IN THE SUPREME COURT OF FLORIDA

NO. 69380

HENRY PERRY SIRECI,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida, and
R. L. Dugger, Superintendent, Florida State Prison,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Race discrimination/
death sentence

INTRODUCTION

This application raises one substantive issue: That Mr. Sireci was sentenced to death by a system unconstitutionally skewed on the basis of race. This, of course, is the same claim presently pending before the United States Supreme Court in McCleskey v. Wainwright, 106 S.Ct. 3331 (1986) and Hitchcock v. Wainwright, 106 S.Ct. 2888 (1986).

Since the time the United States Supreme Court granted certiorari in Hitchcock and McCleskey, that Court has granted stays of execution in several cases raising the identical claim. In Davis v. Wainwright, No. A-224 (U.S. September 23, 1986) and Hardwick v. Wainwright, No. A-225 (U.S. September 23, 1986), the Court, by a vote of 7 to 2, granted stays pending the filing and disposition of certiorari petitions. Earlier, in Berry v. Phelps, 55 U.S.L.W. 3114 (August 6, 1986), the Court granted a stay pending filing and disposition of a petition for writ of certiorari. Berry involved a successor habeas corpus petition, and the only issue raised in the stay request was the McCleskey/Hitchcock claim. The stay was granted despite the "procedural default" and "abuse" status of Berry. See also Messer v. Kemp, 106 S.Ct. 3342 (July 8, 1986) (order granting stay of execution pending timely filing and disposition of certiorari petition; successor habeas); Wingo v. Blackburn, 55 U.S.L.W. 3127 (August 5, 1986) (stay pending timely certiorari petition); Watson v. Blackburn, No. 85-5082 (September 4, 1986) (stay granted by Supreme Court; successor habeas; McCleskey claim only issue raised in stay application); Moore v. Blackburn, No. A-30 (September 11, 1986) (stay granted by Supreme Court pending appeal to Fifth Circuit; second successor habeas; only issues in stay application were McCleskey and ineffective assistance of counsel raised for the third time on habeas); Celestine v. Blackburn (September 12, 1986) (stay ordered by United States District Court, Western District of Louisiana; second successor habeas); McCleskey only issue in stay application); Glass v.

Blackburn (September 11, 19860 (stay granted by Supreme Court; McCleskey one of several issues raised); Brodgon v. Blackburn (September 11, 1986) (stay granted by Supreme Court in successor habeas; McCleskey the principal issue in application); Riles v. McCotter, No. 86-2738 (September 16, 1986) (stay ordered in successor habeas by United States District Court, Southern District of Texas; State's motion to vacate denied by Fifth Circuit on September 16, 1986); Rault v. Blackburn, September 17, 1986 (stay granted by Supreme Court in successor habeas; McCleskey only issue raised).

JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). The Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const.

This is Mr. Sireci's first such application. In 1982, he filed a Rule 3.850 motion in Circuit Court raising the claim presented now. Mr. Sireci asserted in Circuit Court that the death penalty in Florida is being administered and applied in a manner that discriminates on the basis of race See Transcript of Motion to Vacate Hearing, pp. 105-25, 172-299, 301-06, 322-24, 542-47, 630-32, 659-722. He moved for an evidentiary hearing and for the appointment of experts, both of which were denied. Nevertheless, Mr. Sireci proffered statistical analyses of Florida's system of capital punishment, including an early draft of the study conducted and subsequently published by Stanford Professors Gross and Mauro. The Circuit Court carefully considered the claim, but ultimately rejected it.

Mr. Sireci aggressively pursued the claim on appeal to this Court. Mr. Sireci devoted 28 pages of his brief to the issue, broken down as follows:

> I. SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON THE RACE OF THE VICTIM OR RACE OF THE DEFENDANT VIOLATES THE FOURTEENTH AMENDMENT.
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> A. Stating the Prima Facie Case: Discrimination Based on the Victim's Race Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

1. The Historical Purpose of the Amendment: Intent of the Framers.

2. Traditional Equal Protection Principles.

3. Race As An Aggravating Circumstance.

B. Proving the Prima Facie Case: Intentional Discrimination Under the Fourteenth Amendment May Be Proven By Statistical Evidence.

C. The Evidence in this Case: A Preliminary Factual Showing and the Need for an Evidentiary Hearing

1. The Quantitative Evidence

2. The Qualitative Evidence: Placing The Statistics in Historical Context

3. The Need For an Evidentiary Hearing and Findings of Fact

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

Initial Brief of Appellant at 28-56, Sireci v. State, No. 64.728.

This Court rejected Mr. Sireci's claim solely on its merits:

> Appellant's contention that his death sentence was a product of systematic racial discrimination in this state capital sentencing procedure is without merit. We recently rejected this claim in Smith v. State and Adams v. State, 449 So.2d 819 (Fla. 1984). The Supreme Court of the United States most recently rejected this claim in Wainwright v. Ford, ____ U.S. ____, 104 S. Ct. 3498, 82 L.Ed.2d 911 (1984). The statistical evidence presented by appellant fails to alter our view on this matter. This basis of relief alleged by Sireci was properly denied by the trial court.

Sireci v. State, 469 So.2d 119, 120 (Fla. 1985). See also Stewart v. State, No. 69,338 (Fla. September 25, 1986); Griffen v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985) (noting that race claim properly brought in Rule 3.850 proceeding).

This Court has recognized that in habeas "in the case of error that prejudicially derives fundamental constitutional rights . . . this Court will revisit a matter previously settled by the affirmance of a conviction or sentence." Kennedy v. Wainwright, So.2d 424 (Fla. 1986) (emphasis added). The Court in Kennedy declined to revisit an issue raised in Kennedy's direct

appeal -- death qualification of Kennedy's jury -- but the nature of the issue involved here is quite different.

Unlike the petitioner in Stewart, Mr. Sireci did timely raise this claim in the proper forum: A Rule 3.850 motion. Unlike Stewart, Mr. Sireci simply asks this Court to revisit an issue previously raised in the proper proceeding. This Court's Kennedy opinion makes clear that this is the proper office of habeas.

