IN THE SUPREME COURT
STATE OF FLORIDA

HENRY PERRY SIRECI

Appellant/Petitioner,

v.

CASE NO. 69380

STATE OF FLORIDA, LOUIE L. WAINWRIGHT, et.al.,

Appellee/Respondents.
_____/

ON APPEAL FROM THE DENIAL OF A MOTION FOR POST-CONVICTION RELIEF IN THE CIRCUIT COURT IN AND FOR ORANGE COUNTY, FLORIDA/ RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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/RESPONDENTS

TABLE OF CONTENTS

(Table of Contents, con't.) PAGE:

TABLE OF CITATIONS

Table of Citations (con't.) PAGE:

Table of Citations (con't.) PAGE:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

The facts of the case as found by the Florida Supreme Court on direct appeal in Sireci v. State, 399 So.2d 964 (Fla. 1981), are set out herein for the convenience of the court and parties:

The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argued that the purpose of his visit was to take some keys from the rack so that he could come back later and steal an automobile. The state argued that defendant went to the used car lot for the purpose of robbing the owner at that time.

The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab and incisive wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with a wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.

Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's

testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he was not going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.

The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim. The premeditation of Sireci in committing the homicide was proven beyond a reasonable doubt. The defendant stated to witness Perkins, in recounting the incident, that he hit the victim with the lug wrench, and demanded from the victim the location of the victim's money. The victim would not tell him, so the defendant stabbed him. The defendant told witness Perkins that he had looked all over for the money, but could not find any, so he took the man's wallet. The evidence shows that the defendant needed money, since he was not working and was preparing to go on a trip. The evidence was also sufficient to sustain a finding by the jury that defendant was guilty of felony murder. There was clearly sufficient, competent evidence by virtue of the circumstances, the physical evidence, and

the defendant's own statements, to support the jury's verdict of guilty of murder in the first degree. Every reasonable hypothesis of innocence was excluded.

The defendant's brother-in-law, David Wilson testified as to various statements made by the defendant which fully implicated him in the crime charged. He also testified that the defendant gave details about the knife and where the homicide took place. The defendant told Wilson where the knife was located and Wilson retrieved the knife at that location and turned it over to the authorities.

The defendant's former cellmate Donald Holtzinger testified regarding an alleged attempt by the defendant to have his brother-in-law, Wilson killed. The incriminating statements made by defendant to his cellmates were not the result of any initiation of law enforcement. The cellmates came to the police after the statements were made. The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction.

Detective Nazurchuk testified concerning the interrogation of the defendant shortly after he was arrested. He stated that he read defendant his rights and that "he requested his attorney." The detective stated that the interview was then terminated. The defendant made incriminating statements to many people, including a confession to his brother-in-law.

The defendant was indicted for the first-degree murder of Howard Poteet on February 27, 1976 (R 2). The defendant pled

not guilty (R 12). The trial court, of its own motion, entered an order appointing Dr. Robert Kirkland and Dr. Robert Herrera to examine the defendant, as to his mental condition at the time of the alleged offense, as well as his present mental condition, and file with the court a written report of their examination and conclusions (R 62). These reports were filed (R 63-64,69).

According to the report of Edward A Herrera, M.D., Sireci denied the charges against him, claiming he had been shooting pool with a truck driver and drinking at one of the local taverns at the time of the murders. (Sireci pleaded guilty to the premeditated stabbing murder of John Short in case no. CR 76-533). Dr. Herrera found nothing that would lead him to believe that Sireci was unable to distinguish between right and wrong at the time of the crime. He found Sireci to be alert and well oriented with no evidence of anxiety, depressed affect, thought, intellectual or memory impairment, and his judgment was good. Sireci denied any history of physical problems, including a history of convulsive disorder. Dr. Herrera concluded that Sireci was sane at the time of the alleged commission of the offense and was competent to stand trial (R 63-64).

Sireci also denied the commission of the charged offenses to Robert C. Kirkland, M.D.. Dr. Kirkland also found Sireci's past history unremarkable and found no evidence of significant mental disorder. Dr. Kirkland concluded that Sireci was legally sane at the time of the commission of the alleged offenses and was legally sane and competent to stand trial (R 69).

