IN THE SUPREME COURT OF FLORIDA

HENRY PERRY SIRECI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 64,728

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

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE

The State accepts the Statement of the Case contained in the initial brief of the Appellant, but wishes to invite the Court's attention to the following additional facts.

Counsel testified at the hearing below that because of his then understanding of the law of Florida, he did not investigate, develop, or proffer evidence of mitigating factors other than those listed in the statute (V. 865-66). Counsel also testified that he went as far as he could go, and he doesn't recall being stopped or limited in any way and, in fact, presented every thing he had (V 41; 43). Counsel further testified that he discussed Sireci's history with him, put Sireci on the stand, and went as far as he could go in presenting mitigating circumstances (V 4041; 64). Counsel didn't know what other witnesses he would have put on or if there were any other mitigating factors (V 42).

Following Holtzinger's direct testimony defense counsel was extended the opportunity of cross-examining Holtzinger two days later, which counsel declined (T 628). Counsel testified that although he was given the opportunity to talk to Holtzinger and then to cross-examine Holtzinger, it was a strategy decision to refrain from doing so. Counsel was hoping to preserve what he perceived to be a discovery violation on the part of the state in not timely furnishing him with Holtzinger's name. (V 56-63). Trial counsel was aware at the time he employed this strategy that Holtzinger was in jail and that

Holtzinger had prior felony convictions (V 65-66).

The symbols for references used in the Appellant's Initial Brief will also be used in this Answer Brief, and are restated for convenience as follows:

"V" Record on Appeal of Motion to Vacate Judgment and Sentence pursuant to Rule 3.850;

"R" Record on direct appeal to this Court;

"S" Transcript of Advisory Sentencing Proceedings;

"T" Transcript of the Trial on Guilt/Innocence;

"C" Transcript of Meaning on Motion for Continuance.

QUESTION PRESENTED

The Appellant, Henry Perry Sireci, has stated the question presented for decision in points II and III of his brief as follows:

> II. WHETHER SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON THE RACE OF THE VICTIM OR RACE OF THE DEFENDANT VIOLATES THE FOURTEENTH AMENDMENT
>
> III. WHETHER SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON RACE OF THE VICTIM OR RACE OF THE DEFENDANT ALSO VIOLATES THE EIGHTH AMENDMENT

The Appellee, the state of Florida, prefers to restate the questions presented more concisely, combining the questions into one issue on appeal and rephrasing it as follows:

> II. WHETHER A CLAIM THAT SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON THE RACE OF THE VICTIM OR RACE OF THE DEFENDANT VIOLATES THE FOURTEENTH AND EIGHTH AMENDMENTS IS COGNIZABLE ON APPLICATION FOR POST-CONVICTION RELIEF AND WHETHER IN THE INSTANT CASE SUCH CLAIM IS UNFOUNDED AND NOT SUPPORTED BY ANY CREDIBLE EVIDENCE AS WELL.

ARGUMENT

I. APPELLANT WAS NOT DENIED A FAIR AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BY THE PRECLUSION OF EVIDENCE OF NON-STATUTORY MITIGATING FACTORS

It should first be noted that on direct appeal to this Court, Sireci's counsel argued that presentation and consideration of mitigating evidence had been improperly limited and cited both Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed 2d 973 (1978), and Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed.2d 239 (1977). (V 466-473) The record conclusively demonstrates, therefore, that the limitation on mitigating evidence issue has been raised previously, has been fully considered, and has been found to be without merit. Sireci v. State, 399 So.2d 964 (Fla. 1981); Sireci v. Florida, ____U.S. _____, 102 S. Ct. 2257 (1982). It is well-settled that a motion under Florida Rule of Criminal Procedure 3.850 cannot be utilized for a second appeal to consider issues that either were raised in the initial appeal or could have been raised in that appeal. Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Foster v. State, 400 So.2d 1 (Fla. 1981); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spenkelink v. State, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977). It is now, and was below, the State's clear position that this issue was raised on the initial appeal and disposed of and warrants no further consideration.