This claim goes to the core assumption of the system under which people are sentenced to die in Florida: That it actually operates in a fair and unbiased way. Few issues could be more basic. Violent crime undermines the sense of order and shared moral values without which no society could exist. We punish people who commit such crimes in order to reaffirm our standards of right and wrong. But if the punishment itself is administered in a way skewed by race, it fails its purpose and becomes like the crime that triggered it, just another spectacle of suffering -- all the more terrifying and demoralizing because this time the killer is organized society itself, the same society on which we depend for stability and security in our daily lives. No matter how much an individual criminal may "deserve" his punishment, the manner of its imposition robs it of any possible value, and leaves us ashamed instead of reassured.

Before this Court addresses the broader factual or legal questions posed by Mr. Sireci's constitutional claim, however, it should remand this case for development of a full factual record. Difficult constitutional issues arising on a complex factual background ought not be resolved until the relevant facts have been clearly presented. The evidentiary record in this case -- as it presently stands -- is not a satisfactory predicate for determining the important constitutional questions about discriminatory application of the death penalty, an issue of consummate significance to the administration of justice in our State. Since the discovery and hearing that Mr. Sireci sought in his Rule 3.850 proceeding were denied by the trial court and

have not occurred, the record does not contain examination of the data forming the foundation of Mr. Sireci's claim.

Further, habeas lies because only this Court can provide relief. This Court has rejected the merits of the claim presented here in a string of cases. The claim is based upon statistical evidence which this Court rejected summarily when it was presented as early as 1979, based upon the then available evidence, in Henry v. State, 377 So. 2d 692 (Fla. 1979). The Court in Henry relied upon Spinkellink v. Wainwright, 587 F.2d 582 (5th Cir. 1978). The Court also rejected the claim when it was presented more recently upon much more comprehensive data. See Adams v. State, 449 So. 2d 819, 820-21 (Fla. 1984); Ford v. Wainwright, 451 So. 2d 471, 474-75 (Fla. 1984); Jackson v. State, 452 So. 2d 533, 536 (Fla. 1984); State v. Washington, 453 So. 2d 389, 391-92 (Fla. 1984); Dobbert v. State, 456 So. 2d 424, 429 (Fla. 1984); State v. Henry, 456 So. 2d 466, 468 (Fla. 1984); Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984); Bundy v. State, ___ So. 2d ____, 11 FLW 294 (Fla. 1984); Adams v. State, 380 So. 2d 423, 425 (Fla. 1980); Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980); Thomas v. State, 421 So. 2d 160, 162-63 (Fla. 1982); Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983); Riley v. State, 433 So. 2d 976, 979 (Fla. 1983). The state trial courts are bound by this Court's precedent rejecting this claim, holding that the same evidence presented below is insufficient to warrant evidentiary consideration.

PROCEDURAL HISTORY

Mr. Sireci was convicted of first degree murder and sentenced to death. This Court affirmed the conviction and sentence.

The Governor signed Mr. Sireci's death warrant in 1982. Mr. Sireci filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. While that petition was pending in Circuit Court, Mr. Sireci filed a "mixed" federal habeas corpus petition in Federal District Court. Because the petition was "mixed", the District Court dismissed it without prejudice to

re-file. Mr. Sireci did not refile his federal habeas corpus petition. Thus, Mr. Sireci has not yet received federal review of any of his claims.

Following the federal court's dismissal without prejudice of Mr. Sireci's petition, the Florida Circuit Court granted a stay. Following an evidentiary hearing, the Circuit Court denied the Rule 3.850 motion. This Court affirmed. After considering the case for a year, the United States Supreme Court denied certiorari.

Mr. Sireci then filed a second Rule 3.850 motion in Circuit Court. Six weeks later, the Governor signed Mr. Sireci's present death warrant. As of this writing, the Circuit Court has not yet ruled on the Rule 3.850 motion.

FACTUAL BASIS OF RELIEF

Petitioner was sentenced to death pursuant to a death penalty scheme in Florida which arbitrarily and discriminatorily selects its targets based on the unconstitutional factor of race. In this section, Petitioner will present the evidence which demonstrates that the death penalty has in fact been administered in Florida in an arbitrary and discriminatory manner.

Despite the eighth amendment's requirement that sentencing discretion be suitably directed and limited, and the Florida death penalty statute's provision to comply with that mandate through the use of an exclusive list of aggravating circumstances, the death penalty is still imposed in Florida for reasons other than those aggravating circumstances. Death sentences are still imposed in Florida, for example, because the victim was a white person instead of black person, because the defendant is black instead of white, because the homicide was committed by chance in a county where the death penalty is much more frequently imposed rather than in a county which seldom imposes the death penalty, or because the defendant is a man instead of a woman.

Not only does the imposition of death sentences on the basis of these factors violate the eighth amendment's requirement

of carefully channeled sentencing discretion, but it also violates the thirteenth amendment and the due process and equal protection guarantees of the fourteenth amendment by its reliance upon constitutionally impermissible, irrelevant factors. See Zant v. Stephens, 462 U.S. 862, 885 (1983). Certainly there can be no dispute that the consideration of race (of the defendant or the victim) in the course of deciding a capital sentence violates the thirteenth and fourteenth amendments' mandates abolishing slavery and all badges of slavery and requiring the equal treatment of all people without regard to consideration of race. Likewise, the fourteenth amendment's requirement of equal protection indisputably forbids the differential treatment of people on the basis of their sex or race, or on the basis of totally irrelevant considerations such as geography.

That death sentences are imposed on the basis of these factors is not typically a simple matter to demonstrate. Juries and judges do not usually tell us that the real reason they have recommended or imposed death in particular cases are among these constitutionally impermissible factors. Accordingly, circumstantial evidence must be relied upon to demonstrate the determinative role these factors play in the course of capital sentencing decisions in this state. Statistical evidence is, therefore, the form of circumstantial evidence which must be examined in relation to this claim.

The best developed statistical evidence available at this time with respect to the imposition of the death penalty in Florida has focused upon only one constitutionally impermissible factor: the race of the victim. Taking into account all publicly available data respecting the imposition of the death penalty in Florida, this evidence persuasively demonstrates that the race of the victim is a determinative factor in the imposition of the death sentence in Florida.

This evidence is drawn primarily from a study by Professors Samuel R. Gross and Robert Mauro, published as Patterns of Death: An Analysis of Racial Disparities in Capital

Sentencing and Homicidal Victimization, 37 Stanford L. Rev. 27 (Nov. 1984). As will be seen, however, a number of other well designed studies have reached the same conclusions, and they are also taken into account herein.