Sireci was tried on October 18, 1976 (R 169). Following the

jury trial, the jury came back with a verdict of guilty of first-degree murder (R 196).

A sentencing hearing was held on November 5, 1976 (R 272). David Wilson testified as to a conversation in which Sireci related to him that he was in trouble on some stolen credit cards that he took off of a person that was murdered in a robbery (TR 14). He further testified as Sireci's employer, that Sireci performed his job well, and understood and carried out instructions (TR 16). Socially, Sireci had always been himself, was always polite and he had never seen him mad or violent (TR 16-17). He further testified that he visited Sireci twice in jail. He asked Sireci why he stabbed people so many times and Sireci said he wanted to be sure that they were dead (TR 18). On cross-examination, he described Sireci as just an average, normal guy (TR 18). He had never seen him fly into a rage (TR 22).

Harvey Woodall met Sireci in jail after the murders (TR 41). Sireci told him that he did not feel sorry for the guy at all and felt like he needed killing (TR 42). He did not have any remorse for the killing. Life did not mean anything to him (TR 43).

Barbara Perkins testified that she had conversations with Sireci after the homicide of Poteet (TR 44). She asked him why he had to kill and he told her that he did not want anybody to identify him. He killed Poteet with a knife (TR 45).

Sireci testified on his own behalf at the advisory sentencing phase. He testified that he changed his name to Butch Blackstone when he found out that his father was not his real father (TR 49). He stated that in a way he was cast out of his family circle twelve

years ago (TR 50). This was due to his belief about his father and his name change (TR 51). He went out on his own at sixteen years of age and did a lot of traveling (TR 52). He did not knowlingly and consciously inflict those wounds on Poteet (TR 54). On cross-examination, Sireci admitted to previously holding up a service station and taking in the neighborhood of one hundred dollars (TR 62). He has been married three times (TR 69).

Dr. Robert Kirkland testified on Sireci's behalf (TR 70). He interviewed and talked with Sireci at length in the Orange County Jail (TR 75). He testified that, as of the time of the offense, Sireci showed certain schizoid trends, but not of psychotic proportion (TR 78). In his opinion, Sireci was under the influence of extreme mental or emotional disturbance at the time of the crime, as he is poorly equipped to handle social and family living, because of his underlying character disturbance and past experience with family (TR 81). His opinion was based on observation and information and no medical tests were performed (TR 88).

Dr. Edward Herrera also testified in rebuttal for the state, based on his independent examination of Sireci, but did not conclude that Sireci was under the influence of extreme emotional disturbance at the time of the crime (TR 94). He would classify Sireci as having a sociopathic or personality disorder (TR 98). He was quite clear and outspoken and his history was not typical of a schizoid individual (TR 98).

The jury advised and recommended to the court that it impose a sentence of death (TR 1483;App. 1 p. 274). On November 15, 1976, the trial judge sentenced Sireci to death (App 7, p.5).

The trial court found that (1) at the time he committed the murder, Sireci had been previously convicted of a felony involving violence or threat of violence; (2) the murder was committed while he was engaged in a robbery (3) that the murder was committed to avoid or prevent arrest; (4) the murder was especially heinous, atrocious and evil. No mitigating circumstances were found (R 294-296).

Sireci subsequently appealed his conviction and sentence to the Supreme Court of Florida, and his conviction and sentence were affirmed on April 9, 1981, and the opinion was modified on rehearing on June 10, 1981. Sireci v. State, 399 So.2d 964 (Fla. 1981).

During the pendency of his direct appeal to the Supreme Court of Florida, Sireci joined in an original class action habeas corpus proceeding in the Supreme Court of Florida challenging that court's practice of reviewing ex parte non-record information concerning his and other capital appellant's personal backgrounds. The Supreme Court of Florida denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari. Brown v. Wainwright, 454 U.S. 1000 (1981).