Moreover, the State would suggest that the Appellant's claim that the operation of law rendered his trial counsel ineffective, is a deprivation of due process claim scantily clothed as ineffective assistance of counsel. See Hitchcock v. State, 432 So.2d 42, 43 (Fla. 1983). The instant claim boils down to merely another Lockett challenge.

Aside from having previously argued the Lockett issue on direct appeal to this court, the issue is not cognizable under Rule 3.850 for the reason that Lockett did not change the law in Florida. As this court stated in Cooper v. State, 437 So.2d 1070, 1071-1072, (Fla. 1983):

> . . . He contends that Lockett, decided subsequent to his trial and appeal, compels a reversal of his sentence. When his original appeal was taken to this Court, however, Florida's law was consistent with the pronouncement of Lockett. In Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2185, 60 L. Ed 2d 1060 (1979), we held that the wording of the death penalty statute and the construction placed by this Court on that statute indicate unequivocally that the list of mitigating factors contained in this statute is not exhaustive. We referred to our earlier decisions in Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L. ed 2d 666 (1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), among others, to demonstrate this Court's constant view that all relevant circumstances may be considered in mitigation and that the statutory factors merely indicate principal factors to be

> considered. We made clear that Lockett did not change the law in Florida since our law preexisting Lockett was consistent with the dictates of Lockett.

This Court concluded that since Lockett did not change the law of Florida, the dictates of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed.2d 612 (1980) were not met to allow a change in decisional law to be considered in a capital case under Rule 3.850.

The Appellant claims that the issue now raised is different from the Lockett challenge raised on direct appeal in that on direct appeal the Appellant argued that on its face Florida's statute violated Lockett during the period between Cooper and Songer but the issue now raised challenges the application of the statute to the Appellant's particular case (Appellant's Brief p. 4). This court in Cooper also noted in passing:

> . . .Post conviction proceedings are not intended to afford defendant a second appeal of matters that were or could have been raised on direct appeal, and a defendant cannot argue on appeal the relevancy of evidence on one ground and then by collateral attack again argue the relevancy of that evidence on a different ground.

437 So.2d at 1072.

It should be clear that any and all aspects of the Lockett issue should have been raised by the Appellant in his direct appeal and those issues not raised (as the Appellant

claims the instant issue was not raised) are thereby waived.

It is obvious the court below also considered the issue a rehash of Lockett, previously determined by this court. The court below noted:

> . . .The conflict between Burger's opinion in Lockett and our Supreme Court's opinion in Cooper v. State is such a good argument that it did not go unnoticed at the time of the appeal. It was presented to the Supreme Courts of both Florida and the United States. Both of those supreme courts ruled on the Sireci case after the decision in Lockett v. Ohio. The issue was presented, presumably it was heard, considered and disposed of against Sireci by the very courts that decided Cooper and Lockett (V 877)

The lower court, however, permitted defense counsel to raise and argue the point mainly because the maximum penalty was involved and to avoid any possibility of arbitrariness in applying such penalty (V 877).

In its order denying motion for rehearing, the lower court was more expressive in its view that a Rule 3.850 motion is not the proper medium for review of such an issue. The court stated:

> . . .The argument that the death sentencing procedure in Florida was unconstitutional as interpreted in Cooper v. State, is to argue that it was unconstitutional as to all defendants between the Cooper opinion in 1976 and Songer in 1978. If that is the case, it is a proper grounds for appeal and review in the supreme courts of this state and the United States. It has been argued unsuccessfully on appeal in this case. The argument is convoluted when it comes up in

> the context of a motion for post-conviction relief, such as this one made for Mr. Sireci. It amounts to arguing that the Florida Supreme Court rendered defense attorney Kirkland ineffective by inclarity of its opinion and apparent ruling in Cooper v. State. Rule 3.850 was never intended to provide a trial judge with a secondary super-review of the state supreme court's precision in announcing Florida's jurprudence (V 909)

The State would reiterate that this is an issue previously argued unsuccessfully. This Court noted in its decision on Sireci's direct appeal that in his findings of fact, the trial judge specifically recognized that "[A]ll evidence of mitigating circumstances may be considered by the judge or jury" and that the trial judge recognized his duty to assess what factual situations require the imposition of death by a process of reasoned judgment and not a mere counting process of "x" number of aggravating circumstances and "x" number of mitigating circumstances. Sireci 399 So.2d at 971-972. Moreover, in rejecting Sireci's argument on direct appeal that the judge expressly limited himself to statutory mitigating circumstances, this court pointed out that this was not a situation where the judge refused to hear certain evidence of mitigating circumstances, but that he properly found that evidence not to mitigate the sentencing conclusion. Sireci 399 So.2d at 972. In essence, this court has plainly laid to rest any and all aspects of the Lockett issue. If the issue is to be resurrected, then plainly, a lower court is not the proper forum.

