887). The witness called Sliney again at the Club Manta Ray, told him he had buyers for the remaining guns. Exhibits 24A was admitted and played to the jury. (TR 9, 888-893). Twardzik gave him six hundred dollars in cash and provided a

body bug. (TR 9, 894). Sliney went home to get the guns and sold them to Capeles for five hundred dollars. (TR 9, 896). Exhibit 25A was introduced into evidence. (TR 9, 898-904, 905-907). The witness turned the Exhibit 29 gun over to Sgt. Twardzik. (TR 9, 907). Exhibit 31 was a third gun he purchased. (TR 9, 908).

Deputy Sheriff Twardzik testified that he observed the glass display cases in the shop at the crime scene were empty. (TR 10, 925). He examined the firearms register from the victim's pawn shop. (TR 10, 930). It listed the serial numbers, brand and caliber of the weapons he had in the shop. Some had been sold and notations on the line matching the serial number that they were sold. The ones that were blank were obviously not sold and that's how he obtained the serial numbers. (TR 10, 932). He took the serial numbers, recorded them and had them entered into a national computer; if the guns were subsequently located they would be a match for the guns taken in a homicide. (TR 10, 940). Four guns were missing from the shop. (TR 10, 941). About a week later he had a conversation with Officer McGinn and Twardzik then contacted Thaddeus Capeles. After talking to him Twardzik showed him a photocopy of a similar type Derringer that had been taken from the shop. He asked, and Capeles agreed, to cooperate with law enforcement. A controlled phone call was made to Sliney. (TR 10, 945). They set up a time Sliney would meet Capeles

for the latter to buy the firearm. (TR 10, 946). The transaction was recorded by a tape recording. (TR 10, 947). Capeles returned with a Derringer. (TR 10, 948). It matched the Davis .25 caliber Derringer that had been in the shop. (TR 10, 950).[1] After checking the serial number, an additional gun sale was set up for Capeles to buy three more weapons. (TR 10, 952). The three guns sold by Sliney to Capeles matched the serial numbers on the pawn shop register. (TR 10, 954).

Petitioner contends that the testimony of McGinn, Capeles and Twardzik constituted irrelevant collateral crime evidence which was prejudicial to him and that appellate counsel's failure to challenge such impermissible collateral crime evidence violated his constitutional right to effective assistance of counsel on appeal. In this instance -- as well as in the case of the other issues raised in this petition -- there was no contemporaneous objection at trial on the grounds now urged and therefore appellate counsel may not be deemed deficient for the failure to raise error unpreserved below. See Provenzano v. Dugger, 561 So. 2d 541, 548 (Fla. 1990); Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989); Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

In addition to the fact that the current claim was not preserved

[1] Mrs. Blumberg was recalled to testify the gun was in the shop the day before the killing. (TR 10, 1038).

and hence procedurally barred from review on direct appeal, it is also a meritless claim and appellate counsel is not deficient in failing to raise meritless issues. Rutherford, *supra*, at 643; Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998).

It is meritless since as Petitioner correctly anticipated, the now challenged evidence was not introduced pursuant to Williams v. State, 110 So. 2d 654 (Fla. 1959) and its progeny, i.e., that an offense is relevant to show motive, opportunity, intent or absence of mistake in the crime charged. Rather, the evidence established here was relevant evidence admissible under F.S. 90.402. Sliney's ability and willingness to sell to Capeles guns taken during the robbery/homicide was invaluable evidence linking Petitioner to the crime for which he was on trial.

There is no error much less fundamental error upon which an appellate court could predicate reversal.

Petitioner complains that the tape recordings presented to the jury contained expletives and racial epithets. Sliney may not obtain relief on this score under the guise of ineffective assistance of appellate counsel since that vehicle is not available merely to repeat arguments that were raised and rejected on direct appeal, or variants thereof. See Parker v. Dugger, 550 So. 2d 459 (Fla. 1989);

Fotopoulos v. State, 838 So. 2d 1122, 1135 (Fla. 2002); Atkins v. Dugger, 541 So. 2d 1165, 1166-67 (Fla. 1989); Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000).

Sliney did raise as Issue III in his direct appeal brief a claim that the trial court had erred in admitting portions of the Sliney-Capeles conversations which contained irrelevant and prejudicial material (Initial Brief, pp. 58-59). This Court ruled:

> Thereafter, Sliney asked that if the recordings were found relevant, certain objectionable portions containing offensive language and racial epithets be omitted. Sliney maintains that these particular portions of the transcript lacked any probative value and served only to portray Sliney in a bad light. We agree with the trial court, which reviewed the tapes before they were admitted to the jury, that the taped statements were relevant and that their probative value was not outweighed by their prejudicial effect.