Sireci filed a petition for writ of certiorari in the Supreme Court of the United States following his direct appeal. Certiorari was denied on May 17, 1982. Sireci v. Florida, 456 U.S. 984 (1982). Rehearing was denied on June 28, 1982. Sireci v. Florida, 458 U.S. 1116 (1982).

Sireci filed a motion for post-conviction relief in the

Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida on September 8, 1982. Relief was denied on December 3, 1983. The Florida Supreme Court affirmed on March 21, 1985, Sireci v. State, 469 So.2d 119 (Fla. 1985). Certiorari was denied thereafter by the United States Supreme Court on June 30, 1986. Sireci v. Florida, 106 S.Ct. 3308 (1986).

On September 15, 1982, Sireci filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Orlando Division, which was dismissed as a mixed petition without prejudice to refile a petition which presents only issues which have been exhausted in the state courts by Judge Kovachevich on September 16, 1982.

On July 25, 1986, Sireci filed a second successive motion for post-conviction relief in the Circuit Court for Orange County, Florida. On September 10, 1986, Governor Graham signed Sireci's second death warrant, which became effective October 1, 1986, and expires at 12:00 noon, October 8, 1986. The Superintendent of the Florida State Prison has selected 7:00 a.m., on October 7, 1986, as the precise time of the execution. A hearing on the motion for post-conviction relief filed in the Circuit Court, has been scheduled for Friday, September 26, 1986. Upon the denial of same, oral argument on appeal will be heard before the Florida Supreme Court on September 29, 1986 at 9:00 a.m.. It is expected that Sireci will file, as well, and argue at that time, an original petition for writ of habeas corpus on the issue of discrimination in the application of the death penalty, on the basis of having killed a white victim and, thereafter, seek a stay of execution in the United States Supreme Court.

SUMMARY OF ARGUMENT

The issues raised herein could have been raised either at trial, on direct appeal, in the first motion for post-conviction relief, or even in the second, successive motion for post-conviction relief, are presented herein only for the purposes of stay-provocation and should be barred from consideration as an abuse of procedure.

ARGUMENT

I. THE CLAIM THAT SIRECI WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN TWO PSYCHIATRISTS APPOINTED BEFORE TRIAL TO EVALUATE HIS SANITY AT THE TIME OF THE OFFENSE, FAILED TO CONDUCT COMPETENT AND APPROPRIATE EVALUATIONS, AND THE RELATED ALTERNATIVE CLAIM THAT SIRECI WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CHALLENGE THE PROFESSIONAL COMPETENCE OF THE PRE-TRIAL EVALUATION OF SIRECI BY THE TWO COURT-APPOINTED PSYCHIATRISTS ARE BARRED FROM CONSIDERATION AS AN ABUSE OF PROCEDURE.

Sireci contends that he was deprived of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, when the two psychiatrists appointed before trial to evaluate his sanity at the time of the offense, failed to conduct competent and appropriate evauations, and in the alternative, that he was deprived of his right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, when counsel failed to challenge the professional competence of the pre-trial evaluations of Sireci by the two court-appointed psychiatrists. Sireci bases such claim of psychiatric, as well as attorney incompetence, upon the re-evaluation and new conclusion of Dr. Dorothy Otnow Lewis, who believes Sireci to be suffering from severe organic impairment, secondary to brain injury, and from psychosis, which may also may have been secondary to brain injury, or which may have developed independent of that injury, on the basis of a newly discovered history that Sireci had been in a car accident when he was age sixteen years old, suffering serious head injury and on the basis of a mental status evaluation which

reflected that Sireci had paranoid orientation and a rambling way of speaking. On the basis of psychological tests as well, Dr. Lewis concludes that Sireci suffered the affects of both brain damage and psychosis. Neurological evaluation by Dr. Jonathan Pincus, allegedly confirmed such brain injury. The appellant contended below that a neuropsychological evaluation by Dr. James Vallely, a neuropsychologist, was able to localize and explain the behavioral affects of such brain injury. As set out on page 15 of the motion for post-conviction relief, however, tests by Dr. Vallely suggest only mild to moderate organic compromise to the left hemisphere temporal regions and mild to moderate impairment of left hemisphere anterior functioning. In light of her clinical findings, Dr. Lewis concludes:

> Given Mr. Sireci's history of severe head trauma, evidence on neurological examination and neuropsychological assessment of damage to both sides of the brain, and history of impulsive personality change following a head trauma, one can justifiably conclude that the two violent, impulsive stabbings of which Mr. Sireci was convicted were products of impaired brain function. The nature of the homicides (i.e., multiple stabbing) suggest that these acts were impulsive repetitive responses to perceived threats, and that once started, because of his brain injury, Mr. Sireci was unable to stop himself.