The lower court also determined that "even if the effects of the Cooper v. State opinion could be pursued through a motion for postconviction relief alleging ineffectiveness of defense counsel, the argument fails." (V 909). The State would submit that this is a proper determination.

Assuming arguendo that it is proper to reach the issue of ineffectiveness of counsel, such ineffectiveness cannot be shown, even aside from the Lockett issue.

This simply is not a case where there was a total failure to present mitigating evidence. Defense counsel was able to put quite a bit of nonstatutory mitigating evidence before the jury for their consideration. Nor does Sireci identify any one of his enumerated items of fact, in this appeal, as a specific omission which amounted to a substantial deficiency which may have affected the outcome of the trial. See Francois v. State, 423 So.2d 357, 359-60 (Fla. 1982).

Even if defense counsel felt constrained by what he testified were his perceptions as to the limitations of the statute, such constraints obviously did not deter defense counsel. He testified that he went as far as he could go, and he doesn't recall being stopped or limited in any way (V 41). In fact he presented everything he had (V 43). Counsel had discussed Sireci's history with him and had available for presentation to the jury (which he did present without objection or restriction) Sireci's first-hand picture of his own life (V 64) Sireci then could have brought out any additional

factors about his own life that would have been mitigating. Counsel was neither ineffective in this regard nor effectively deterred. This court adopted identical reasoning in rejecting a defendant's claims in this regard in Hitchcock v. State, 432 So.2d 42 (Fla. 1983) also See, Thomas v. State, 421 So.2d 160, 163 (Fla. 1982); Washington v. State, 397 So.2d 285, 286 (Fla.1981)

Counsel testified that he discussed Sireci's history with him, put Sireci on the stand, and went as far as he could go in presenting mitigating circumstances (V 40-41; 64) Counsel didn't know what other witnesses he would have put on or if there were any other mitigating factors (V 42). Obviously after conferring with Sireci, what mitigating factors were known to counsel at that time were utilized. Counsel cannot be faulted for failing to call other witnesses to prove the existence of other mitigating circumstances, which at that time he evidently did not believe existed, especially in view of the fact that Sireci was put on the stand and testified himself. This very argument was rejected in Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982). Moreover, the choice by counsel to present or not present evidence in mitigation at the sentencing phase of trial is a tactical decision properly within counsel's discretion. Brown v. State, 439 So.2d 872, 875 (Fla. 1983). Counsel's choice to present mitigating evidence in the manner in which he did could be considered a strategic decision in most instances. See Foster v. Strickland, 707 F.2d 1339, 1344 (11th Cir. 1983). Counsel's statements

cannot be taken at face value because experience indicates that some people depreciate their own knowledge and ability as a trial tactic for persuasive reasons. More importantly, memories fade. While actions are often remembered, the underlying reasons therefore are often obscure. It is always possible to enlarge upon anything with the passage of time and benefit of hindsight and a list of nonstatutory mitigating factors is no exception.

With respect to effectiveness of counsel at a sentencing hearing, there is no requirement to call any set number of character witnesses which would merely be cumlative. Raulerson v. State, 437 So.2d 1105 (Fla. 1983) The list of allegedly non-statutory mitigating circumstances presented by Sireci is basically cumulative of the information adduced at the sentencing hearing and is derived from defense depositions and was argued on direct appeal (V 456-458). In any event consideration of Sireci's proffered affidavits relects that even in the event such testimony was not considered, it would certainly not create a substantial likelihood that there was actual and substantial disadvantage to Sireci. See, Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983).