699 So. 2d at 670.

Thus, Sliney's claim must fail to the extent he is presenting a variant or similar argument presented and rejected earlier. Petitioner, cognizant of the fact that his claim was previously presented in a different form argues that appellate counsel should have instead focused on the prejudicial effect of the collateral crime evidence -- that it became a feature of the trial.[2] This

[2] Petitioner complains that the testimony relating to collateral crime evidence comprises some 125 pages; the statistic is

appears to be mere second-guessing by collateral counsel. Since there was no improper presentation of evidence by the prosecutor -- whether of collateral crime or otherwise -- the claim is meritless and should be denied. See Downs v. State, 740 So. 2d 506, 577 n.18 (Fla. 1999) (rejecting appellate counsel ineffectiveness where the claim would have been rejected on appeal); Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

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misleading once it is observed that almost fifty of those pages were devoted to a proffer and was not testimony heard by the jury at that time. (TR 9, 817-862).

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE INTRODUCTION OF ALLEGED IRRELEVANT AND PREJUDICIAL HEARSAY TESTIMONY?

Petitioner complains that appellate counsel failed on appeal to challenge the testimony of Deputy Marinola who testified regarding his arrival on the scene that "[t]he call was dispatched as an aggravated battery. Subject was struck in the head with a hammer." (TR 8, 701). He also complains that crime scene technician Gil Stover testified that "I was called by Detective Sergeant Twardzik in reference to a homicide that had been committed there." (TR 8, 711). Additionally, paramedic John Eric Miller testified in response to a question as to what he found on arrival at the scene that:

> A We were the first unit there. The sheriff's department was right behind us. They were coming from multiple directions. We just happened to pull into the parking lot first. I stepped out of the ambulance. The wife was coming out of the shop at that time. Immediately I knew something was wrong more so than we had received a call as a individual had been hit by a hammer. I expected somebody who was working had possibly hit their hand or something. I wasn't expecting what we found, but knew instantly when we pulled up and saw the wife that something was worse.

TR 8, 741-742.

Deputy Sheriff Twardzik lastly testified that "On the evening of the 18th, I received a phone call at my house about six o'clock

stating that there had been a robbery and a homicide." (TR 10, 923).

Mr. Sliney candidly acknowledges that there were no defense objections at trial on the basis of hearsay as to these excerpts of testimony from witnesses Marinola, Stover, Miller and Twardzik. An appellate attorney cannot be deemed to be ineffective for failing to appeal an issue that has been unpreserved by objection below. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

Even if there had been a timely objection for preservation purposes, challenge to the testimony of Marinola and Stover would have been unsuccessful since their testimony appears to be more a recitation of the witnesses' observations rather than a hearsay report from someone else. In any event since there was no objection to the now-challenged testimony, Petitioner may not obtain relief unless he can demonstrate that the error was fundamental requiring appellate counsel to urge it. This Court has described fundamental error as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Rutherford, *supra*, at 646.

Clearly, Petitioner cannot establish that the innocuous statements of these witnesses about a reported homicide constitute fundamental error -- since the evidence properly adduced at trial demonstrates there was indeed a homicide. Since Petitioner has failed to demonstrate either deficiency or prejudice, his claim must fail. Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003); Holland v. State/Crosby, 2005 Fla. LEXIS 2208 (Fla. November 10, 2005).

CLAIM III

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO CHALLENGE THE PROSECUTOR'S ALLEGED MISSTATEMENT OF THE LAW TO THE JURY?

In his closing argument defense counsel urged in pertinent part:

> We need to talk briefly about the law that the Court is going to give you. And briefly it is whether or not this meets any of the facts and circumstances in this case.
>
> Well, we know that the only evidence implicating Jack Sliney in the homicide, in the death of Mr. Blumberg, is his statement, his statement to law enforcement. We already know that that statement is incredible based upon the fact that he's been drinking, that it was taken in the early morning hours of June 28th, based upon the fact that he did not have an ability to perceive the facts that he was talking about because they were wrong.
>
> Oh, what do we have then? Unequivocally, I can't in all candor stand before you, ladies and gentlemen, and say Jack Rilea Sliney is not guilty of everything, find him not guilty and let him go home. I can't do that. I'm asking you to take some time. This is not an open and shut case as the State has portrayed it.
>
> Take time to read the jury instructions. It is quite clear on its face that Jack Sliney is guilty of at least aggravated battery of George Blumberg, and you're going to receive the instruction on that. Because what did Jack Sliney do? He told them in the taped statement and then he told you from the stand, I grabbed Mr. Blumberg and as a result Mr. Blumberg was seriously injured. Dr. Imami said that his nose had been broken, blood started flowing as a result of him falling down. Yes, it could have been, the lacerations may have been consistent with that broken nose.