The study by Professors Gross and Mauro focused upon all homicides in Florida during the 5-year period, 1976-1980. The data for the study were drawn from two sources: Supplementary Homicide Reports (SHR's) that local police agencies file with the Uniform Crime Reporting Section of the FBI, and the Death Row, U.S.A., a periodic publication of the NAACP Legal Defense and Educational Fund (LDF) which has become the standard reference source for current data on death row inmates. See Enmund v. Florida, 458 U.S. 782, 795 nn.18, 19 (1982); id. at 818 n.34 (O'Connor, J., dissenting); Godfrey v. Georgia, 446 U.S. 428, 439 nn. 7, 8 (1980); Greenberg, Capital Punishment As A System, 91 Yale L.J. 908, 909 n.7 (1982). The Supplementary Homicide Reports provided data on virtually all homicides which occurred during the 1976-1980 period -- 3501 homicides -- while Death Row U.S.A. provided data on the homicides for which someone was eventually sentenced to death -- 130 death sentences. Florida's reporting rate for known homicides was over 98% for this period. The data available for each homicide through these sources were the following: (a) the sex, age and race of the victim(s); (b) the sex, age and race of the suspect(s) or defendant(s); (c) the date and place of the homicide; (d) the weapon used; (e) the commission of any separate felony accompanying the homicide; and (f) the relationship between the victim(s) and suspect(s) or defendant(s).

Because of the previous documentation that the race of the victim was a determinative factor in capital sentencing decisions in Florida, see, e.g., Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 1980 Crime and Delinquency 563 (October 1980), Gross and Mauro analyzed whether the race of the victim was, on the basis of the data they had gathered, a determinant in capital

sentencing. Initially, Gross and Mauro determined that a large proportion of homicide victims in Florida during this 5-year period were black -- 43%. On this basis, one would expect that nearly half of the death sentences imposed for homicides -- approximately four out of every ten death sentences -- would be imposed for homicides involving black victims. However, the data dramatically contradicted this expectation. Instead, only one out every nine death sentences imposed was imposed for a black victim homicide; the other eight were imposed for white victim homicides. Based upon this extremely strong correlation between white victim homicides and death sentences, Gross and Mauro examined the data to determine whether any nonracial factor might explain the strength of this relationship.

Six nonracial factors were examined for their individual and cumulative impact upon the death sentencing determination: (1) the commission of a homicide in the course of another felony; (2) the killing of a stranger; (3) the killing of multiple victims; (4) the killing of a female victim; (5) the use of a gun; and (6) the geographical location of the homicide. While five of these six factors were correlated -- with varying degrees of strength -- with the imposition of the death sentence, none explained away the consistently high correlation between white victims and death sentences. Regardless of the presence of one or more of the nonracial factors highly correlated with the death sentence, the homicides which involved, in addition, white victims, were much more likely to result in death sentences.

The commission of a separate felony accompanying the homicide was highly predictive of an eventual death sentence: 22.0% of felony homicides resulted in death sentences, while only 0.9% of nonfelony homicides resulted in death sentences. The felony circumstance thus increased the likelihood of a death sentence by a factor of nearly 24. Within either of these categories of homicide, however, white victim homicides were far more likely to result in death sentences. Of the felony homicides involving white victims, 27.5% resulted in

death sentences, while only 7.0% of such homicides involving black victims resulted in death sentences. Of the nonfelony homicides involving white victims, 1.5% resulted in death sentences, while only 0.4% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a felony or not, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

The killing of a stranger was also highly predictive of an eventual death sentence: 9.7% of the homicides in which the defendants and victims were strangers to each other resulted in death sentences, while only 2.3% of the homicides in which the the defendants and victims were acquainted with each other resulted in death sentences. The "stranger" factor thus increased the likelihood of a death sentence by a factor of four. Within either of these categories, however, white victim homicides were far more likely to result in death sentences, particularly when the "stranger" factor was present. Of the "stranger" homicides involving white victims, 14.5% resulted in death sentences, while only 1.2% of such homicides involving black victims resulted in death sentences. Of the "nonstranger" homicides involving white victims, 3.7% resulted in death sentences, while only 1.0% of such homicides involving black victims resulted in death sentences. Thus, when the "stranger" aggravating factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing a black victim. When the "stranger" factor was not present, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

The killing of multiple victims was also highly predictable of an eventual death sentence: 18.3% of the homicides in which there were multiple victims resulted in death sentences, while only 3.2% of the homicides in which there were single victims resulted in death sentences. The multiple victim

factor thus increased the likelihood of a death sentence by a factor of nearly six. Within either of these categories, however, white victim homicides were more likely to result in death sentences. Of the multiple victim homicides involving white victims, 20.4% resulted in death sentences, while only 11.1% of such homicides involving black victims resulted in death sentences. Of the single victim homicides involving white victims, 5.5% resulted in death sentences, while 0.7% of such homicides involving black victims resulted in death sentences. Thus, when the multiple victims aggravating factor was present, a person killing white victims was two times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

The killing of a female victim was also predictive of an eventual death sentence: 7.2% of the homicides in which a woman was killed resulted in death sentences, while only 2.5% of the homicides in which a man was killed resulted in death sentences. The female victim factor thus increased the likelihood of a death sentence by a factor of nearly three. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the female victim homicides involving white victims, 19.8% resulted in death sentences, while only 1.6% of such homicides involving black victims resulted in death sentences. Of the male victim homicides involving white victims, 4.4% resulted in death sentences, while 0.6% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a female or male victim, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

The killing of a victim in a rural county was also predictive of an eventual death sentence: 5.1% of the rural homicides resulted in death sentences, while only 3.4% of the

urban homicides resulted in death sentences. The geography factor thus increased the likelihood of a death sentence by a factor of nearly two. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the rural homicides involving white victims, 8.5% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the urban homicides involving white victims, 5.8% resulted in death sentences, while 0.8% of such homicides involving black victims resulted in death sentences. Thus, where the rural factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was seven times more likely to be sentenced to death than a person killing a black victim.