It is obvious that counsel could not be expected to predict the decision in Lockett. Proffit v. Wainwright, 685 F.2d 1227, 1247-1248 (11th Cir. 1982); Muhammad v. State, 426 So.2d 533 (Fla. 1982); See Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L.Ed. 2d 785 (1970). Ineffectiveness

cannot be predicated upon such a basis. Sireci, however, makes the argument an either/or situation claiming that he was deprived of the benefit of consideration of nonstatutory mitigating factors by either the state of the Florida law at the time or through ineffective assistance of counsel. To shut down both avenues of approach would seem somewhat unfair, however, Sireci ignores a very important fact and that is that whatever ball may have been dropped by trial counsel was picked up and carried to the finish line by appellate counsel. Lockett and Cooper were the subjects of a direct appeal. Relief was not warranted then nor is it warranted now.

II. A CLAIM THAT SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON THE RACE OF THE VICTIM OR RACE OF THE DEFENDANT VIOLATES THE FOURTEENTH AND EIGHTH AMENDMENT IS NOT COGNIZABLE ON APPLICATION FOR POST-CONVICTION RELIEF AND IN THE INSTANT CASE IS UNFOUNDED AND NOT SUPPORTED BY ANY CREDIBLE EVIDENCE AS WELL.

The most recent pronouncement on this issue occurred by this Honorable Court in Griffin v. State, ___So.2d ___ (Florida 1984) [9 FLW 97 Case No. 65014, 65016; March 16, 1984]. Griffin took an appeal from a circuit court order denying his motion for post-conviction relief and this Court affirmed the trial court's denial of relief without an evidentiary hearing on all grounds other than ineffective assistance of counsel. One such ground involved a pattern of racial disparity in the prosecution, trial and sentencing of capital offenders in Florida. Without more, this decision seems to imply that evidentiary hearings are not mandated on such claims.

In Henry v. State, 377 So.2d 692 (Fla. 1979), the petitioner raised the contention that the death penalty was unconstitutional as applied. At that time, in 1979, this court ruled that such a contention could properly be raised as a subject for consideration in a proceeding for post-conviction relief. It determined, in Henry, however, that the trial court's refusal to conduct a hearing or grant other relief on the issue of whether the death penalty was unconstitutionally applied because it was imposed in an arbitrary and capricious and irrational manner based on geography, poverty and other

arbitrary factors, was proper since the hypothetical, unsupported argument had been rejected as a legal basis for relief in prior cases and no preliminary factual basis for the contention was presented to the trial judge. Such a hypothetical, unsupported argument of counsel had been rejected as a legal basis for relief in Spinkellink v. Wainwright, 578 F.2d 582, 613-14 (5th Cir. 1978), cert. denied. 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). Subsequently, the United States Court of Appeals, Fifth Circuit passed on Henry's claim. The Fifth Circuit determined that even if in the county in which the petitioner was sentenced, 16.3 percent of all capital indictments resulted in the death sentence and 41.7 percent of all convictions resulted in the death sentence, while the state wide percentages were 9.7 percent and 24.3 percent, respectively, there was no constitutional violation, as the petitioner alleged no racial, sexual or other inherently suspicious discrimination, and did not argue that the death penalty was somehow unsuited in his particular case, and did not raise a claim that the Florida Court failed properly to conduct a proportionality review, but claimed only that the Florida death penalty was arbitrary and capricious as applied. Henry v. Wainwright, 721 F.2d 990, 998 (5th Cir. 1983). Similarly, in the instant case, Sireci has made no showing as to why the death penalty was somehow unsuited in his particular case. Nor did he raise a claim that the Florida Court failed to properly conduct a proportionality review. The Fifth Circuit Court of Appeals

also cited Maggio v. Williams, ____U.S.___ 104 S.Ct. 311, ___L. Ed.2d_____ (1983), in which the Supreme Court refused to review a claim that the Louisiana Supreme Court's proportionality review is inadequate because the Louisiana Court makes comparisons only on a district wide basis. The Fifth Circuit determined that by deciding against Williams, in effect, the Court strongly indicated not only that the death penalty may be applied differently from county to county, but that the state Supreme Court need not review those differing applications to determine whether they are disproportionate. 721 F.2d at 998. Later, in Pulley v. Harris, ____U.S.____, ___S.Ct.____, ___L.Ed.2d ___ #82-1095, 34 Cr. L. Rptr. 3027 (1984), the United States Supreme Court determined that the Eighth Amendment's prohibition of cruel and unusual punishment does not require a state appellate court to conduct, upon request, a proportionality review of a death sentence in which the sentence is compared with the penalties imposed in similar cases. Such a review would seem even more mandated that the review Sireci would have the lower court conduct, yet it is no longer required.