Motion for post-conviction relief, p. 17; letter of Dr. Lewis to counsel (9-30; 85).

Sireci thereby argues that had the procedures utilized by Dr. Lewis been utilized in evaluating him before trial, evidence could have been presented to demonstrate unequivocally that the capital felony was committed while the defendant was under the

influence of extreme mental or emotional disturbance, and that the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. Sireci also contends that a defense based upon a lack of intent to commit homicide would then have been a plausible defense, as such organic impairment precluded Sireci's ability to control his violent impulses under the circumstances of the crime--where the fight with the victim triggered a rage reaction in Sireci, that his impaired brain could not block or control. Sireci admits, however, that such organic impairment may not have provided a defense to first-degree felony (robbery) murder. Motion for post-conviction relief, p. 26.

As the record reflects and Sireci admits, he filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, in the circuit court on September 8, 1982, and relief was denied on September 3, 1983. The Florida Supreme Court affirmed the denial of post-conviction relief on March 21, 1985. Sireci v. State, 469 So.2d 119 (Fla. 1985). Neither one of the instant issues were raised in the prior motion for post-conviction relief. It is well settled that a second petition for post-conviction relief, under Florida Rule of Criminal Procedure 3.850, may be dismissed as an abuse of procedure, unless the petitioner shows justification for the failure to raise the issues in the first petition. This justification could be established by a showing in his petition that there has been a change in the law since the first petition, or that there are facts relevant to issues in the cause that could not have been discovered at the time

the first petition was filed. Witt v. State, 465 So.2d 510, 512 (Fla. 1985).

Sireci's reliance on Ake v. Oklahoma, 105 S.Ct. 1087 (1985), as a change of law sufficient under Witt, is misplaced. In a previous case, Martin v. State, 455 So.2d 370 (Fla. 1984), this court found Ake to be factually distinguishable, because Oklahoma, evidently, does not have the responsibility of providing such services [court-appointed experts] to indigents charged with capital crimes. 455 So.2d 372 n.2. The Eleventh Circuit Court of Appeals similarly held that ". . . nothing in Ake even suggests that a defendant is constitutionally entitled to a favorable psychiatric opinion. Rather, the court's discussion in Ake focused on the need for a competent, independent psychiatrist to assist in the 'evaluation, preparation, and presentation of the defense.'" Martin v. Wainwright, 770 F.2d 918, 935 (11th Cir. 1985). Moreover, the appellant himself recognizes that Ake is not novel law in footnote 2 of his motion for post-conviction relief. Motion for post-conviction relief, p. 5. Thus, there has been no change in the law since the first petition to establish justification for not raising this issue in the first motion for post-conviction relief. Nor has Sireci demonstrated under the Witt standard, that there were facts relevant to issues in the cause that could not have been discovered at the time the first petition was filed. The only new fact in this cause is the presence of Dr. Lewis at Starke, an occurrence which could have been occasioned at the time of the last motion for post-conviction relief. Indeed, the only reason offered for the failure