Unlike the other nonracial factors, the killing of a person with a gun was not predictive of an eventual death sentence: 3.0% of the homicides in which the victim was killed with a gun resulted in death sentences, while 5.1% of the homicides in which the victim was killed by another means resulted in death sentences. The "gun" factor thus made it somewhat less likely for the defendant to be sentenced to death. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the "use of a gun" homicides involving white victims, 5.3% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the "other means" homicides involving white victims, 8.7% resulted in death sentences, while 1.1% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide was committed by use of a gun or other means, a person killing a white victim was nearly eight times more likely to be sentenced to death than a person killing a black victim.

In order to account for the possibility that some combination of the nonracial aggravating factors might explain

away the strong race-of-the-victim pattern they were seeing -- which had not been explained by an examination of the factors individually -- Gross and Mauro examined Florida death cases on a "scale of aggravation." This scale examined the cumulative effects of the three aggravating factors which Gross and Mauro had found most strongly predicted death sentences: the commission of the homicide in the course of a felony, the commission of the homicide against a stranger, and the commission of a multiple victims homicide. Their results can best be shown by the following table showing the percentage of death sentences in each category:

	Number of Major Aggravating Circumstances		
	0	1	2-3
White Victim	1.0% (10/1044)	7.0% (36/511)	28.2% (68/241)
Black Victim	0.3% (4/1251)	1.4% (5/363)	7.5% (5/67)

Cases with two or three aggravating circumstances were combined into one category because there were too few cases with all three aggravating circumstances to provide meaningful analysis of a distinct category. The pattern of racial disparities displayed in this table (as in the previous analyses) is consistent and strong. The magnitude of these disparities can be evaluated, in part, by considering the right-hand column, which includes the most aggravated homicides. The majority of the death sentences, almost 60%, were among those cases. Death sentences were not the rule for these homicides, but they were given in a fair proportion of those cases that had white victims -- in over 25% of such cases. But even within this highly aggravated set of cases, death sentences for black victim homicides were quite rare: they occurred about one-fourth as often as among white victim homicides -- in only 7.5% of such cases.

Gross and Mauro further examined the possibility that some combination of the nonracial aggravating factors might explain away the strong race-of-the-victim pattern they had seen in examining individual nonracial factors by conducting a

multiple regression analysis. As Gross and Mauro described it,

> Multiple regression is a statistical technique for sorting out the simultaneous effects of several causal or "independent" variables on an outcome or "dependent" variable. Multiple regression analysis produces a mathematical model of the data that includes estimates of the effects of each independent variable on the dependent variable, controlling for the effects of the other independent variables. This technique can be used to test for racial discrimination in a set of sentencing decisions by designating the sentencing choice as the outcome variable in a model that includes the racial characteristic of interest as a causal variable along with the legitimate variables that might explain these decisions. If the racial variable has a statistically significant effect on the outcome variable in this model (that is, an effect that would be unlikely to occur by mere chance), that demonstrates that the racial characteristic is associated with these outcomes in a way that cannot be explained by the legitimate variables that are included in the model.

37 Stanford L. Rev. at 75-76. The results of the regression analysis confirmed in every respect the pattern previously shown by the data: "Multiple logistic regression (or "logit") analysis reveals large and statistically significant race-of-victim effects on capital sentencing in . . . Florida. . . . After controlling for the effects of all the other variables in our data set, the killing of a white victim increased the odds of a death sentence by an estimated factor of . . . about five in Florida. . . ." Id. at 83.

Because of the critical role of appellate review in the capital sentencing process -- "to avoid arbitrariness and to assure proportionality," Zant v. Stephens, 462 U.S. at 890 -- there is at least the possibility that the racially discriminatory sentencing patterns which Gross and Mauro found at the trial level could be rooted out by careful appellate review. To examine this possibility, Gross and Mauro compared the racial patterns of death sentences that have been affirmed by the Florida Supreme Court to the racial patterns of all reported homicides. As with all reported homicides, however, Gross and Mauro found the race of the victim emerged in just as strong a pattern among affirmed death sentences as it had among homicides

for which death was imposed in the trial courts. As before, affirmed death sentences were far more likely for white victim homicides, 2.2% (39/1803), than for black victim homicides, 0.4% (6/1683) -- a ratio of nearly six to one. Also, as before, this disparity persisted when controlling for three aggravating factors most highly predictive of death sentences:

Percentage of Death Sentences
by Race of Victim
Affirmed Death Sentences Only

	Felony Circumstance		Relationship of Suspect to Victim		Number of Victims	
	Felony	Non-Felony	Stranger	Non-Stranger	Multiple Victims	Single Victim
White Victim	10.1% (35/346)	0.3% (4/1272)	4.9% (23/469)	1.3% (16/1227)	7.1% (7/98)	1.9% (32/1705)
Black Victim	3.9% (5/128)	0.1% (1/1468)	0% (0/257)	0.4% (6/1337)	7.4% (2/27)	0.2% (4/1656)

Again, as before, the race-of-victim disparity persisted when Gross and Mauro controlled for the cumulative and simultaneous effects of the nonracial aggravating factors:

Percentage of Death Sentences by
Level of Aggravation and Race of Victim
Affirmed Death Sentences Only

Number of Major Aggravating Circumstances

	0	1	2-3
White Victim	0.1% (1/1044)	2.7% (14/511)	10.0% (24/241)
Black Victim	0.1% (1/1251)	0.8% (3/363)	3.0% (2/67)

Accordingly appellate review has not eliminated, or even diminished in a significant way, the racially-based imposition of the death sentence in Florida.

The United States Supreme Court has recently made clear that "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a[n] [intentional discrimination] lawsuit need not prove discrimination with scientific certainty; rather, his or

her burden is to prove discrimination by a preponderance of the evidence." Bazemore v. Friday, ___ U.S. ___, 54 U.S.L.W. 4972, 4975-76 (July 1, 1986). Thus, "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" Id. at 4975. Gross and Mauro addressed the matter of "omitted variables" as well.