In Sullivan v. Wainwright, ___U.S.___, 104 S.Ct. 450, ____L.Ed.2d ____(1983), the United States Supreme Court refused to disagree with the decisions of the Florida Supreme Court and the Federal District Court and the Eleventh Circuit Court of Appeals on Sullivan's claim of discriminatory application of the death sentence. Counsel for Sullivan, who was white, presented voluminous statistics allegedly supporting the claim of

discriminatory application of the death sentence. The Court found that the record showed that the Florida Supreme Court and both the Federal District Court and the Eleventh Circuit Court of Appeals had considered voluminous statistics which assertedly supported the claim of discriminatory application of the death sentence and had determined in written opinions that such evidence was insufficient to show unconstitutional discrimination and the Court refused to interfer with such findings. 104 S.C. at 451. This court had previously found that Sullivan's allegations of discrimination did not constitute a sufficient preliminary factual basis to state a cognizable claim, as was the case in many prior cases. Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983). On Appeal to the Eleventh Circuit Court of Appeals, that court determined that the issue presented by Sullivan was foreclosed by Spinkellink v. Wainwright, 578 F.2d 582, 612,et. seq. (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.C., 1548, 59 L.Ed.2d 796 (1979), and Adams v. Wainwright, 709 F.2d 1443, 1449-50 (11th Cir. 1983). The court noted that "the petitioner presents nothing more than the statistical impact type case as presented in those cases. Although there are new studies, the thrust is the same as ones previously held not sufficient to show the Florida system to have intentionally discriminated against petitioner." Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir. 1983).

In Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), the court stated:

> Mere conclusary allegations, as the petitioner makes here, such as that the death penalty is being administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons would not warrant an evidentiary hearing.

709 F.2d at 1449-50.

The court determined that disparate impact in sentencing alone is insufficient to establish a violation of the Fourteenth Amendment as there must be a showing of an intent to discriminate and only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice. 709 F.2d at 1449. The State would submit that such is not the case here and Sireci has completely failed to show any form of intentional discrimination. Prior to the case being heard by the Eleventh Circuit Court of Appeals, this Court had denied Adams claim on the basis that the fact that there were four death sentences imposed during a four year period in St. Lucie County, together with conclusions drawn therefrom, did not constitute a sufficient preliminary factual basis that the death penalty was imposed in an arbitrary, capricious, and irrational manner. Adams v. State, 380 So.2d 423, 424 (Fla. 1980). Similarly, in the instant case, Sireci has failed to establish a preliminary factual basis that the death penalty was imposed in an arbitrary, capricious, or irrational manner. A similar claim was rejected in

Hitchcock v. State, 432 So.2d 42 (Fla. 1983).

In Thomas v. State, 421 So.2d 160 (Fla. 1982), as in this case, the Appellant filed some data from what were characterized as preliminary studies of capital sentencing in Florida and asked for an evidentiary hearing and funds to employ experts to assist in proving the factual allegations. He argued that his allegations raised a substantial enough question to require the appointment of experts to develop his claim. This Court found that the appellant's allegations of discrimination did not constitute a sufficient preliminary factual basis to state a cognizable claim. 421 So.2d at 163.

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). The Fifth Circuit Court of Appeals did not hold that victim-oriented discrimination allegations are per se not cognizable, but did hold, that in light of readily stated possible innocent explanations for the disparatity, the statistics presented were an inadequate factual basis upon which to ground a claim of discrimination.