> Ladies and gentlemen, that's exactly what happened. That's uncontroverted. That's the only solid consistent evidence that you have that Jack Sliney participated in any direct harm to George Blumberg.
>
> There is another jury instruction with regard to culpable negligence. I invite you and I encourage you to look at that. It's not complicated and actually involves because of the gross negligence on the part of Jack Sliney.
>
> I don't know how you want to interpret the facts and I'm not going to ask you to interpret the facts in any way but to determine whether or not Jack Rilea Sliney is guilty rather of aggravated battery, but of something a little more serious, culpable negligence.
>
> Whether his conduct of leaving Mr. Blumberg there to the mercy of Keith Witteman is felt inexcusable that, in fact, it operates as culpable negligence.

TR 12, 1268-1270.

In rebuttal, the prosecutor stated:

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

TR 12, 1276.

There was no defense objection at this time. The trial court subsequently instructed the jury on first degree murder, second degree murder and manslaughter, defined culpable negligence, attempted murder, aggravated battery, robbery with a weapon, and

theft. (TR 12, 1299-1320).

Petitioner argues that appellate counsel fell below the requirements demanded by the Sixth Amendment in failing to challenge the prosecutor's alleged misstatement of law to the jury. As noted previously, appellate counsel cannot be deemed deficient for failing to urge on direct appeal a claim that was unpreserved by contemporaneous objection in the trial court. See Rutherford, *supra*; Groover, *supra*; Medina, *supra*; Provenzano, *supra*.

Petitioner now argues that the prosecutor "denigrated" defense counsel's argument. Sliney urges that defense counsel was inviting the jury to consider the offense of manslaughter by culpable negligence, a second-degree felony, not the misdemeanor culpable negligence offense. Sliney contends that with the prosecutor's false "clarifying" of the law he effectively derogated defense counsel's credibility and veracity, and left the jury to believe that defense counsel was trying to trick them. This claim is meritless.

The cases cited by Petitioner do not compel the granting of relief in the instant case. In Miller v. State, 712 So. 2d 451 (Fla. 2nd DCA 1998) for example, the prosecutor ridiculed the appellant's defense of voluntary intoxication and misstated the law and the trial court overruled defense counsel's objection. In Quaggin v. State, 752 So. 2d 19 (Fla. 5th DCA 2000) the Court reversed because of

instructional error compounded by several improper prosecutorial comments. Priestley v. State, 537 So. 2d 690 (Fla. 2nd DCA 1989) involved both an erroneous jury instruction which had the effect of negating the defendant's defense and a prosecutor's misstatement of the law, which merited reversal. In Harvey v. State, 448 So. 2d 578 (Fla. 3rd DCA 1984) the appellate court reversed where the trial court provided a misleading instruction, the prosecutor made repeated misstatements of the law and when the jury expressed confusion and requested re-instruction the trial court repeated the original instruction. In Tuff v. State, 509 So. 2d 953 (Fla. 4th DCA 1987) the appellate court found several remarks by the prosecutor were improper and fundamentally tainted the case.

In contrast, in the instant case Petitioner voices no complaint with the instructions by the trial court to the jury and a dozen years after the trial Petitioner has been able to unearth only a single comment by the prosecutor which he alleges to be a misstatement. Contrary to Sliney's argument the prosecutor did not denigrate the defense and suggest that defense counsel was trying to trick them. Indeed the prosecutor specifically noted that "I'm sure that he did not mean to mislead anybody on that." (TR 12, 1276) Since the defense counsel was not specific in stating which culpable negligence statute he relied on, there was nothing improper in the

prosecutor's brief response. Even if there were error, there is no fundamental error i.e. error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Rutherford, supra, at 646.

Accordingly, appellate counsel's failure to urge this point as fundamental error would not have succeeded and this claim of deficiency and resulting prejudice is meritless.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied on the merits.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. 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, on this 22nd day of November, 2005.

CERTIFICATE OF FONT COMPLIANCE

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

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COUNSEL FOR RESPONDENT