> For a legally permissible sentencing variable that is absent from our data to substantially change the estimated size of the effect of the victim's race on capital sentencing the variable would have to satisfy three conditions: (1) it must be correlated with the victim's race; (2) it must be correlated capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis. For example, let us assume that it is appropriate to consider homicides that are committed at night as more aggravated than those committed during the day. For this variable to explain the victim-based homicides are more likely to have occurred at night than black-victim homicides, that night-time homicides are in fact more likely to result in the death penalty than day-time homicides, and that the effect of the time of the homicide on capital sentencing persists after controlling for the felony circumstance of the homicide, the number of victims, the relationship of the victim to the killer, and the other variables that we have already considered. Moreover, the magnitude of the effect of the time of the killing on capital sentencing would have to be quite large -- comparable to the magnitude of the racial effect it is offered to explain.
>
> Given these requirements it is reasonable to accept the observed patterns as valid descriptions of the systems of capital sentencing that we studied unless some plausible alternative hypothesis can be stated that explains how some legitimate sentencing variable that we did not consider, or some combination of such variables, could account for these patterns. No such hypothesis is apparent. It is true that in the period that we studied white-victim homicides in each state were generally more aggravated than black-victim homicides, but we have considerable data on the level of aggravation, and the racial pattern that we observed is apparent in each state after controlling for the several aggravating factors in our data. Data on omitted aggravating factors could only explain the observed racial disparities if they were to

> show that black-victim cases were systematically less heinous that white-victim cases within the categories defined by the included variables, for example, among felony killings of strangers, using guns. This does not seem likely. Similarly, it is almost certain that homicides with weak evidence of the suspect's guilt are less likely to result in death sentences than those with strong evidence. But for data on the strength of the evidence to undercut our findings they would have to show that, within the levels of aggravation identified by our analysis, black-victim cases had systematically weaker evidence than white-victim cases. In the absence of any empirical evidence of such a pattern, and there is none, it must be considered improbable -- especially considering the magnitudes of the racial effects we found.
>
> Finally, the criminal record of the suspect undoubtedly has an effect on the chances of a death sentence. Moreover, we know that black defendants in general are more likely to have serious criminal records that white defendants, and we can safely assume that this general relationship applies to the homicide suspects in our study. This association, however, explains very little. after controlling for level of aggravation, the race of the suspect is not a significant predictive variable, and the principal racial pattern that we did find -- discrimination by race of victim -- persisted when we controlled for the race of the suspect. Indeed, we were careful to make sure that the effect of the race of the victim could be determined separately from any possible race-of-suspect effect. To assert that the criminal records of the suspects might account for determination by the race of the victim one would have to suppose that, controlling for the nature of the homicide and for their relationship to the victims, the killers of whites, regardless of their own race, were more likely to have serious criminal records than the killers of blacks. We know of no empirical or logical basis for such a supposition, and it seems unlikely that any unforeseen effect of this type could be large enough and consistent enough to have the power to explain the racial patterns that we have reported.
>
> In sum, we are aware of no plausible alternative hypothesis that might explain the observed racial patterns in capital sentencing, in legitimate non-discriminatory terms.

37 Stanford L. Rev. at 100-02 (footnotes omitted).

The reliability of the Gross-Mauro study is confirmed not only by its own design and results, as the preceding discussion shows, but in two other ways as well. First, confirmation is by a comparison of the results found in Florida

with those of the other seven states included in the Gross-Mauro study. A similar pattern of race-of-victim based discrimination was found in each state. Second, confirmation is by a comparison of the Gross-Mauro study to other studies of Florida's imposition of the death penalty.

Gross and Mauro make the comparison to other Florida studies extensively, at pages 43-45 and 102 of their article, and are able to demonstrate the strength of their study thereby. No matter what the methodology of the study or what number of variables the study has examined, each has come to the same conclusion in Florida as well as other states: the race of the victim is unquestionably a major determinant in the decision to impose death.

In a study examining an earlier period of the application of the death penalty statute in Florida -- in its first five years -- William Bowers and Glenn Pierce focused upon the probability of receiving the death sentence in Florida by race of offender and victim. Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 1980 Crime and Delinquency 563 (October 1980). The following table illustrates their findings:

Probability of Receiving the Death Sentence in Florida, for Criminal Homicide, by Race of Offender and Victim (from effective date of post-Furman death statute through 1977)

	(1)	(2)	(3)
Offender/Victim Racial Combinations	Estimated Number of Offenders	Persons Sentenced to Death	Overall Probability Of Death Sentence
Black kills white	240	53	22.1%
White kills white	1,768	82	4.6%
Black kills black	1,922	12	.6%
White kills black	80	0	0%

The authors analyze this data as follows:

> In Florida, the difference by race of victim is great. Among Black offenders, those who kill Whites are nearly 40 times more likely to be sentenced to death than those who kill Blacks. The difference by race of offender, although not as great, is also marked.

Id. at 595. To attempt to account for legitimate factors which might explain these results, Bowers and Pierce examined the data at specific, discretionary stages within the judicial process and examined a specific kind of murder (felony-murder). The strength of the race-of-victim discrimination remained:

In examining the likelihood of moving from one stage to the next in the judicial process for the various offender/victim racial categories, Bowers and Pierce again found the racial pattern to be clear and consistent. The table below shows that the racial patterns identified in the over-all probability of receiving a death sentence (shown in the preceding table) also exist at the significant decision-making stages of the criminal justice process.

Charges, Indictments, Convictions, and Death Sentences in Florida for Criminal Homicides, by Race of Offender and Victim (from effective date of post-Furman statute through 1977)
Conditional Probability of Moving between Successive Stages

Offender/Victim Racial Combinations	First Degree Indictment Given Indictment	First Degree Charge Given First Degree Indictment	Death Sentence Given First Degree Charge	Overall Probability of a Death Sentence Given Indictment
Black kills white	92.5%	43.0%	47.0%	18.7%
White kills white	66.6%	37.0%	29.0%	7.1%
Black kills black	36.6%	19.4%	19.6%	1.4%
White kills black	42.9%	15.0%	0%	0%

Id. at 578.

In evaluating the processing of felony and non-felony type murder cases by race of the offender and the victim, Bowers and Pierce found the results of this analysis also to be consistent with those disproportionate racial patterns previously identified. Thus, even in a felony-type murder, a white can kill a black with zero probability of receiving the death sentence.