Justice Overton, specially concurring in Meeks v. State, 382 So.2d 673 (Fla. 1980), perhaps stated the most cogent reason for rejecting victim-oriented statistical factual information:

> . . .I would totally reject the contention of movant-appellant that a victim-oriented statistical factual basis may be submitted within the purview of Henry v. State, 377 So.2d 692 (Fla. 1979), to show that Florida's

> death penalty statute is imposed in an unconstitutional and discriminatory manner. The Appellant's statistical allegations are based entirely on the race of the victim, rather than the race of the offender. To try to statistically correlate offenders race with the race of their victims results in a mathematical nightmare which has no bearing on the actual conduct of the offender as the determining factor of who lives and who dies. We are obligated to review each case upon its facts and circumstances and determine whether or not the conduct of the offender justifies the imposition of the death penalty.

382 So.2d at 676.

The State would submit that the actual conduct of the offender should be determinitive of the penalty received, as the fact that others may have escaped the same penalty does not make the offender's actual conduct any less egregious and is no basis for vacating a sentence in his case. Moreover, the Fifth Circuit Court of Appeals in Spinkellink, supra, rejected just such statistical information as was submitted by the Appellant in this case. Spinkellink submitted statistical evidence which reflected that 92 percent of the inmates on Florida death row had murdered white victims while only 8 percent had murdered black victims and this data was held to be legally insufficient to establish a prima facie showing of racial discrimination. 578 F.2d 612. The State would conclude that the appellant's data was also legally insufficient to establish a prima facie showing of racial discrimination.

Further, if proportionality in regard to the circumstances of the crime is no longer mandated, it would seem incongruous to review the racial basis of the offender or victim.

III. APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL OR DUE PROCESS OF LAW BY COUNSEL NOT EXAMINING A STATE'S WITNESS NOR WAS HE DEPRIVED OF DUE PROCESS OF LAW BY THE STATE'S ALLEGED FAILURE TO DISCLOSE ALLEGED DEALS WITH THIS WITNESS.

Appellant contends that he was deprived of effective assistance of counsel due to his counsel's not cross-examining Donald Holtzinger. On appeal Sireci contended that his right to discovery had been violated for lack of a written witness list containing Holtzinger's name. However, this Court rejected such a contention finding that the defense had been aware of Holtzinger's name as little as two weeks after the state had become aware of this witness. Sireci v. State, 399 So.2d 964, 968 (Fla. 1981). Sireci's first attorney was certainly aware of Holtzinger. This Court also determined that Holtzinger's name appeared on the pracecipe for witness subpoena filed twelve days before trial. Id. at 969. Sireci's first defense attorney told his trial attorney of the existence of Holtzinger as a possible witness one week prior to trial. In addition, following his direct testimony defense counsel was extended the opportunity of cross-examining Holtzinger two days later which counsel declined (T. 628).

Sireci, argues, nevertheless, that his trial attorney was ineffective for failing to talk to Holtzinger prior to trial or to cross-examine Holtzinger. However, at the Motion to Vacate hearing, the trial attorney testified that although he was given the opportunity to talk to Holtzinger and then to

cross-examine Holtzinger, it was a strategy decision to refrain from doing so. Counsel was hoping to preserve what he perceived to be a discovery violation on the part of the state in not timely furnishing him with Holtzinger's name (V 56-63). Obviously, if counsel had attempted to mitigate the prejudice from what he perceived to be a discovery violation, this would have hurt the chances for reversal on appeal with reference to what he perceived to be a fundamental discovery violation on the record. This Court, on direct appeal of this matter, rejected the argument that the trial court erred in denying counsel's request for a continuance, and that the trial court erred in denying Appellant's motion to exclude Holtzinger's testimony. In essence, while counsel's strategy was unsuccessful, it was strategy nevertheless. Moreover, trial counsel was indeed aware, at the time he employed this strategy, that Holtzinger was in jail and that Holtzinger had prior felony convictions (V 65-66). An attorney is not ineffective when, as here, he takes certain action, or refuses to take certain action, because of trial strategy or tactics. Songer v. State, 419 So.2d 1044 (Fla. 1982).

Most importantly, Appellant's claim that his counsel's failure to cross-examine Holtzinger prejudiced him is clearly refuted by the record.