to earlier raise this issue, is reliance on the predecessor Rule 3.850 motion, which barred successive motions only if they stated substantially the same grounds as the previous motion attacking the same conviction. This issue has been decided adversely to Sireci by this court in Christopher v. State, 489 So.2d 22 (Fla. 1986), whereby this court determined that the rule amendment narrowing the grounds which may be alleged in successive motions for post-conviction relief is procedural in nature and may be applied retroactively. Moreover, in that same case, this court determined that where an initial motion for post-conviction relief raises a claim of ineffective assistance of counsel, the trial court may summarily deny a successive motion which raises additional grounds for that ineffectiveness, so that the parasitic ineffective assistance of counsel claim presented herein must also fail. 489 So.2d at 24. Even in the event this claim was cognizable, relief would hardly be warranted. In the present case, the report and analysis as proffered are insufficient to contradict substantially, the original psychiatric determination. This court rejected a similar claim in James v. State, 489 So.2d 737, 739 (Fla. 1986). The court found no merit to this issue because "the possibility of organic brain damage, which James now claims he has, does not necessarily mean that one is incompetent or that one may engage in violent, dangerous behavior and not be held accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in todays' society." 489 So.2d 739. In the present case, the neuropsychological evaluation of Dr. Vallely, showed only mild to moderate impairment. Moreover,

the record belies the fact that Sireci's acts were only the result of psychosis with accompanying violent behavior. As the facts reflect, Sireci fully intended to rob his victim and then kill him, so as to eliminate all witnesses to the crime. Thereafter, Sireci attempted to have his own brother-in-law killed, so that his testimony could not implicate him in the crime. Sireci declared his innocence to both examining psychiatrists (R 63-64;69). In a letter to the judge, after being convicted, Sireci again proclaimed his innocence and moved for a mistrial claiming that there are two men from Georgia with knowledge of who committed the killings, neither of which man Sireci knows, eliminating any reason for the men to lie (R 291-292). The record reflects, however, that a Charles Askew was in the same cellhouse as these two men, and was in the same cell area as Sireci in the Orange County Jail. Transcript of motion to continue, p. 10-11. Thus, were there some truth to Dr. Lewis' diagnosis, the record reflects that such truth was not operative at the time of the crime and at the trial. The record conclusively demonstrates that Sireci was a thinking felon's felon.

In the past, this court has previously rejected similar claims. In Martin v. State, 455 So.2d 370 (Fla. 1984), the defendant contended that an excluded psychologist would have testified that Martin had severe brain damage, which would have contradicted a neurologist's findings, and undermine the other experts opinions, based on those findings. This court found that Martin's claim that the unappointed expert would have completely undermined the neurologist's findings, and the testimony based on those

findings was purely speculative, and, at best, this expert's testimony would have given the jury and judge one more bit of information to be considered and weighed, along with the other experts testimony, and the proof that Martin was, at best, a murderer and rapist who committed the instant crime while on parole. This court saw no reason to abridge the doctrine of finality in this instance, because it did not believe that this psychologist's testimony would have produced more fairness and uniformity. 455 So.2d at 372. Only a neurologist had examined Martin for brain damage and found that, although he had some brain damage, that damage was insignificant. According to Martin, this conclusion was erroneous, and would have been rebutted by the excluded neuropsychologist. Martin's claim faired no better in federal court. The Eleventh Circuit Court of Appeals held that ". . . nothing in Ake even suggests that a defendant is constitutionally entitled to a favorable psychiatric opinion. Rather, the court's discussion in Ake, focused on the need for a competent, independent psychiatrist to assist in the 'evaluation, preparation, and presentation of the defense.'" Martin v. Wainwright, 770 F.2d 918, 935 (11th Cir. 1985). The court further held, "with respect to the issue of organic brain damage, we reject the notion that either Ake or the due process clause requires the appointment of an expert who could reach a conclusion favorable to the defendant, and hold that the examination conducted by Dr. Wilson, an independent and presumably competent neurologist, met minimum constitional standards." 770 F.2d 935.

In State v. Henry, 456 So.2d 466 (Fla. 1984), Henry raised

the issue of organic brain damage in the context of an application for leave to file a petition for writ of error coram nobis. Henry based his application on a claimed, recently discovered evidence of organic brain damage and emotional and intellectual impairment. These diagnoses allegedly were made possible only by advances in medical science made after Henry's conviction and sentence. Henry's position was that failure to admit this evidence, had it been available, would have been an error of sufficient magnitude to warrant a new sentencing trial. The application was denied by this court because it could not say that, had this evidence been before the jury, it would have conclusively precluded entry of a sentence of death. 456 So.2d 470.