Probability of Receiving the Death Sentence in Florida
Felony and Non-felony Murder by Race of Offender and Victim
(from effective dates of post-Furman death statutes through 1977)

Felony-Type Murder	Nonfelony-Type Murder

(1)	(2)	(3)	(4)	(5)	(6)
Offender/ Victim Racial Combination	Estimated Number of Offenders	Persons Sentenced to Death	Probability of Death Sentence	Estimated Number of Offenders	Persons Sentenced to Death	Overall Probability of Death Sentence
Black kills white	143	46	32.3%	97	7	7.2%
White kills white	303	65	21.5%	1,465	17	1.2%
Black kills black	160	7	4.4%	1,762	5	0.3%
White kills black	11	0	0.0%	69	0	0.0%

Id. at 599.

The conclusions reached in other studies of the racially-biased application of Florida's death sentence concur with those described above:

(i) M. Radelet and G. Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Soc. Rev. 587 (1985), in which the authors studied data on 1,419 defendants indicted for homicide in Florida between 1973 and 1977, and concluded that "the criminal justice system is disproportionately severe on homicides against whites and by blacks, and this bias is evident at every stage of the criminal justice process."

(ii) L. Foley and R. Powell, The Discretion of Prosecutors, Judges and Juries in Capital Cases, 7 Crim. J. Rev. 16 (Fall 1982), analyzed all first-degree murder indictments in 21 Florida counties during 1972-78, and concluded that "defendants in capital cases in Florida receive differential treatment due to their attributes and the attributes of their victims."

(iii) L. Foley, Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases (unpublished study), concluded that "males and offenders accused of murder of a white victim were . . . much more likely to receive the death penalty than females and those accused of murder of a black victim."

(iv) M. Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Sociological Rev. 918 (1981), examined the homicide indictments in 20 Florida counties between 1976 and 1977, and concluded that "relative equality in the imposition of the death penalty appears mythical as long as prosecutors are more likely to obtain first-degree murder indictments for those accused of murdering white strangers than for those accused of murdering black strangers."

Finally, the validity of the Gross-Mauro study is confirmed by the results recently made known in a study of the imposition of the death penalty in Georgia. Professors Baldus, Woodworth, and Pulaski have recently completed a massive study of a large sample of Georgia cases (1066) in which the defendants were convicted of murder or manslaughter. The Baldus study was the subject of an evidentiary hearing in the lower court in McCleskey v. Kemp. The Baldus study examined the relation between more than 400 factors -- concerned with defendants' and victims' backgrounds, the defendants' criminal records, the circumstances of the homicides, and the strength of the evidence of the defendants' guilt -- and the imposition of the death penalty. Professor Baldus and his colleagues found, as did Gross and Mauro in the Georgia part of their study, that the race of the victim was an extraordinary and strong determinant in death sentencing. Two findings of the Baldus study in particular, however, provide strong confirmation of the validity of the study conducted by Gross and Mauro -- both in Georgia and in Florida. As reported by Gross and Mauro, these findings are the following:

> First, the Baldus study establishes that data on the defendants' criminal records have little or no impact on the pattern of discrimination by race of victim in capital sentencing in Georgia. Second, the study demonstrates that the magnitude of the race-of-victim effect that we found in Georgia would not be reduced if we were able to control for additional variables concerning the level of aggravation of the homicides and the strength of the evidence against the defendants. The study reports a logistic regression model on the odds of a death sentence, which is comparable to several of our own, as well as many larger regression

> analyses that include numerous additional control variables. Comparisons between these larger models and the smaller one reveals two important facts: (1) the race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

37 Stanford L. Rev. at 103-04 (footnotes omitted). Accordingly, while there is no "Baldus-type" study of Florida, it appears that the Gross-Mauro study of Florida, in combination with other Florida studies, is just as reliable as such a study would be if it were available, based on the experience in Georgia.

Florida's history of race discrimination also supplements the showing of the statistically disparate imposition of death sentences on the basis of race. If provided the opportunity, Mr. Sireci would, first, prove that Florida has had a longstanding history of de jure racial segregation and discrimination in virtually all areas of public life, which did not completely end, statewide, until 1971, with the end of de jure school segregation. Second, Mr. Sireci would prove that the effects of de jure race discrimination continued beyond the end of de jure discrimination, and have continued to be reflected in the present, in the unemployment levels of black people, the disproportionate concentration of black people in lower paid and lower status jobs, the median level of black family income in comparison to white family income, and the disproportionately low numbers of black students in the institutions of higher education in Florida. These historical facts give rise to an inference of purposeful discrimination as the explanation for the strongly disparate application of the death penalty on the basis of the victim's race, and the defendant's race, a predicate for fourteenth amendment analysis.

The fourteenth amendment equal protection claim may be based on a showing 1) that "[t]he impact of the official action. . . bears more heavily on one race than another. . ." Village of

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); (2) that the particular decision made affords state actors broad discretion, which is relevant because of "the opportunity for discrimination [it]. . . present[s] the state, if so minded, to discriminate without ready detection," Whitus v. Georgia, 385 U.S. 545, 552 (1967); and (3) that there has been historical discrimination. The fist and third bases have been shown, and it is abundantly clear that capital sentencing systems in general, and Florida's in particular, are characterized by a broad "range of discretion entrusted to a jury," which affords "a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 90 L. Ed. 2d at 35 (1986).

While race-of-victim studies have been much more exhaustively pursued, there have been preliminary studies focusing upon other arbitrary determinants of capital sentencing -- geography, sex of the defendant, and occupation of the victim. These studies have shown precisely what the pre-Gross-Mauro and pre-Baldus studies showed with respect to the race of the defendant and the race of the victim: that these factors also arbitrarily and discriminatorily play a determinative role in the process of capital sentencing. While these studies have not been developed to the same extent as the others, the subsequent experience with race-of-victim studies indicates that the opportunity should be provided to further develop these studies, in light of the strength of their preliminary figures -- showing a high degree of influence upon the imposition of the death sentence.