Holtzinger was one of many witnesses, whose testimony was corroborated by physical evidence introduced at trial. Sireci's girlfriend, Barbara Perkins, testified he told her that he hit the victim in the head with a wrench, and that he stabbed the

victim. Sireci, 399 So.2d at 967; Sireci told Perkins he killed the victim. Sireci had the victim's wallet and credit cards in his possession (R 163-164).

Another of Sireci's cellmates, Harvy Woodall, testified that Sireci described the manner in which he killed the victim (R 434-435); Sireci, 399 So.2d at 967. Sireci told Woodall he stabbed the man over sixty (60) times (T. 434-435). Another witness also testified that Sireci recounted the murder to him and the manner in which the victim was killed (T. 455-456). Sireci also told David Wilson, his brother-in-law, about the murder and the taking of credit cards (T. 491-493). Sireci described in vivid detail how the killing was accomplished (T. 497-501). The State adduced more than adequate evidence of Sireci's guilt without Holtzinger's added evidence. Thus, there was no prejudice to Sireci to the extent that there is a likelihood that the waiver of Holtzinger's cross-examination affected the outcome of the case or even the course of the proceedings.

IV. APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL NOT OBJECTING TO AN ALLEGED COMMENT ON APPELLANT'S EXERCISE OF HIS RIGHTS TO COUNSEL AND TO REMAIN SILENT.

At trial Detective Nazurchuk testified concerning the interrogation of Sireci shortly after he was arrested, stating that he read the Appellant his rights and that he requested his attorney (T 531-532).

This Court, on Sireci's direct appeal fully considered the issue and afforded the Appellant no relief on this ground, obviously finding no denial of due process of law by the introduction of such testimony and no prejudice to the Appellant. Sireci v. State, 399 So.2d 964, 970 (Fla. 1981). This Court, in so deciding, specifically noted "[T]he defendant made incriminating statements to many people, including a confession to his brother-in-law." 399 So.2d at 970. The issue, having once been fully considered, collateral relief proceedings may not be used to retry an issue previously ligitated on direct appeal. See Hitchcock v. State, 432 So.2d 42, 43 (Fla. 1983). This issue was, in the first instance, a convoluted instant replay of an issue litigated and disposed of by this Court and not the proper subject of collateral relief proceedings. Whether counsel objected to such testimony or not, the issue was clearly discussed and disposed of on direct appeal.

A similar issue has previously been brought to the attention of this Court in the context of effectiveness of appellate counsel. In Songer v. Wainwright, 432 So.2d 355 (Fla. 1982) this Court stated that a matter discussed by the court in its opinion on direct appeal, and rejected by the court, constitutes a sufficient "lack of prejudice" so as to preclude a claim of ineffective assistance of counsel for not raising the issue. Although Sireci contends that he was prejudiced by the failure of counsel to object because the objection would have resulted in reversible error on appeal, this Court has stated that "to establish prejudice warranting post-conviction relief, there must be serious doubt of a defendant's guilt." Ford v. State, 407 So.2d 907, 909 (Fla. 1981) Appellant has not demonstrated such "serious doubt", nor could he under the facts of this case.

Moreover, this Court saw no prejudice to Appellant by virtue of Detective Nazurchuk's testimony warranting reversal and, therefore, Appellant's counsel could not be ineffective for not objecting.

Although Clark v. State, 363 So.2d 331 (Fla. 1978) may have required a new trial had this alleged error been preserved, it must be noted that Petitioner's trial took place in October of 1976, two years prior to Clark. Thus as was the case in Cox v. State, 407 So.2d 633 (Fla. 3d DCA 1981) defense counsel's omission of an objection does not constitute ineffective assistance of counsel. In Cox the Third District noted that prior to Clark it was not necessary

to object to testimony concerning the defendant's invocation of his Miranda rights to preserve the point for appellate purposes. Cox at 635, See, Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967); Weiss v. State, 341 So.2d 528 (Fla. 3d DCA 1977); Smith v. State, 342 So.2d 990 (Fla. 3d DCA 1977); Bostic v. State, 332 So.2d 349 (Fla. 4th DCA 1976).