In Witt v. State, 465 So.2d 510 (Fla. 1985), Witt argued that trial counsel was ineffective because of his failure to obtain an additional mental health professional, who would have further established Witt's mental health problems by diagnosing organic brain damage. This court concluded that "Witt has not presented sufficient grounds to justify the filing of this successive petition." Although, this court found it unnecessary to do so, it did address Witt's claim of ineffective assistance of counsel.

In the interests of finality, the denial of post-conviction relief on this issue should be affirmed. There must be an end to the costly, time consuming, and stay-provoking-decades-later, after-the-fact efforts to "explain the unexplainable crime." At some point in time, the criminal justice system must be willing to rely on the perceptions of those who were present at trial, and no purpose is served by a series of decades-later mini-trials.

Although Sireci seeks salvation in the case of Mason v. State, 11 F.L.W. 269 (Fla. June 12, 1986), no relief should be accorded to Sireci or an evidentiary hearing granted on the basis of this case. Mason is wholly distinguishable from the present case. Mason, unlike Sireci, proffered significant evidence of an extensive history of mental retardation, drug abuse and psychotic behavior. Moreover, there was no inability on the part of Sireci, as there was in Mason, to convey accurate information about his history, nor a general tendency to mask, rather than reveal symptoms. Clinical interviews and the transcipt of the advisory sentencing phase do not show Sireci to have been either extremely hostile, guarded or indifferent during his clinical interviews. It is safe to assume that Sireci, like his psychiatrist, also found his own history unremarkable.

II. THE CLAIM THAT THE TRIAL JUDGE AND PROSECUTOR DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING, LEADING TO AN UNRELIABLE AND UNCONSTITUTIONAL SENTENCE OF DEATH IS BARRED FROM CONSIDERATION, AS ITS PRESENTATION AT THIS POINT IN TIME CONSTITUTES AN ABUSE OF PROCESS.

Sireci contends that the trial judge and prosecutor diminished the jury's sense of responsibility for sentencing by being correctly advised that they are required to render an advisory sentence in derogation of the critical role of the jury's sentencing recommendation in the trial judge's sentencing decision, and in appellate review of death sentences, citing Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

No objection to these statements were made at trial and this issue was never subsequently raised on direct appeal, or in the previous motion for post-conviction relief. Any impropriety, if there was impropriety, in such comments to the jury, must be objected to at trial and argued on appeal, and do not constitute fundamental error, so as to be collaterally considered. Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985). Moreover, no reason is even offered for the failure to raise this issue in the previous post-conviction motion, and as such, the present raising of it constitutes an abuse of procedure. See, Thomas v. State, 486 So.2d 577 (Fla. 1986); Christopher v. State, 489 So.2d 22 (Fla. 1986).

The statements in question were factually and legally correct. Middleton v. State, 465 So.2d 1226. What is really complained of is the failure to give a never requested instruction to the jury as to the fact that their verdict is to be given great weight, and the appellate standard set out in Tedder v.

State, supra, for upholding a jury override. Tedder was decided by this court in 1975, and such instruction could certainly have been requested at the time of the trial in 1976. There was no need to await the decision in Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), to raise this issue.

In Caldwell, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellate review. No such statements are presented to this court for review. Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge. The appellate standard for jury overrides in Tedder, which precludes an override of the jury's advisory sentencing recommendation, unless no reasonable person could disagree is being used as a sword to elevate the status of the advisory sentence to virtually that of a final decision, implying that it is actually the jury who sentences. This court should make clear once and for all, especially for purposes of further federal review, that in Florida the judge not the jury is the sentencer. Despite the Tedder standard devised by this court, the judge remains the ultimate sentencer. In Baldwin v. Alabama, 105 S.Ct. 2727 (1985), the Court held that the Alabama statute requiring the jury to return a sentence of death along with its guilty verdict, does not render unconstitutional the death sentence imposed by the trial judge after independently considering the mitigating and aggravating circumstances of the crime. Id. at 2737. Considering that the Alabama courts interpreted the statute expressly to mean that the sentencing

judge is to impose sentence without regard to the jury's mandatory "sentence", and that the judge could refuse to accept the jury's death "sentence" and impose a life sentence instead, the court concluded that the judge was not just the reviewer of the jury's sentence, but, in fact, the sentencer. Id. at 2734-36. In Florida, it is the trial judge who independently considers the mitigating and aggravating circumstances of the crime, and whose findings this court looks to on review. The "great weight" standard of Tedder, does not elevate the status of the jury to that of sentencer, and Caldwell is inapplicable to Florida's sentencing scheme.

III. THE ISSUE OF THE ALLEGED DISCRIMINATORY APPLICATION OF THE DEATH PENALTY IS BARRED FROM CONSIDERATION BY THE DOCTRINE OF PROCEDURAL DEFAULT AND AS AN ABUSE OF THE WRIT.

On direct appeal to the Florida Supreme Court, Sireci made what could only be characterized as a blanket attack on Florida's death penalty statute which included passing reference to the death penalty being disproportionately applied to "persons with white victims." (Initial Brief p. 70). At trial in October, 1976, no challenge was made to the constitutionality of the death penalty other than the filing of a broad based motion to dismiss (R 29-30), which the record does not indicate was ever heard. On appeal, the Florida Supreme Court did not address this issue. Sireci v. State, 399 So.2d 964 (Fla. 1981). In a subsequent Florida Rule of Criminal Procedure 3.850 motion to vacate judgment and sentence, Sireci complained that his sentence of death was a product of systematic racial discrimination in capital sentencing. On appeal from the denial of post-conviction relief, the Florida Supreme Court found this contention to be without merit. Sireci v. State, 469 So.2d 119, 120 (Fla. 1985). Sireci relied upon the Bowers and Foley studies subsequently rejected by all courts. Although various studies were presented to this court on appeal, viv-a-vis the record, and an appendix to Sireci's brief, it does not appear that the actual Gross/Mauro study was presented to the court. The Gross/Mauro study became available in 1984, during the pendency of this appeal. See, Case No. 64,728. Although Sireci moved this court for rehearing and made a renewed motion to remand to permit amendment of Rule 3.850 motion, and to allow further evidentiary development

on the basis of a new case pending before the United States Supreme Court, and in recognition that the amendment to Florida Rule of Criminal Procedure 3.850, may bar a successive motion, Sireci never moved for remand or rehearing on the basis of the new Gross/Mauro studies. On July 25, 1986, Sireci filed a second successive motion for post-conviction relief in the Circuit Court for Orange County, Florida, never raising this issue.

It is clear that a claim that the death sentence was the product of racially discriminatory sentencing practices, is one that should be raised by motion under Florida Rule of Criminal Procedure 3.850. See, Henry v. State, 377 So.2d 692 (Fla. 1982); Smith v. State, 457 So.2d 1380 (Fla. 1984). The issue is improperly raised at this point in time. A petition for writ of habeas corpus is not to be used as a vehicle for obtaining a second appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). Nor should it be used as a last minute stairway to Washington, when a post-conviction motion was filed in July, and any necessary evidentiary hearing on this issue could have been requested and held long before the eve of scheduled execution, and such post-conviction motion is, in itself, the appropriate vehicle for review. Sireci cannot legally ask this court for relief on the present issue without having first applied to the trial court for relief. Ford v. Wainwright, 451 So.2d 471, 474-475 (Fla. 1984); State ex rel. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956). The present successive stay-provoking petition, presented at the eleventh hour, should be rejected, not only as a showcase for a procedurally defaulted claim, but as an abuse of the writ as well.

Arango v. State, 437 So.2d 1099, 1104 (Fla. 1983). The petitioner having had numerous opportunities to properly present this issue should be barred under state law from presenting it in any state forum. See, e.g., Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980); State v. Matera, 266 So.2d 661, 666 (Fla. 1972).

Even were this claim cognizable, it has previously been rejected by this court in Smith v. State, 457 So.2d 1380 (Fla. 1984), Adams v. State, 449 So.2d 819 (Fla. 1984), and by the Supreme Court of the United States in Wainwright v. Ford, 104 S.Ct. 3498 (1984).

IV. RESPONSE TO APPLICATIONS FOR STAY OF EXECUTION.

Because the present pleadings are largely anticipatory in nature, appellee/respondents will answer within this omnibus pleading any and all known and possible requests for a stay of execution.

At the outset, it should be noted that the constitutionally enforceable obligation to stay execution runs only to the point where all post-conviction protections have been fairly accorded, and not beyond into the realm of mere possibility that something not yet considered may yet emerge in the minds of old or new counsel, or that an error of substance in decisions already made, may emerge from the same source. Shaw v. Martin, 613 F.2d. 487 (4th Cir. 1980 (Emphasis added).

In the present case, the merit or lack thereof of the present claims can be satisfactorily concluded prior to execution of the scheduled death sentence, and a stay should not be granted. This is particularly so, because execution is not to occur until October 7, 1986; the raising of the issues herein constitute an abuse of procedure; and no showing of likelihood of success on the merits can be demonstrated.

The issue of the discriminatory application of the death penalty, being raised in this manner at this time, is deliberately stay-provoking. The circuit court being the proper forum for the raising of this issue, the issue is not even properly before this court, and with no properly filed claim for relief in any court, the request for a stay of execution in this court must be denied. State v. Schaeffer, 467 So.2d 698 (Fla. 1985).

Sireci has not demonstrated that he even has the requisite standing to raise this issue, at this point in time. Standing depends upon a showing of injury in fact, and a demonstration that the injury will be redressed by a favorable decision. Simon v. Eastern Ky. Welfare Rights, 426 U.S. 26, 38 (1976); Warth v. Selden, 422 U.S. 490, 505 (1975); L. Tribe, American Constitutional Law, 89-93 (1978). In McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985),(en banc), cert. granted, 106 S.Ct. 3331 (1986), the central issue upon en banc rehearing in the federal court, and in the United States Supreme Court, is whether the Georgia death penalty was racially motivated because the defendant is black. 753 F.2d at 885-886. Sireci is white and his victim is white. In Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985)(en banc), cert. granted, 106 S.Ct. 2888 (1986), no mention, whatsoever, was made in the federal court's en banc decision as to any claim that Florida's death penalty was racially motivated, and although the parties have briefed the issue in Hitchcock, it is a minor one. Moreover, the penalty phase in Sireci's trial took place on November 5, 1976. The Gross/Mauro study covers the period from 1976-1980. Sireci has not demonstrated that the statistics from 1976 alone, without averaging in succeeding years, demonstrate discriminatory application of the death penalty. Furthermore, the Gross/Mauro study fails to compel an inference of purposeful discrimination. Sireci has hardly demonstrated that he suffered injury. Nor can he demonstrate that the injury will be redressed by a favorable decision. The Supreme Court in Sullivan v. Wainwright, 464 U.S. 109 (1983), Wainwright v. Adams,

104 S.Ct. 2183 (1984) and Wainwright v. Ford, 104 S.Ct. 3498 (1984), found the bottom line in the Gross/Mauro study insufficient to raise a constitutional claim. McClesky v. Kemp, 753 F.2d 877, 893 (11th Cir. 1985)(en banc). The granting of certiorari in Hitchcock, does not, in the least, portend the redressing of Sireci's illusory injury. If a stay is to be granted in this case, it should come only from the United States Supreme Court, for state law and federal law is well settled on this issue.

The remaining issues raised constitute a clear abuse of post-conviction process, should not provoke a stay of execution, and warrant no further discussion.

CONCLUSION

Based on the arguments and authorities presented herein, appellees/respondents respectfully request this honorable court to affirm the denial of post-conviction relief and to deny the petition for writ of habeas corpus.

Respectfully submitted,

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 APPELLEES/RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Appeal From the Denial of a Motion for Post-Conviction Relief in the Circuit Court in and for Orange County, Florida/Response to Petition for Writ of Habeas Corpus, has been furnished by mail to Michael A. Mello, Assistant Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32301, this 26th day of September, 1986.

MARGENE A. ROPER
COUNSEL FOR APPELLEES/RESPONDENTS