With respect to the factor of geography, the death penalty is nearly two and one-half times more likely to be imposed in the panhandle than in the southern portion of the State; the northern and central regions fall about midway between these two extremes. The probability that such differences could occur by chance, given evenhanded disposition of the death penalty and comparable offenses committed across the State, is

extremely low, well beyond accepted standards of chance variation -- .002. See Bowers and Pierce, supra. When Bowers and Pierce (the researchers conducting the investigation of geography and the death penalty) controlled for the felony-murder aggravating factor, the geographic disparities not only failed to disappear, but instead, increased -- to a ratio of four to one between the panhandle on the one hand and the northern and souther regions (collectively) on the other, and to a ratio of two to one between the central region on the one hand and the northern and southern regions (collectively) on the other. Id. at 603-05. These regional disparities persisted when potential capital cases were followed from arraignment through final sentencing, id. at 616-19, and after appellate review by this Court. Id. at 623-25. Disparities such as these simply should not occur and cannot be tolerated under a system which must "assure consistency, fairness, and rationality in the evenhanded operation of state law." Proffitt v. Florida, 428 U.S. 242, 260 (1976). Moreover, there can be no plausible hypothesis to explain this disparity, for it is not plausible that the character of homicides or defendants varies significantly from region to region within a state. Plausibly, what do vary are the attitudes of sentencers from region to region, but that cannot -- under a unitary, evenhanded state law -- be allowed to mean the literal difference between life and death among defendants.

On the basis of a 21-county study concerning all cases from 1972 through 1978 in which first-degree murder indictments were returned, a study conducted by Professor Linda A. Foley and Richard Powell, of the University of North Florida (referred to supra), the sex of the offender also appears to determine significantly the imposition of the death penalty in Florida. In this study, Foley and Powell sought to ascertain the variables which have a statistically significant influence on three critical stages of the capital prosecution process in Florida: the prosecutor's decision whether to go to trial or dismiss charges, the jury's sentence recommendation, and the judge's

sentencing decision. Their findings demonstrate the influence of the sex of the defendant on the capital sentencing process to a greater degree of statistical significance than the threshold of statistical significance required by the Supreme Court in Castaneda v. Partida, 430 U.S. 482 (1977):

> The fourth factor influencing the trying of a case is an attribute of the defendant: sex (p .0179). A female defendant is much more likely to have her case dismissed than is a male defendant. . . . It should be remembered that the relationships between this attribute and other factors (e.g., circumstances of the case) have been removed statistically. Therefore, this attribute is influencing the prosecutor's decision separately from any of the legal factors which might be related to it (at least those legal factors examined in this study).
>
> * * * * * *
>
> According to the log linear analysis, both the jury and the judge are significantly influenced by the sex of the offender. . . (.0001). In both decisions females . . . are less likely to receive the death penalty. However, the analysis of covariance controls for the impact of many other predictor variables,thus the level of significance for . . . [this] . . . variable[] is reduced. . . . [Nonetheless] the sex of the offender still influences the decision of both parties [to a statistically significant degree (p .0491, p .0255), after the analysis of covariance].

7 Crim. J. Rev. at 19-21.

While the sex of the defendant has not been studied even to the degree that geography has, this factor shows a strong enough correlation with the imposition of death sentences that further opportunity for evidentiary consideration is certainly warranted.

On the basis of the foregoing facts, Mr. Sireci submits that the imposition of the death penalty in Florida is still in violation of the eighth and fourteenth amendments -- having changed superficially, but not in substance, from the discriminatory, arbitrary imposition of death so firmly condemned in Furman v. Georgia.

LEGAL BASES FOR RELIEF

Mr. Sireci's earlier brief to this Court fully explored the constitutional bases of his claim; he will not represent this argument here and will rely upon his earlier presentation. However, there are several recent developments in the law that provide impetus for reevaluation of this Court's prior holdings on this question. The first such development is the Eleventh Circuit Court of Appeals' decision in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) setting forth new standards governing the evaluation of claims concerning the discriminatory application of the death penalty. These new standards disapprove of the reasoning of Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978) -- that the Supreme Court's finding of facial constitutionality of the Florida statute means that as a matter of law "the arbitrariness and capriciousness condemned in Furman have been conclusively removed" -- which formed the basis of this Court's rejection of the claim. The intervention of these new standards caused the Eleventh Circuit to reconsider its holdings concerning the application of the death penalty in Florida. The Eleventh Circuit remanded a Florida case for reconsideration in light of McCleskey standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985) cert. denied, 106 S. Ct. 1992, vacated on other grounds, 106 S. Ct. 1964 (1986).

The McCleskey standards remain tentative, however, because the Supreme Court of the United States has granted certiorari to review McCleskey and the Florida case of Hitchcock v. Wainwright. The question presented by Hitchcock's certiorari petition is

> IV. Whether Mr. Hitchcock should be provided the opportunity to prove at an evidentiary hearing his claim that the death penalty is being arbitrarily applied in Florida on the basis of race and other impermissible factors in violation of the Eighth and Fourteenth Amendments especially in view of the new standards for evaluating such claims announced by the Court of Appeals?

See also 54 U.S.L.W. 3832 (summarizing certiorari issues). Oral arguments are scheduled in these cases for October 15, 1986. Accordingly, the constitutional standards governing the discriminatory application of the death penalty are under active

consideration by the Nation's highest court.

There is one further intervening decision that effects the consideration of the present case. In Bazemore v. Friday, 106 S. Ct. 3000 (1986), an action under the federal Civil Rights Act concerning employment discrimination, the Court disapproved of the lower court's treatment of multivariate or multiple regression statistical analysis. Id. at 3008-10. The lower court's view in Bazemore of statistical proof of discrimination was the same as the Eleventh Circuit's in McCleskey and Hitchcock -- that to allege a prima facie claim of discrimination, multivariate analysis must account for all possible variables. This reasoning, by adoption, also has been the reasoning of this Court. See, e.g., Sullivan v. State, 441 So. 2d 609, 614 (Fla. 1983). It is now apparent that such reasoning is erroneous.

Due to these recent developments in the law, this Court should reconsider its prior holdings as to this claim. While these recent developments do not yet meet the "change of law" test set out in Witt v. State, 387 So. 2d 922 (Fla. 1980), so as to require this Court to change its prior holdings, the developments are significant enough in scope to permit this Court to revisit its prior rulings. Moreover, rulings by the Supreme Court in favor of McCleskey or Hitchcock would most certainly qualify to require reconsideration of the issue under the Witt test. At the least, the active consideration of the issue by the Supreme Court counsels for this Court to hold this case pending those decisions, for they will most certainly establish the constitutional principles governing the resolution of the claim presented here.

This is so because this Court has relied upon the standards set by the federal courts in determining whether an evidentiary hearing is necessary. In an early case raising this claim of arbitrary application of the death penalty, this Court, though recognizing its appropriateness for post-conviction hearing, ruled that under the court of appeals' rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), an insufficient

preliminary showing had been made under constitutional standards to require an evidentiary hearing. Henry v. State, 377 So. 2d 692 (Fla. 1979). Since that time, by citation and incorporation of prior opinions, this Court has continued to adhere to that reasoning. For example, in the recent decision in Harvard v. State, 486 So. 2d 537 (Fla. 1986), the Court relied upon its prior decision in Sullivan v. State, 441 So. 2d 609 (Fla. 1983). The Sullivan decision had in turn relied upon Spinkellink. Sullivan, 441 So. 2d at 614 (also citing Henry v. State, supra). In its decision in Harvard, the Court also relied upon Adams v. State, 449 So. 2d 819 (Fla. 1984), which relied in turn upon Sullivan. Accordingly, at bottom, the Florida resolution of this claim is based upon the federal court's reasoning in Spinkellink, and will depend for its resolution upon the constitutional standards to be considered by the Supreme Court in Hitchcock and McCleskey for the showing of a prima facie case.

The question to be resolved in this case is not whether Mr. Sireci has proven discrimination in the application of the death penalty in Florida. Rather, the question at this stage of the proceedings is whether he has hereinafter alleged a prima facie case. In post-conviction proceedings under Rule 3.850, the governing standard is that a claim cannot be dismissed without evidentiary consideration unless allegations "conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. The Florida standard for summary dismissal, which is based upon the federal standard, Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963), is the same as the federal standard. Since the federal courts have defined the summary dismissal standards in more detail than have the courts of this State, it is appropriate to look to those standards for guidance. Id. And under those standards, summary denial would be unwarranted. Mr. Sireci has set out a prima facie case.

One of the remaining "badges and . . . incidents of slavery," Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968), that still infects contemporary American society is the

devaluation of the lives and rights of black people in relation to the lives and rights of white people. In the latter 19th and early 20th centuries, the degradation of black people led to open tolerance for violence committed by whites against blacks. "With no legal or social restraints, white ruffians and sometimes ordinary citizens angered by some incident assaulted blacks without fear of reprisal." Shofner, Custom, Law and History: The Enduring Influence of Florida's "Black Code", Fla. Hist. Q. 277, 291 (1977). Indeed, this was one of the evils that Congress sought to remedy when it enacted the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871. See Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983) ("[I]t is clear from the legislative debates that, in the view of the [Ku Klux Klan] Act's sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished").

Race discrimination in this form and in other forms "'still remain[s] a fact of life, in the administration of justice as in our society as a whole.'" Vasquez v. Hillery, 106 S. Ct. 617, 624 (1986) (quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)). As the allegations presented by this case demonstrate, it has continued to inform the decision to impose the death sentence for homicide in Florida. Society's most severe criminal sanction is still imposed -- as it historically has been -- significantly less often when the victim of the homicide is black than when the victim is white.

Had this Court's prior rejections of this claim in prior cases been on the basis of evidentiary hearings in the Circuit Courts, its rulings might have been unremarkable. However, its previous rulings were solely on the basis of the allegations set forth in the pleadings, for the claim has always been summarily denied.

Summary dispositions of this sort are allowed only in two circumstances. The first is if, assuming the truth of the allegations, the petitioner is not legally entitled to relief.

See Fla. R. Crim. P. 3.850; Machibroda v. United States, 368 U.S. 487, 495-96 (1962); Townsend v. Sain, 372 U.S. 293, 307, 312 (1963). The second is if the allegations are "wholly incredible." See Machibroda v. United States, 368 U.S. at 495-96; Blackledge v. Allison, 431 U.S. 63, 74, 76 (1977). Given the longstanding condemnation of racial discrimination in criminal proceedings, it is not likely that this Court has approved the summary dismissals of this claim on the basis of not being entitled to relief as a matter of law. Surely if the allegations are true -- that death sentences in Florida are imposed in significant part on the basis of racial considerations -- Mr. Sireci is entitled to relief. See, e.g., Zant v. Stephens, 462 U.S. 862, 885 (1983); Rose v. Mitchell, 443 U.S. 545, 555 (1979); Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring); Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring); Id. at 249-51 (Douglas, J., concurring); Id. at 364-66 (Marshall, J., concurring). Just last Term, the United States Supreme Court emphasized that the Constitution cannot tolerate even the "risk of racial prejudice infecting a capital sentencing proceeding. . . ." Turner v. Murray, 106 S. Ct. 1683, 1688 (1986) (emphasis added). Thus, this Court's previous approval of the summary dismissals of this claim must have been based upon a view that the "statistical study" relied on was wholly incredible.

In this light, the Court's prior rulings raise the following question for determination: Can the claim that there is systematic race-of-victim and race-of-defendant based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis alleged in support of the claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)?

The question presented here goes to the allegations

necessary to state a prima facie case of discrimination or arbitrariness, not to whether that case has been proved by a preponderance of the evidence in light of all the evidence adduced by both parties in an evidentiary hearing. Whether a claimant has stated a prima facie case depends solely upon the allegations made by the claimant. If the unrebutted allegations would permit a rational trier of fact to find discrimination or arbitrariness, they are not "wholly incredible" and must be considered in the adversarial testing process of an evidentiary hearing. Burdine, 450 U.S. at 254 n.7 ("[t]he phrase 'prima facie case' . . . describe[s] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue"). In contrast, whether a claimant has proved discrimination by a preponderance of the evidence in such a hearing "will depend in a given case on the factual context of each case in light of all the evidence presented by both the [claimant] and the [respondent]." Bazemore v. Friday, 106 S. Ct. at 3009.

CONCLUSION/RELIEF SOUGHT

Petitioner respectfully requests that this Court enter a stay of execution and await the decisions in Hitchcock and McCleskey, and then that the Court analyze the claim presented here under the parameters articulated by the United States Supreme Court, and vacate Mr. Sireci's death sentence, after evidentiary development of the claim, if necessary.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by ~~Federal Express~~ Greyhound Bus Lines and U.S. Mail to Margene Roper, Daytona Beach Regional Office, 125 North Ridgewood, 4th Floor, Beck's Building, Daytona Beach, Florida 32014, this 25th day of September, 1986.

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MICHAEL A. MELLO