It was not until Clark that the requirement of a contemporaneous objection became clear. Therefore, Appellant's counsel cannot be deemed to have rendered ineffective assistance on this basis since counsel cannot be judged ineffective by a standard based on hindsight. United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). Nor can he be judged so for failing to anticipate future developments in the law. Parker v. North Carolina, 397 U.S. 790 (1970).

V. THE FLORIDA CAPITAL SENTENCING SYSTEM AS A WHOLE IS NOT VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE OF THE DUE PROCESS MANDATE THAT A LESSER INCLUDED OFFENSE INSTRUCTION BE GIVEN WHEN THE EVIDENCE WARRANTS SUCH INSTRUCTION.

It should first be noted that the Appellant did not object on appeal to the jury instructions on lesser offenses. It is well settled that collateral relief proceedings may not be used as a vehicle to raise for the first time issues which the Appellant could have raised during the initial appeal on the merits. Thompson v. State, 410 So. 2d 500, 501 (Fla. 1982). Sireci never objected to the giving of such instructions and the issue of the propriety of the instructions has been waived. Castor v. State, 365 So. 2d 701 (Fla. 1978).

Defense counsel strenuously argued in front of the jury that this was not a first degree murder, but a less serious offense (T 708-711). Referring to the prosecutor's charge, he stated that it is not unusual in the practice of law to ask for more than you get (T 711). Thereafter, after attempting to use lesser offenses for his benefit, and arguing that the evidence only supported lesser offenses, he is now estopped from asserting that the jury instructions on lessers were improper. See, McPhee v. State, 254 So. 2d 406 (Fla. 1st DCA 1971).

A jury's consideration of lesser included offenses in capital cases is not offensive to the Constitution. The

Appellant argued below that Florida law invites jurors to dispense mercy and grant pardons and that this causes an arbitrary and capricious application of the death penalty. The United States Supreme Court, however, has already held that the giving of lesser included offenses is mandatory in capital cases. Beck v. Alabama, 447 U.S. 625 (1980). In addition, the cases declaring death penalty statutes unconstitutional based their holding on inadequate guidance of the jury. Proffitt v. Florida, 428 U.S. 242, 256 (1976). The Court found nothing wrong with a jury choosing to dispense mercy by convicting of a lesser offense. Gregg v. Georgia, 428 U.S. 153, 199 (1976).

The Appellant cites Hopper v. Evans, 456 U.S. 605, 102 S. Ct. 2049, 72 L.Ed. 2d 367 (1982) as support. In Hopper, the Appellant challenged the failure to instruct on lesser included offenses. The Court merely held that the lack of evidence to support the lessers negated the need to hold a new trial. Put another way, the lack of prejudice to the defendant excused the failure to give instructions. Hopper does not in any way ever forbid the giving of lesser included instructions, even if there was a lack of evidence, a fact which the State disputes, as did defense counsel at trial.

Moreover, this Court has fully addressed and disposed of this issue in Aldridge v. Wainwright, 433 So. 2d 988, 990 (Fla. 1983). Aldridge asserted that Hopper mandates that due process requires that a lesser included offense instruction

be given only when the evidence warrants such an instruction and that the standard jury instructions which direct the trial judge to instruct the jury on all lesser degrees of homocide render the capital sentencing scheme unconstitutional. This Court rejected this contention:

> ...Hopper is not applicable here because in that case Alabama law prohibited instructions on lesser included offenses in capital murder cases. The rule of law established in Hopper is that due process provides that defendants in capital cases are entitled, as in every other criminal case, to an instruction on lesser included offenses when the evidence warrants such an instruction. Hopper was never intended to limit the giving of lesser included offense instructions in capital cases, and the petitioner's argument is without merit.

433 So.2d at 990.

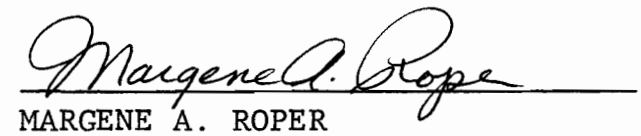
This issue is not now a viable one.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the order of the trial court denying the Appellant post conviction relief.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE