ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

HENRY PERRY SIRECI,

Appellee/Cross-Appellant.

CASE NO. 70,937

ON APPEAL AND CROSS APPEAL FROM AN ORDER OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA GRANTING POST-CONVICTION RELIEF AS TO SENTENCE

ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT

JULIUS L. CHAMBERS
RICHARD H. BURR, III
DEBORAH FINS
99 Hudson Street, 16th fl.
New York, New York 10013
(212) 219-1900

MARK E. OLIVE
Office of the Capital
Collateral Representative
1533 S. Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

Counsel for Appellee
/Cross-Appellant

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STATEMENT OF THE FACTS

To the extent that appellee/cross-appellant disputes the statement of the facts set forth by the appellant, those differences are clearly set forth in the discussion below.

SUMMARY OF THE ARGUMENT

Mr. Sireci's due process right to constitutionally adequate psychiatric evaluation in order to present a mental mitigation defense in the penalty phase of his capital trial, recognized in Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed. 53, 105 S.Ct. 1087 (1985), was triggered by the pretrial appointment of psychiatrists who evaluated Mr. Sireci, then testified at the penalty phase of his trial. The trial court's finding that these psychiatrists failed to conduct constitutionally adequate evaluations -- due to their ignorance of or their ignoring the three "red flags" in Mr. Sireci's case which required further inquiry into the possibility of organic brain damage -- is supported by substantial evidence. The court's two additional findings of fact -- that Mr. Sireci suffered from organic brain damage at the time of the homicide which the psychiatrists could have discovered if they had performed competent evaluations, and that this evidence would have established the "mental" mitigating circumstances set forth at Fla. Stat. §§ 921.141(6)(b) and (f) -- were also supported by substantial evidence. Significantly, the trial court's findings on all three of these issues were supported as well by the testimony of the state's own expert. For these reasons, and

because of the "great weight," Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977), that would have been given to mental mitigation had the appointed psychiatrists performed constitutionally adequate evaluations (which could not have been a factor in Mr. Sireci's sentencing as it was conducted, due to the absence of evidence of mental mitigation), there is a reasonable probability that had the Ake violation not occurred, Mr. Sireci would not have been sentenced to death. Accordingly, the state cannot prevail in its purely factual challenge to the decision below.

With respect to Mr. Sireci's cross-appeal, the trial court erred in limiting the reach of the Ake violation to Mr. Sireci's sentence. The evidence demonstrated that competent psychiatric evaluation would have allowed the presentation of a credible guilt-phase defense to first degree premeditated murder. Mr. Sireci already had a credible defense to first degree felony murder, which would have been strengthened by competent psychiatric evaluation. Finally, the probability of the state offering Mr. Sireci a plea to second degree murder would have been greatly enhanced by competent psychiatric evaluation. In these circumstances, the trial court could not have fairly decided that the Ake violation would have had no material effect on the determination of Mr. Sireci's guilt.

ARGUMENT ON STATE'S APPEAL

I. THE STATE CANNOT PREVAIL IN ITS PURELY FACTUAL CHALLENGE TO THE DECISION BELOW, BECAUSE THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S DECISION.

As is clear from the state's brief -- a 33-page statement of facts and 12 pages of argument -- the state's basic challenge to the decision below is on factual grounds. The state simply disagrees with the trial court's determinations of credibility and other assessments of the facts before it. The state's challenge cannot prevail, because, as we discuss below, there is substantial evidence in the record to support the trial court's conclusions -- including, it should be noted, the testimony of the state's own expert at the post-conviction hearing.

The trial court found that the two court-appointed psychiatrists who examined Mr. Sireci before trial and testified at the penalty phase of his trial had, because of their constitutionally inadequate evaluations, failed to discover that Mr. Sireci suffered from serious organic brain damage at the time of the homicide for which he was convicted and sentenced to death. The court therefore ordered that Mr. Sireci be resentenced.

In reviewing a decision of a trial court after an evidentiary hearing on a post-conviction motion under Fla. R. Crim. P. 3.850, the standard of review is clear. "[If] [t]he trial court's order is supported by competent substantial evidence, . . . this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the

credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955) (citation omitted)." Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984).

The decision below was rendered after several days of evidentiary hearings. The psychiatrists who conducted the pre-trial evaluations appeared at the hearing to justify their actions, and the trial court was able to observe their demeanor as they asserted their positions and were questioned by counsel. Similarly, the court observed the expert witnesses presented by both the defendant and the state. After reviewing the testimony and the documentary evidence explained by the testimony, the trial court made its findings. Since all of its findings are amply supported by substantial competent evidence in the record -- including testimony by the state's own expert -- as discussed below, the decision of the trial court should be affirmed.

> A. THE STATE'S ONLY LEGAL ARGUMENT -- THAT THE ORIGINAL DEFENSE REQUEST FOR EXPERT PSYCHIATRIC ASSISTANCE DID NOT SPECIFY SENTENCING ISSUES AND THEREFORE DID NOT TRIGGER DUE PROCESS PROTECTIONS AT SENTENCING -- IS INAPPOSITE, BECAUSE BOTH COURT-APPOINTED PSYCHIATRISTS ACTUALLY TESTIFIED AT THE SENTENCING PHASE OF MR. SIRECI'S TRIAL AND PRESENTED THEIR OPINIONS AS EXPERTS ON THE MENTAL HEALTH MITIGATING CIRCUMSTANCES.

The state's first argument is that Mr. Sireci cannot assert any due process rights to competent evaluations by the state-appointed psychiatrists because the original request for psychiatric examinations by defense counsel did not specify that the examinations should encompass an evaluation of mitigating

factors. (State's Br. at 36-37). The problem with the state's argument, however, is that -- whatever the original request may have been -- due process is implicated here because both psychiatrists testified at the sentencing stage as experts on the mental health mitigating factors. Both were there by virtue of their appointment by the court to examine Mr. Sireci, and both testified on the basis of those court-ordered examinations. Most importantly, as the trial court found below, both presented testimony that misled the jury and the judge concerning Mr. Sireci's actual mental state. Due process is implicated when the state is responsible for the presentation of misinformation to the sentencer about the defendant. Townsend v. Burke, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948). Accord, Zant v. Stephens, 462 U.S. 862, 887 & n.23, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983).

The state's discussion of Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985), reflects a misunderstanding of that opinion. Ake recognized that it would be impractical for the state in every capital case to appoint expert psychiatric witnesses to assist the defense, whether requested by the defense or not. Ake set forth a reasonable requirement that in order for the state to be obligated to provide psychiatric assistance to the defense, the defense would have to make a showing that such assistance was warranted in the case. Ake also made clear that where such assistance was warranted, the defendant must be provided access to "a competent psychiatrist who will conduct an

appropriate examination." 470 U.S. at 83. The Court's holding reflects the obvious truth that it would be ludicrous to require the states to provide expert assistance where it is shown to be necessary to the defense, but then to allow the expert to perform so incompetently that he was of no real assistance. The purpose of the Ake requirement is to insure the reliability of fact-finding in criminal cases. To allow the presentation of misinformation or misdiagnosis would defeat the purpose of the requirement.

The holding in Ake that applies to Mr. Sireci's case is the holding that when the states provide psychiatric experts to indigents, those experts must perform competently. The part of Ake dealing with the showing that needs to be made in order to obtain the appointment of experts is irrelevant in a case where those experts have been appointed by the state and have presented themselves to the jury and judge as experts on the sentencing issues, but have performed their evaluations so incompetently that they mislead the jury and judge in testifying about the defendant's mental state. That is the case here.[1]

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[1] There is little difference between the presentation of a misdiagnosis by a court-appointed expert presented as a state witness or a defense witness. Under Ake, the defense witness must perform competently. Under ordinary due process notions set forth in Townsend, the state cannot present misinformation to the sentencer.

B. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE STATE-APPOINTED PSYCHIATRISTS PERFORMED CONSTITUTIONALLY INADEQUATE EVALUATIONS.

Although there may be no document labeled "National Standard for Competent Psychiatric Evaluations," there is, within the psychiatric profession, an articulable, accepted and agreed upon standard of care. (R. 233, 244, 245, 249). That standard is contained in the major textbooks used by every medical school and residency training program in this country (R. 248, 249, 250), and is transmitted to psychiatrists during their training (R. 232, 235).[2]

Defendant's expert, Dr. Seymour Halleck, a professor in the Department of Psychiatry at the University of North Carolina (R. 218), has been a teacher in psychiatry since 1958 (except for a period of time when he served as Medical Director for the State Division of Corrections in Wisconsin), and a director of residency training programs (R. 219-22). He has been a member of the American Association of Directors of Psychiatric Residency Training since 1969, serving on that group's executive board for ten years, and as president of the group for a term. (R. 226). In his work for the Association as a member of the residency review

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[2] The state's expert, Dr. Pollack, did not like the term "standard of care," but preferred "good patient care" or "quality medical practice." (R. 559). He testified that the standard he was taught in training was "to be thorough." (R. 560). Of course, what it means to be thorough is to do all the things that training has taught you is required to be done in a particular case. He acknowledged that there is a good deal of information on what a good examination is, and that inculcation with that knowledge is what training in medical school and residency programs is all about. (R. 614).

accrediting committee, he has been involved in evaluating training programs and is knowledgeable about the contents of our nation's training programs. (R. 246). He is also one of only forty Senior Examiners for the American Board of Psychiatry and Neurology and as such determines whether a psychiatrist is to become "board certified." (R. 226). In the course of his work, he has reviewed the evaluations performed by court-appointed psychiatrists, including those in Florida, where he was asked to do an evaluation of forensic psychiatric training. (R. 251-53).[3] He is aware of any differences in the standard of care between 1976 and the present. (R. 253-54).

After hearing the testimony on voir dire and examining Dr. Halleck's curriculum vitae, the trial court accepted Dr. Halleck as an expert qualified to testify concerning standards of care for the psychiatric profession. (R. 254).

Dr. Halleck rendered his expert opinion that the pre-trial evaluations of Mr. Sireci performed by Drs. Herrera and Kirkland were inadequate (R. 269), negligent (R. 288, 295), and below the standard of practice (R. 270).[4] He was joined by the other psychiatric experts below -- including the state's expert, Dr.

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[3] Dr. Halleck has spent a good deal of time in forensic medicine. He received formal training at the Menninger School of Psychiatry, was consultant to two institutions while teaching at the University of Wisconsin, and continued to serve as Chief Consultant to the Department of Corrections after leaving the Department as Medical Director. He has written extensively on and won awards for his work in, criminology and forensic psychiatry. (R. 219-24).

[4] Dr. Lewis, a defense expert in psychiatry, similarly found the evaluations to be "very incomplete." (R. 417).

Pollack -- in designating actions or omissions that would fall below the standard of care if performed by a psychiatrist conducting an evaluation, and which were performed by Drs. Herrera and Kirkland in evaluating Mr. Sireci.[5]

Every expert on psychiatry who testified below -- including the state's expert, Dr. Pollack -- agreed that in order to perform a minimally competent psychiatric evaluation, the examining psychiatrist must do two things (among others): 1) he must obtain an objective medical history, which includes any history of head injuries (R. 263-65, Dr. Halleck; R. 320, 321-22, Dr. Lewis; R. 558, Dr. Pollack); and 2) he must eliminate the possibility of organic brain damage before presenting a diagnosis, particularly a diagnosis of sociopathy or anti-social personality disorder (R. 258-60, Dr. Halleck; R. 326, Dr. Lewis; R. 588, 597, Dr. Pollack).[6] The first is a necessary pre-requisite to the second.

A mental status examination is an examination by a psychiatrist during which the person to be evaluated is asked questions and observed by the psychiatrist. A properly performed mental status examination, while sufficient to suggest the presence of an organic disorder, is insufficient to rule out its

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[5] The state's expert testified on direct examination only regarding his assessment of Dr. Kirkland's examination. He was not asked nor did he offer any opinion as to the competency of Dr. Herrera's examination. The state thus offered no evidence in defense of Dr. Herrera's examination.

[6] An applicant for Board Certification who does not address the issue of organic damage automatically fails his exam. (R. 262-63, Dr. Halleck).

existence, particularly when frontal lobe damage is involved. (R. 266, 271, Dr. Halleck; R. 324, 409, Dr. Lewis). Both Dr. Herrera and Dr. Kirkland acknowledged this. (R. 23, 167). Additional testing, some of which should be within the competence of a board certified psychiatrist, is required. (R. 271, Dr. Halleck; R. 316, Dr. Lewis; R. 585, 600, Dr. Pollack).

It is necessary to test for organic brain damage in a forensic examination as well as other examinations, because certain kinds of brain damage can affect a person's responsibility for criminal behavior. Forensic psychiatrists deem organically caused personality disorders to be more serious in terms of applicable legal principles than mere functional disorders. (R. 261). Damage to a person's frontal lobes, in particular, can interfere with judgment and behavior, and specifically the capacity to control impulses or conform one's conduct to the requirements of law (R. 270, 275, 276, Dr. Halleck; R. 322, 326, Dr. Lewis; R. 457, Dr. Pincus; R. 520, 525, 531, Dr. Vallely; R. 612, 613, Dr. Pollack), and can result in repetitious behavior which the brain-damaged person cannot stop. (R. 352, Dr. Lewis). An organically impaired person is likely to overreact if thwarted, and is unable to conceptualize the consequences of his acts. (R. 355, Dr. Lewis). Even Drs. Herrera and Kirkland admitted that brain damage can affect or contribute to a person's behavior in a way that would make him less culpable

for criminal behavior. (R. 22, 150, 174).[7] There has been a recognition that organic damage can contribute to violent behavior at least since the 1920s when experimental work was done with animals, and certainly since the 1960s when research was conducted with human beings (R. 434, 595).

Psychiatrists need to eliminate a diagnosis of brain damage before diagnosing a person as a sociopath or anti-social personality because a brain damaged person can exhibit behaviors or attitudes which are similar to those exhibited by a sociopath or anti-social personality. For example, a brain damaged person may react without much emotional response, and thus appear indifferent. (R. 58). He may not show appropriate concern for the consequences of his actions. (R. 58). In order to avoid misdiagnosis of sociopathy or anti-social personality, a psychiatrist must be sure that the attitudes and behaviors he observes are not the result of organic brain damage. (R. 260, Dr. Halleck; R. 360, 361, Dr. Lewis).

The experts agreed that in order to obtain an objective medical history, the examining psychiatrist must ask very specific questions, since most people will not know what is

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[7] The relationship between temporal lobe dysfunction in particular and violent behavior has been know since at least 1948. (R. 595, Dr. Pollack). In 1980, the DSM III designated "organic personality syndrome" as an additional mental disease or defect. The state seems to argue that because designation of this disorder was not made until after 1976, Drs. Herrera and Kirkland should not have been concerned about brain damage. All of the experts, including the state's expert, disagree. Even Dr. Herrera admitted that the medical profession knew about "organicity" in 1976 when he did his examination. (R. 40).

important to tell the psychiatrist, and what is not.(R. 303, Dr. Halleck; R. 416, 417, Dr. Lewis; R. 502, Dr. Vallely; R. 578, Dr. Pollack). The problem is not that patients desire to be deceptive, it is that they lack understanding of the relevance of medical facts to their mental state. (R. 416). A simple question like, "have you had any health problems?" will not suffice. (R. 362, 363, Dr. Lewis; R. 588, Dr. Pollack). Part of psychiatric training includes training on obtaining an objective medical history. (R. 362, Dr. Lewis; R. 578, Dr. Pollack).

In the course of obtaining an objective medical history, there are certain facts which serve as "red flags" to psychiatrists. When one of those "red flags" appears during the course of obtaining a medical history (or at any other point in the examination process), the psychiatrist must, if he is performing competently, explore further to determine whether the patient suffered brain damage. (R. 265, 271, 274, Dr. Halleck; R. 327, Dr. Lewis; R. 577, 583-84, Dr. Pollack). Again, Dr. Herrera and Dr. Kirkland admitted this. (R. 67, 82-3, 150, 152, 181).

One of the "red flags" requiring further inquiry, and one which the standard of care requires a doctor to take "very, very seriously" is a history of a head injury, particularly one which caused an alteration of consciousness like a coma. (R. 265, 271, Dr. Halleck; R. 322, Dr. Lewis). Another is a visible paralysis, particularly a facial paralysis, which would suggest previous injury or neurological damage (R. 271, 274, Dr. Halleck; R. 577, 583, 610, Dr. Pollack). A third is repetitious behavior during

the course of a crime, which is very characteristic of people who have organic deficiencies. (R. 270, 275, 295, Dr. Halleck; R. 327, 354, 365, Dr. Lewis; R. 588, Dr. Pollack). Mr. Sireci had all three, and Drs. Herrera and Kirkland were ignorant of or ignored all three.

When Mr. Sireci was sixteen years old he was in a near-fatal car accident, during which he sustained a serious head injury. (Def. Ex. 3; R. 344, 354, 383, Dr. Lewis; R. 617, Dr. Pollack). As a result of the accident, he was in and out of consciousness over a two-week period. (R. 343). The accident also resulted in paralysis of half his face. (R. 188-89, 343, 386). The crime for which Mr. Sireci was convicted involved 55 stab wounds to the victim. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981).

Dr. Kirkland failed to notice the paralysis or find out about the accident (R. 143, 141), but knew about the 55 stab wounds (R. 149). Dr. Herrera did not know about the 55 stab wounds (R. 73), now assumes he did not notice the paralysis (because he believes he would have made note of it if he did and he had no such note, R. 16), but did find out about the car accident (R. 11). Having learned of the accident, however, and having learned that Mr. Sireci was in a coma after the accident (R. 12), he nonetheless failed to take the necessary next steps to determine whether Mr. Sireci suffered any permanent brain damage as a result of the accident. Neither doctor took the appropriate steps to eliminate the possibility that Mr. Sireci suffered from organic brain damage before designating him an

anti-social personality.

1. Dr. Kirkland's Evaluation

Dr. Kirkland saw Mr. Sireci twice, for a total of an hour and a half. (R. 131). The first interview was in July of 1976, the second at the time of the trial in October, 1976. (Id.). Between the time of the first and second interviews, Dr. Kirkland's brother, Edward R. Kirkland had been appointed as defense counsel to represent Mr. Sireci. (SH 72-3). Attorney Kirkland asked his brother Dr. Kirkland to testify at the penalty phase of the trial. In his decidedly unenthusiastic testimony at the penalty stage of the trial[8], Dr. Kirkland diagnosed Mr. Sireci as having "schizoid trends" (SH 78) or a "schizoid personality" (SH 82), explaining that the diagnosis was one of an anti-social personality disorder (SH 83). Such people, he testified, are peculiar, eccentric or odd (SH 85, 86, 87), and "do not seem to feel the way that you and I do" because they lack depth of feeling (SH 77, 85, 87). At the post-conviction hearing, Dr. Kirkland maintained that Mr. Sireci was a sociopath, and that that was what his trial testimony had revealed. (R. 132). The diagnosis was based on his interviews with Mr. Sireci and the statements of the jailers that they had not noticed anything in particular, since he had no other information about Mr. Sireci. (R. 140).

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[8] Dr. Kirkland testified at the post-conviction hearing that he never had the feeling his testimony at the sentencing phase was "directed toward much of anything" (R. 140-41) and a reading of the testimony confirms that feeling.

As the state argues in its brief (State's Br. at 39), Dr. Kirkland adamantly defended his evaluation of Mr. Sireci. While admitting that the only attempt he made to obtain an objective history was his interview of Mr. Sireci himself (R. 140), he defended the practice by arguing that his interview did not produce any information which should have prompted him to inquire further. He thus did not seek information from defense counsel nor from Mr. Sireci's family. He did not conduct nor arrange for any psychological or neurological testing, and based his evaluation solely on his mental status examination and the lack of noteworthy information from the jailers. (R. 140).

Although at one point he reluctantly admitted that it was "possible" he made a mistake and missed the facial paralysis (R. 158), Dr. Kirkland otherwise vehemently maintained that Mr. Sireci's face was not paralyzed when he saw Mr. Sireci in 1976, and that the injury must have occurred subsequently (R. 144, 158). He did so, no doubt, because he understood the significance of the paralysis. He claimed that had he noticed a facial paralysis, he would have noted it in his report because "it's [an] important . . . sign of the organic brain, central nervous system damage." (R. 146). He admitted that physical signs of organic deficits are significant, and psychiatrists have a responsibility to look for those signs. (R. 152). One of those signs is right-sided facial weakness, and he stated he probably would have wanted to do further evaluative tests, including neurological tests, if he was aware of such a weakness -- even if

he knew nothing else. (R. 152, 181).

It is clear that to have missed something as important and obvious as the facial paralysis was to have practiced below the standard of care (R. 283, 295, Dr. Halleck), to have been "negligent" or "incomplete" as the state's expert admitted (R. 610-11, Dr. Pollack). There is ample support for the trial court's finding that the facial paralysis was present in 1976 at the time of Dr. Kirkland's examination. The trial court observed Dr. Kirkland as he testified that the paralysis could not have been present, and weighed that testimony against the medical reports, the testimony of the experts, the testimony of Mr. Sireci and the testimony of Dr. Herrera, who admitted that he might have missed the paralysis because "the illumination [in the jail] was lousy." (R. 80).

In its brief, the state tries to challenge the trial court's findings and bolster Dr. Kirkland's testimony by arguing that it is possible that Mr. Sireci's face healed after the accident in 1965, and was then re-damaged between 1976 and 1984 when the new evaluations were done, either by new injury or "acute onset of palsy of unknown ideology," and thus perhaps was not present when the court-appointed doctors interviewed Mr. Sireci in 1976. (State's Br. at 39). The state's own expert, Dr. Pollack, rejected the "acute onset" theory as "obtuse." (R. 575).

The trial court appropriately rejected the state's arguments, and there is substantial evidence in the record to support its contrary finding that the facial paralysis occurred

in 1965 and remained unchanged, thus existing in 1976 when Drs. Herrera and Kirkland interviewed Mr. Sireci.

Medical records from the two hospitals in Illinois where Mr. Sireci was hospitalized after the car accident in 1965 noted damage to the specific nerve that would cause the specific form of facial paralysis now present. (Def. Ex. 3; R. 343, 344, 385, Dr. Lewis; R. 573, Dr. Pollack). The experts reviewed those records and found them adequate to support a conclusion that the paralysis seen now occurred then. Dr. Lewis, based on her reading of the records and her conversations with members of Mr. Sireci's family, testified that there is "no doubt" that the facial paralysis would have been there since 1965. (R. 343, 386). As she explained, one does not get function back when a nerve is severed, as it was in Mr. Sireci's case. (R. 386). Mr. Sireci himself testified that the damage occurred as a result of the accident and that his face had been unchanged since. (R. 188-89).[9] There was no evidence or testimony to indicate that the paralysis could have occurred in any other way. Mr. Sireci has been in state custody continuously since 1976, when Drs. Herrera and Kirkland conducted their interviews. If Mr. Sireci had been in a fight or accident severe enough to have created right facial paralysis, surely the state would have medical records of that

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[9] The only real dispute about Mr. Sireci's face was whether his muscles would have been limp, or if they would have gone through the process of constricting that follows the kind of nerve damage he sustained. Either way, his face would have looked abnormal, and questions about the injury should have been asked. See R. 445, Dr. Pincus.

event. No such records were produced. No witness testified to any such event.

The failure to observe the right-sided facial paralysis and follow up on its significance alone required a finding that Dr. Kirkland's evaluation was grossly inadequate. (R. 283, 295, Dr. Halleck; R. 610, Dr. Pollack). But that was not Dr. Kirkland's only failing. He also did not obtain an objective medical history from Mr. Sireci, which would have revealed the head injury caused by the car accident.

Dr. Kirkland could not recall being told about a head injury (R. 142), but testified that his evaluation was competent because he would have used a "review of systems" to obtain the information, implying that his failure to obtain the information stemmed from Mr. Sireci's failure to supply it. (R. 156).

The trial court appropriately rejected this self-serving testimony. Dr. Lewis and Dr. Vallely had no trouble getting Mr. Sireci to talk about the accident. (R. 342, 371, 414, 416, Dr. Lewis; R. 527, Dr. Vallely). Dr. Kirkland tried to differentiate Mr. Sireci's willingness to talk to the doctors in 1984 by arguing that Mr. Sireci reacted differently in 1976. The state claims Dr. Kirkland is being "faulted for a lack of clairvoyance." (State's Br. at 38). The primary problem with that argument is that Dr. Herrera was able to get the information from Mr. Sireci without a problem in 1976, at the same time as Dr. Kirkland's interviews. (R. 11).

Dr. Lewis pointed out that it is standard practice for a

doctor to note in a report when a patient refuses to answer a question, and to note answers to important questions. (R. 414-15, 416). Had Dr. Kirkland asked Mr. Sireci the appropriate question, and had Mr. Sireci refused to answer, that fact should have been noted in Dr. Kirkland's report, but it was not.

Dr. Pollack, the state's expert at the post-conviction hearing, testified that in 15 years of practice no patient had ever been deceptive about a medical history of serious injury (although he might be about his psychiatric history). (R. 619). He acknowledged that a psychiatrist should be able to discover objective medical facts like a head injury sustained in a car accident by asking appropriately specific questions. (R. 578, 619).

The state recites the answers to hypothetical questions it asked of the experts concerning what a doctor can do when he has done all he could. (State's Br. at 17). The state asked the experts what a doctor could do after asking all the right questions and getting no answer, trying to get information from defense counsel and relatives and coming up dry. The problem with those hypotheticals is that they bear no relationship to what Dr. Kirkland did. He could not have asked the right questions, because every doctor who did learned of the car accident and coma. He never asked for information from defense counsel, or tried to talk to the family. A simple phone call from Dr. Lewis was all it took for her to get information from the family. (R. 336, 338). The state's expert, Dr. Pollack, indicated that asking

defense counsel for information and assistance in gathering information is a step he would have taken in order to obtain an objective medical history. (R. 602). He "always" asks for history from defense counsel when conducting forensic examinations if he needs it, and deems it especially important in capital cases because he wants to know the truth about the defendant's history. (R. 602). Dr. Halleck testified that it is a psychiatrist's duty to seek information from defense counsel if the defendant does not provide sufficient data. (R. 286). The failure to obtain a simple medical history that would have revealed the head injury resulting from the car accident, by itself, placed Dr. Kirkland's examination below the standard of care. (R. 271, 295, Dr. Halleck).

The problem was not that Dr. Kirkland did not take extraordinary steps to obtain information, as the state implies. The problem is that he did not take the ordinary steps to investigate brain damage even though the defendant "obviously has had severe impulsive behavior in the past and [Dr. Kirkland didn't] have a clear diagnosis as to what[] [was] causing it." (R. 287, Dr. Halleck). Dr. Kirkland knew of the 55 stab wounds (R. 149), but took no steps to eliminate the distinct possibility, or "high probability" (R. 275, Dr. Halleck), that such behavior was caused by an organic disorder.[10]

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[10] The state implies that a possible explanation for the 55 stab wounds is reflected in Mr. Sireci's statement to others after the offense that he did not want to leave witnesses to the robbery. (State's Br. at 16). Even Dr. Herrera, who had not known about the multiple stabbings, found that explanation to be

The initial testimony of the state's expert, Dr. Pollack, that Dr. Kirkland performed competently was given in ignorance of the medical records from Illinois documenting the facial paralysis in 1965 (R. 572), and the neuropsychological report by Dr. Vallely (R. 569). Once exposed to that material, Dr. Pollack's testimony changed substantially, as the trial court well observed.

The trial court's finding that Dr. Kirkland's evaluation was constitutionally inadequate is thus supported by substantial evidence in the record. Dr. Kirkland failed to notice an obvious facial paralysis, failed to probe whether the infliction of 55 stab wounds was related to organicity (as their sheer number should have suggested), and failed to obtain an objective medical history of Mr. Sireci that would have revealed a serious head injury when Mr. Sireci was sixteen years old. Having missed or ignored the "red flags" in this case which required further testing for brain damage, he performed far below the minimum standard of care for his profession.

2. Dr. Herrera's Evaluation

Dr. Herrera's performance was in some ways more shocking than Dr. Kirkland's, even though he did a better initial job of

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insufficient when asked about it at the post-conviction hearing. (R. 99). The experts explained that people with brain damage often provide post hoc explanations for what is inexplicable to themselves. (R. 351, 367, Dr. Lewis; 471-72, Dr. Pincus). Obviously it does not take 55 stab wounds to eliminate a witness, and it would not be an efficient way to do so if one were planning on it. (R. 292, Dr. Halleck; R. 403, Dr. Lewis; R. 471-2, Dr. Pincus; R. 608, Dr. Pollack). The driven quality of the behavior belies the defendant's post hoc explanation.

obtaining an objective medical history of Mr. Sireci. It is the very fact that he obtained the history and learned of the "red flag" of the head injury, but chose to go no further in his evaluation that is so distressing. It may be for this reason that the state provided no expert testimony on the competency of Dr. Herrera's examination.

Dr. Herrera also interviewed Mr. Sireci twice for a total of one and one half hours, also in July and October of 1976. (R. 10). He did no neurological testing (R. 17), although he was Board Certified (R. 105) and presumably qualified to conduct the simple tests. He did no psychological testing, nor did he arrange for anyone else to do any. (R. 17). No other diagnostic studies were done. (R. 17).

Although he never noticed the right facial paralysis (he testified that lighting was poor in the jail and he could have missed it, R. 80) his notes reflect that during his second visit he learned of the car accident (R. 11). His notes stated: "head injury, car accident, January the 13th, 1964 at 6:00 p.m. on a Friday night.[11] Shot in forehead, jaw broken, unconscious for two weeks, age sixteen, no seizures afterward." (R. 12).

The state's expert, Dr. Pollack, agreed with the defense

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[11] It should be noted that the accident was actually January 15, 1965. Whether Dr. Herrera's notes inaccurately reflect what he was told, or Mr. Sireci's memory was faulty, is unclear. It is interesting to note that Dr. Herrera found no problem with Mr. Sireci's memory, and based his diagnosis of sociopathy or anti-social personality disorder in part on Mr. Sireci's supposedly intact memory. (R. 20). The tests performed by Drs. Lewis and Vallely showed that Mr. Sireci's memory was impaired. (R. 351, 525).

expert, Dr. Halleck, that it is below the standard of care for a psychiatrist to learn of that kind of information and not conduct tests to determine whether brain injury resulted. (R. 265, 271, Dr. Halleck; R. 626, Dr. Pollack).

Dr. Herrera's explanation for his failure to investigate the information of head injury and unconsciousness reflected an appalling ignorance of the significance of the information. In his view, the fact that Mr. Sireci suffered no "seizures" as a result of the injury, and never beat his wife or child, ended his inquiry. (R. 13, 60).[12] He explained that in private practice he would generally want to know if the patient experienced behavioral changes after an accident resulting in a serious head injury (R. 63), since such a change in behavior is a "red flag"

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[12] Dr. Herrera's view that Mr. Sireci's head injury would be of no consequence if he suffered no "seizures" as a result of the injury reveals an appalling lack of knowledge about the various neurological consequences which can follow a head injury. For example, "[c]losed head injuries are the most common cause of organic personality syndrome in peacetime." H. Kaplan & B. Sadock, Comprehensive Textbook of Psychiatry/IV 877 (4th ed. 1985). Seizures are not associated with "Organic Personality Syndromes," but many of Mr. Sireci's behavioral and emotional problems are. Thus, the DSM-IIIR (cited in State's Br. at 41) describes the features of this syndrome as follows:

> (1) affective instability, e.g., marked shifts from normal mood to depression, irritability or anxiety
> (2) recurrent outbursts of aggression or rage that are grossly out of proportion to any precipitating psychosocial stressors
> (3) markedly impaired social judgment, e.g., sexual indiscretions
> (4) marked apathy and indifference
> (5) suspiciousness or paranoid ideation

Id. at 115.

(R. 67). Yet in Mr. Sireci's case, he made no inquiry beyond questioning Mr. Sireci -- who does not, as is common with head injured people, recognize that such changes occurred. (R. 192). Dr. Herrera did not, therefore, learn of the changes in Mr. Sireci's behavior after the accident. After the accident, Mr. Sireci became extremely violent, flying into unexplained rages for which he would later have no memory, like punching a refrigerator so hard the family had to buy a new one. (R. 352). His mother was upset and fearful because of his changed behavior and the unpredictability of his temper after the accident. (R. 398).

Dr. Herrera felt no obligation to contact defense counsel or Mr. Sireci's family in order to obtain more information about Mr. Sireci's behavior after the accident. (R. 14). Dr. Herrera believed it was up to defense counsel and the family to contact him. (R. 14, 65). The state's expert in the post-conviction hearing, Dr. Pollack, disagreed, noting that it is the doctor's duty to obtain the information he needs to make an accurate diagnosis. (R. 602-03). Dr. Herrera did not explain how defense counsel or the family would know that he needed information, or what information he needed, if he did not contact them.

Dr. Herrera also sought justification for his lack of investigation in his view that his task was so circumscribed that it did not matter whether Mr. Sireci suffered from brain damage or not. (R. 27-8, 41). It is difficult to understand his reasoning in light of the explicit testimony by the experts,

again including Dr. Pollack, that the diagnosis he made of sociopathy is one that cannot be made according to reasonable medical standards until a diagnosis of organic brain damage is explicitly ruled out. (R. 257-59, Dr. Halleck; R. 326, Dr. Lewis; R. 597, Dr. Pollack).

Moreover, Dr. Herrera cannot now claim that his evaluation was for such a limited purpose that it would not encompass an accurate assessment of Mr. Sireci's mental state at the time of the crime -- including organic brain damage -- when he presented himself as an expert to the jury and the judge on precisely that issue at the penalty stage of Mr. Sireci's trial.

It should be noted here in support of the judgment below, although not specifically cited by the trial court, that Dr. Herrera was unaware of the nature of the crime when he made his diagnosis. As he testified at the post-conviction hearing, he was unaware that the victim had been stabbed 55 times. (R. 73, 74). Ignorance of such a basic fact of the offense also calls his evaluation into question. As he himself admitted, psychiatrists need to know the basic facts about the crime to do a reliable forensic evaluation. (R. 76). The experts cited the repetitive nature of the stabbings as an important factor to consider in evaluating Mr. Sireci's mental state at the time of the offense. (R. 270, 275, 295, Dr. Halleck; R. 327, 354, Dr. Lewis; R. 457, Dr. Pincus; R. 588, Dr. Pollack). Dr. Herrera himself, initially taken aback when provided with the information during the post-conviction hearing, admitted that it suggested out-of-control

behavior (R. 73), and that "in all likelihood" there was some factor other than a personality disorder operating if Mr. Sireci stabbed 55 times. (R. 117). He was willing, at that point, to concede that brain damage was "possibly an explanation for the 55 times...." (R. 117).

The trial court's finding that Dr. Herrera's evaluation was constitutionally inadequate is thus supported by substantial evidence in the record. Dr. Herrera failed to notice an obvious facial paralysis, failed to inform himself about the nature of the offense before making his diagnosis, and ignored information that Mr. Sireci sustained a serious head injury and was comatose at age sixteen. As with Dr. Kirkland, having missed or ignored the "red flags" which required further investigation into brain damage, he performed far below the minimum standard of care for his profession.

C. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT BECAUSE OF THE DEFECTIVE EVALUATIONS, THE PSYCHIATRISTS FAILED TO DISCOVER ORGANIC BRAIN DAMAGE THAT HAD BEEN PRESENT SINCE MR. SIRECI WAS SIXTEEN YEARS OLD AND WAS PRESENT AT THE TIME OF THE HOMICIDE FOR WHICH HE WAS SENTENCED TO DEATH.

In 1984 Mr. Sireci was examined by a psychiatrist, a neurologist and a neuropsychologist, and given psychological tests by an assistant to the psychiatrist. (R. 314, 328). He was given a neurological examination and psychological and neuropsychological tests. (R. 347-48, 349, 442, 448, 449, 514). The tests given are objective medical tests, in which physical and intellectual capacities are tested. Before the tests were

introduced into general usage in the profession, they were themselves tested repeatedly for their ability to measure specific deficits. (R. 297, Dr. Halleck; R. 482, Dr. Pincus; R. 497-98, 508, 511, Dr. Vallely). As a result of that process, it is clear that certain tests reveal abnormalities which correspond to damage to specific parts of the brain. (R. 511). All the tests performed were available in 1976 when Drs. Herrera and Kirkland evaluated Mr. Sireci. (R. 296, Dr. Halleck; R. 413, Dr. Lewis). As Dr. Lewis testified, Mr. Sireci's deficits were so pronounced that the most rudimentary of the tests, which any board certified psychiatrist should have been able to perform, would have been "able to document brain damage." (R. 316). Dr. Pollack, the state's expert, testified that if additional tests were needed, it was possible to ask the court that they be done. (R. 558-59).

The unequivocal finding of all the doctors who performed all the tests was that Mr. Sireci suffered from extensive brain damage on both the right and left side, pinpointed in the frontal and temporal lobe regions (R. 340, 345, 349, 383, 384, Dr. Lewis; R. 451, 455, Dr. Pincus; R. 516, 521, 525, Dr. Vallely).[13]

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[13] The standard neurological tests of reflex and strength revealed inordinate weakness, hyperflexia and a Babinski sign on the left side, all of which indicate damage to the right side of the brain. (R. 345-6, Dr. Lewis; R. 448, 451 Dr. Pincus). The Babinski sign is one of the most unequivocal findings of neurological damage, and it serves to localize the damage. (R. 346, Dr. Lewis; R. 449, Dr. Pincus). The tests also found clonus on the right knee, a sign of damage to the left side of the brain. (R. 448, Dr. Pincus). These tests tend to under represent the level of damage to the brain. "The damage is almost always more extensive than suspected on the basis of the physical examination." (R. 455, Dr. Pincus).

There is no question that Mr. Sireci was in a car accident at age sixteen, and that the seventh facial nerve was severed as a result of that accident. The doctors who examined Mr. Sireci, and Dr. Halleck, who reviewed their reports, testified that, to a reasonable degree of medical certainty the brain damage which they documented occurred as a result of the car accident. (R. 301, Dr. Halleck; R. 354, 383, Dr. Lewis; R. 447, Dr. Pincus; R. 528-29, Dr. Vallely).[14]

The psychological tests revealed a wide discrepancy in scores on all aspects of the Tests (R. 347, Dr. Lewis). The normal score on the Digit Span Test is 10. Mr. Sireci's score was 6. (R. 348, Dr. Lewis). Mr. Sireci scored in the retarded range on the Picture Completion Test. (Id.). The mental status examination revealed memory impairment. A normal person can remember seven digits forward and five backward. Mr. Sireci could only remember four forward (which means he could not memorize a phone number) and three backward. (R. 351, Dr. Lewis). The mental status examination also revealed thought disorders. Mr. Sireci was rambling, concrete and inappropriately jocular. (R. 350, Dr. Lewis).

Mr. Sireci's overall IQ was within the range of normal (i.e., he is not retarded), but the pattern of the specific scores within the test showed that his ability to abstract, which affects judgment, was impaired, revealing left hemisphere frontal lobe damage. (R. 515, Dr. Vallely).

The specific neuropsychological tests for frontal lobe deficits revealed that Mr. Sireci suffered from frontal lobe damage: the Trail Making Test, the Wisconsin Card Sort Test and the Thurstone Word Fluency Task. (R. 516-17, Dr. Vallely).

The doctors rejected the possibility that Mr. Sireci was malingering or faking the results. A person who is faking mental illness will score uniformly low on the psychological tests, but Mr. Sireci's scores were uneven. (R. 392, Dr. Lewis). Some of the neuropsychological tests are specifically designed to reveal malingering. The results of those tests revealed Mr. Sireci was not malingering. (R. 511-13, Dr. Vallely).

[14] There is also the possibility that Mr. Sireci sustained some brain damage during a botched forceps delivery that injured his right eye. (R. 341, 382, 383, Dr. Lewis; R. 446,

The state's expert, Dr. Pollack, did not dispute the defense experts' findings of brain damage or of right facial paralysis. He was just "uncomfortable with their extrapolations in terms of times and appearances of the neurological deficits" (R. 570-71), and thus uncomfortable with faulting Dr. Kirkland for missing them. He gave this testimony, however, before he was aware of the medical records from the car accident in 1965 (R. 572), which were considered by the defense experts in reaching their "extrapolations" concerning the timing of the damage. He acknowledged that the records documented the damage to the facial nerve on the right side (R. 573), and a serious head injury (R. 617).

The state tries to cast doubt on whether Mr. Sireci actually sustained brain damage as a result of the accident, by citing to portions of the medical records below and interpreting their meaning for this Court. (State's Br. at 5). The state's expert reviewed the medical reports at the post-conviction hearing and did not thereafter question the finding of brain damage. The purpose of holding an evidentiary hearing was to enable both sides to present evidence on this issue. The state produced no testimony or other evidence to contradict the findings of brain damage. It is absurd for counsel for the state to now argue, based on her own -- and decidedly lay -- reading of the medical reports, that, contrary to the findings of all the experts who testified at the post-conviction hearing, there was no brain

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447, Dr. Pincus).

damage.[15]

D. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT EVIDENCE OF THE ORGANIC BRAIN DAMAGE FROM WHICH MR. SIRECI SUFFERED WAS EVIDENCE THAT HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE AND SUFFERED FROM A SUBSTANTIAL IMPAIRMENT OF THE CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS ACT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW.

It is true that not all brain damage affects behavior, and that not all brain damaged people become violent or are otherwise impaired in their capacity to control their conduct, as the state suggests. (State's Br. at 40). It is the part of the brain that is damaged that determines whether judgment or control over behavior will be affected (R. 435, Dr. Pincus; R. 518-20, Dr. Vallely; R. 616, Dr. Pollack), and the presence of other factors such as paranoid tendencies or history of parental abuse that

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[15] For example, the state cites a part of one report by radiologists from Mr. Sireci's 1965 hospitalization which failed to find damage to the "cranium." (State's Br. at 45-46). There is a difference between the cranium, or skull, and the frontal lobes of the brain, and lack of damage to one does not imply lack of damage to the other. Moreover, "[f]ractures of the base of the skull are notoriously difficult to detect in roentgenograms [x-rays], but are often clinically evident by ecchymoses over the postauricular area (Battle's sign) or around the orbit (racoon-eyes sign) or by blood behind the ear drum or in the outer ear canal." Comprehensive Textbook of Psychiatry/IV, at 114. As the medical records show, Mr. Sireci had blood in the outer ear canal. Thus, the fact that the radiologists could not document the basilar skull fracture by x-ray in no way undermines the conclusion in 1965 that Mr. Sireci suffered a basilar skull fracture or the conclusion today that he suffered brain damage as a result of the same blow to his head that fractured his skull.

The state also argues that Mr. Sireci has a normal IQ, implying that this negates a finding of brain damage. (State's Br. at 46). In fact, the IQ tests revealed brain damage. See footnote 14.

determines whether the lack of judgment and control over behavior will result in violence. (R. 455-56, Dr. Pincus). Damage to one part of the brain may cause blindness, for example, but would not cause impulsive, repetitious behavior. The damage that Mr. Sireci suffered was to the frontal and temporal lobe regions. (R. 521, 525). Damage to those areas of the brain affects judgment, a person's ability to recognize alternatives in a situation, to respond appropriately to stress, and to control aggressive feelings and violent impulses. (R. 270, Dr. Halleck; R. 326, 355, Dr. Lewis; R. 525, 526, 531, Dr. Vallely). All the experts agreed, as did Drs. Herrera and Kirkland, that frontal and temporal lobe damage could affect a person's capacity to conform his conduct to the requirements of law. (R. 270, Dr. Halleck; R. 355, Dr. Lewis; R. 475, 483, Dr. Pincus; R. 531, Dr. Vallely; R. 613, Dr. Pollack). In addition, he suffered from episodic psychosis in the form of paranoid thought disorder, which made him feel extraordinarily threatened in situations where others would not experience a threat. (R. 340, 356-58, 381, Dr. Lewis; R. 477, Dr. Pincus).[16]

Mr. Sireci was extremely mentally disturbed at the time of the offense in 1976, because he suffered from organic brain damage and paranoid thought disorder. The state misinterprets the

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[16] The findings on the psychological tests are characteristic of responses of psychotic individuals. (R. 358, Dr. Lewis). On the Wechsler Adult Intelligence Scale and the structured projective tests the results suggest schizophrenia. (R. 360, Dr. Lewis). Brain damage can be responsible for symptoms indistinguishable from schizophrenia (R. 360, 361).

responses of the defense experts to the question of whether they could determine with accuracy what Mr. Sireci's "mental state" was at the time of the offense. (State's Br. at 44-45). The experts admitted that they might not be able to say with certainty what Mr. Sireci's every thought and feeling was at the time of the offense, but they could say with certainty, "absolutely, definitely," and even "beyond a reasonable doubt," that the organic brain damage from which Mr. Sireci suffered affected his behavior, thinking and feeling at the time of the crime in 1976; and that the effect would be the effect known to result from such a defect, i.e., a homicide committed while under extreme mental or emotional disturbance and an inability to conform his conduct to the requirements of law. (R. 241-3, 282, Dr. Halleck; R. 315, 349, 355, Dr. Lewis; R. 457, 470, 475, 483, 484, Dr. Pincus; R. 531, Dr. Vallely). Dr. Halleck testified that a homicide committed by stabbing the victim 55 times showed a "very high likelihood" of organic deficit influencing behavior at the time of the crime. (R. 275-76). Dr. Lewis testified that it was unlikely that Mr. Sireci would even be able to conceptualize the consequences of what he was doing short term much less long term. (R. 355). Dr. Vallely testified that although he was uncomfortable stating exactly how the brain damage related to the multiple stabbings, he could say that the frontal lobe deficits "are clearly going to have an impact" or are "a contributing factor" in the commission of the homicide "or in even deciding to deal with life by committing a robbery." (R. 531-32). Even the

state's expert testified that given the information made available by the tests in 1984, he is sure that there was something else, other than sociopathy, that was highly material to Mr. Sireci's responsibility for the crime. (R. 612). "A person with that type of neurological lesion most probably, when confronted with extreme stress would have a very high probability of losing control." (R. 613).

E. THERE IS NO BASIS FOR THE STATE'S ATTACK ON THE NEW MENTAL HEALTH EVALUATIONS: THE STATE'S OWN PSYCHIATRIC EXPERT AT THE POST-CONVICTION HEARING FOUND THEM TO BE REASONABLE AND COMPETENT.

Dr. Pollack, the state's expert at the post-conviction hearing, testified that the evaluations performed by Drs. Lewis, Vallely and Pincus were "certainly reasonable" and their diagnosis supported by the data they found. (R. 570). He thus did not disagree with their findings of organic brain damage. (R. 571). His only disagreement was concerning the competency of Dr. Kirkland's evaluation.[17] He agreed that the failure to note and investigate the right facial paralysis would have been a serious departure from the standard of care (R. 610), but initially was of the opinion that the evaluations were not sub-standard because he could not say with certainty <u>when</u> the right facial paralysis occurred (R. 570-71). After reviewing the medical records and learning more about the evidence during the course of the post-conviction hearing (R. 572-73), it was clear that his view

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[17] He did not express any opinion concerning Dr. Herrera's evaluation.

changed.

Dr. Seymour Halleck, the expert on psychiatric evaluations, was also of the view that the evaluations done by the defense experts in 1984 were "competent reports" which "meet the standard of adequate psychiatric evaluation." (R. 276). Dr. Halleck was not involved with the evaluations in 1984, had only met Dr. Lewis once for five minutes, knew Dr. Pincus by reputation only, and did not know Dr. Vallely. (R. 278-79). His testimony on this issue was that of a detached observer. He based his view on the fact that the group looked at all possible disorders, took the issue of neurological impairment seriously, obtained a good history of possible events compromising neurological functioning, did a thorough neurological examination and conducted neuropsychological testing. (R. 276). He characterized the resulting evaluations as "very, very substantially more reliable" than those by Drs. Herrera and Kirkland. (R. 277).

The state faults the new evaluations because each doctor did not personally conduct every part of the evaluation that each noted was an important ingredient for a thorough work-up. (State's Br. at 44). But none of the experts claimed to be basing his or her conclusion on the single part of the evaluative process for which he or she was responsible. As Dr. Lewis noted, the conclusion of brain damage was based on the results of the multiplicity of data that had been obtained (R. 314, 380), and the inter-consistency of all the information obtained from the examinations, the hospital records, and the interviews of Mr.

Sireci's family (R. 397).

A thorough history was obtained by Dr. Lewis, who not only interviewed Mr. Sireci (R. 314, 327), and reviewed the medical records from his accident (R. 343), but spent time discussing his history with his family, as well (R. 336, 338). Dr. Pincus' examination did not duplicate the taking of the history, but added the medical evidence of brain damage from his neurological examination. (R. 443). Dr. Vallely added the findings from the neuropsychological tests, further pin-pointing the location of the damage within the brain. (R. 521, 525).

All of the findings of each of the doctors complemented the findings of the others. (R. 346, 348-50, 365, 397, Dr. Lewis; R. 453, 483, Dr. Pincus). All of the "hard data" from all of the tests led to the same conclusion, and none were equivocal. (R. 328, 340, 349). Under the circumstances, each doctor could be confident in the ultimate finding of brain damage.

The state challenges the doctors' reliance on the medical records from the Illinois hospitals where Mr. Sireci was hospitalized after his car accident in 1965. (State's Br. at 45). Those records were obtained in the same manner in which doctors regularly obtain records for their use when making a diagnosis. (R. 332). Doctors do not request records clerks to come before them and swear to the authenticity of the records, or even require a certificate of authenticity. They have someone in their office obtain a release from their patient, mail the release to the hospital with a request for the appropriate records, and get

back a photocopy of the records. That is what happened here, except that defense counsel mailed the release and request for the doctor. (R. 332-34). The trial court accepted counsel's assurance as an officer of the court concerning the manner in which the documents were obtained. (R. 334). The documents themselves are patently what they purport to be. They show the name of the hospital, are signed by the physicians, and, as Dr. Lewis noted, there are even nurses' progress notes in the packet. (Def. Ex. 3; R. 332-33). The reports may not be in a form that would allow their introduction into evidence in a criminal trial to prove the truth of the matter stated within them, but they are certainly considered adequate by the medical profession as documentation of medical history, and that is what they were used for in this case.

II. THERE IS MORE THAN A REASONABLE PROBABILITY THAT DISCOVERY OF MR. SIRECI'S EXTENSIVE BRAIN DAMAGE AND PRESENTATION OF THAT FACT TO THE JURY AND TRIAL JUDGE WOULD HAVE AFFECTED THE SENTENCING OUTCOME.

The State proposes, without citing to authority, that the standard to be used in determining whether a death sentence should be reversed when inadequate psychiatric examinations resulted in the failure to discover a defendant's serious organic brain damage is whether the evidence would have affected the sentencing outcome. (State's Br. at 40). That standard is not the appropriate standard in this context. Ake indicates that the only prejudice that must be shown by Mr. Sireci is that his sanity "was likely to be a significant factor in his defense." Ake, 470 U.S. at 86. This Court need not decide the issue, however,

because the prejudice to Mr. Sireci meets either standard.

It is unquestionably true that lay people -- including jurors and judges -- view psychiatric testimony with a bit of skepticism, especially if there is a "battle of the experts."[18]

In the lay person's eyes, the following scenario takes place in criminal trials: Dr. A talks to the defendant and finds him to be psychotic because of the answers he gives to Dr. A's questions, and so Dr. A testifies for the defense. Dr. B similarly talks to the defendant but finds him to be malingering and merely a sociopath, also because of the answers he gives to questions, and so testifies for the state. Neither doctor really knows how the defendant "got that way," but the jury is left to decide which to believe.

That kind of testimony is what was presented to the jury in Mr. Sireci's case, only in his case the defense expert agreed with the prosecution expert that Mr. Sireci suffered from an anti-social personality disorder; they just disagreed as to whether he was "schizoid" or a "sociopath." (SH 82-84, 98). Neither explained how Mr. Sireci might have become that way, and

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[18] The state attempts to exploit this skepticism in this Court by labeling psychiatry a "soft science." (State's Br. at 39). That characterization was disputed by the experts below, who explained that the differing opinions of psychiatrists often arise because of the greater complexity of the data, which makes it more difficult in some cases for the psychiatrist to be definite in his opinion. (R. 230, Dr. Halleck). In Mr. Sireci's case, where all the data points to one conclusion and there is hard medical evidence of impairment, the experts had no difficulty in expressing definite opinions. Additionally, a competent psychiatric evaluation utilizes objective medical tests and proven psychological testing instruments to reach a proper diagnosis. (R. 313, Dr. Lewis).

neither indicated that having an anti-social personality was anything that would mitigate a crime. In fact, the jury was told that 95% of the people in prison are people who could be characterized as sociopaths. (SH 108).

Evidence of an organic malady for which the defendant is not responsible, but which prevents him from controlling his impulses, is evidence of a whole different magnitude. When the jurors and judge hear that evidence, they know that there is an objective, concrete basis for the expert's testimony. Because it is demonstrable, it "evaporates doubts" lay people may have about psychiatric diagnosis. (R. 262). It presents a reason for what is otherwise horrible and inexplicable behavior, and a reason that is mitigating in nature.

The state argues that the jury heard evidence that Mr. Sireci had mental or emotional problems, and therefore whether those problems had an organic basis or some other basis would not have affected their decision. (State Br. at 42-43). That is patently absurd. The diagnoses of Drs. Herrera and Kirkland did not provide evidence that would support a finding of either of the mental mitigating circumstances, and neither was found. Because of his faulty examination, Dr. Kirkland did not believe that Mr. Sireci suffered from any mental or emotional disorder that would "play a part in his plight" (R. 175), and his testimony at the sentencing hearing relayed that feeling quite clearly to the jury. On the other hand, he admitted at the post-conviction hearing that evidence of brain damage could "mitigate

responsibility." (R. 150-51).

Because of his faulty examination, Dr. Herrera testified at the sentencing hearing quite clearly that Mr. Sireci did not suffer from any mental or emotional disturbance that would have affected his behavior (SH 94), but testified at the post-conviction hearing that responsibility for a crime may be diminished if the crime was committed by a brain damaged individual (R. 22).

The pages cited by the state in support of the propositions that Drs. Herrera and Kirkland would not alter their diagnoses even in the face of additional testing (State's Br. at 43) do not contain any such testimony. The testimony therein is simply a review of how they reached their diagnoses. Moreover, whether they would have changed their diagnoses or not is irrelevant, if they would not do so because they were practicing below the standard of care.

The diagnoses of Drs. Lewis, Pincus and Valley <u>do</u> provide evidence that would support findings of <u>both</u> the mental mitigating circumstances, as the trial court found. Dr. Halleck testified that, given the evidence of brain damage, a psychiatrist could say that Mr. Sireci was suffering from extreme mental disturbance at the time of the offense. (R. 282). Dr. Pincus testified that Mr. Sireci at the time of the offense did not have voluntary control over his actions (R. 475, 477), and to a "reasonable degree of medical certainty" was under the influence of an extreme mental disturbance (R. 483-84). Dr.

Pollack testified that if the information about Mr. Sireci's brain damage had been unearthed, a psychiatrist would have a lot more to say to the jury and judge than that the defendant suffered from an anti-social personality disorder (R. 612), and that what he would say would be that the brain lesion caused the defendant to lose control (R. 613). The evidence of brain damage helps to explain the heinousness of 55 stab wounds to the jury in a way that mitigates the offense, since the wounds they can be explained as the result of organically imposed loss of control and not intentional infliction of pain on another human being. (R. 327, 354, Dr. Lewis; R. 457, Dr. Pincus).

The power of findings of the mental mitigating circumstances cannot be overstated. This Court has said that such findings must be given great weight in the sentencing decision. Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977). See also Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Mann v. State, 420 So.2d 578, 581 (Fla. 1982). That is because evidence of extreme mental or emotional disturbance or an inability to conform one's conduct to the requirements of law relate quite specifically to the level of culpability, both morally and legally, of the offender. One who is mentally disturbed, one whose actions are beyond his own control, is not as reprehensible a human being as one who -- with complete control of his feelings and behavior -- acts in a cold-blooded manner in taking another human life. The testimony by all the experts at the post-conviction hearing -- including the state's expert -- was that Mr. Sireci was a mentally disturbed

individual whose conduct was beyond his control by virtue of severe brain damage he suffered in a car accident at age sixteen. There is no question that Mr. Sireci was prejudiced when that evidence, through shoddy evaluation and misdiagnosis, was kept from the jury and judge that decided his fate.

ARGUMENT ON MR. SIRECI'S CROSS-APPEAL

On September 26, 1986, the trial court entered an order staying Mr. Sireci's execution and granting an evidentiary hearing on his claim that his due process and equal protection rights were violated by the failure of Drs. Kirkland and Herrera to provide constitutionally adequate evaluations of his mental status at the time of the offense. The state immediately took an interlocutory appeal from this order, which was entertained but thereafter denied by this Court. State v. Sireci, 502 So.2d 1221 (Fla. 1987).

In the course of denying the state's appeal, the Court also approved various intermediate decisions of the trial court adverse to Mr. Sireci, including its decision to limit the Ake claim to its effect on his sentence:

> The trial court further held that the [evidentiary] hearing is necessary solely to determine the effects, if any, this claim may have had on the sentencing hearing. The court specifically held, and we agree, that the alleged violation of due process/equal protection has no bearing on the determination of Sireci's guilt.

502 So.2d at 1223.

Mr. Sireci petitioned the Court to rehear this aspect of its

decision because he had been denied notice and an opportunity to be heard with respect to it. See Motion for Rehearing, Nos. 69,386 and 69,380, filed January 20, 1987. He argued that the only matter properly before the Court was the state's interlocutory appeal from the rulings adverse to it (the granting of a stay and an evidentiary hearing), that because of this he had no notice that in deciding the state's appeal the Court would also rule upon the trial court's interlocutory decisions adverse to him, that for this reason he had not addressed such matters, and that the Court had thus denied him an opportunity to be heard with respect to them. On March 18, 1987, without opinion, the Court denied rehearing. Thereafter, the trial court conducted the evidentiary hearing on the limited question of the effect of the Ake violation on Mr. Sireci's sentence.

Having denied Mr. Sireci notice and an opportunity to be heard -- the most fundamental protections of due process, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 94 L.Ed. 865, 70 S.Ct. 652 (1950) -- with respect to the trial court's decision to limit his Ake claim to a sentencing issue, the Court can remedy that violation now by entertaining Mr. Sireci's argument with respect to that decision.

The trial court erred in deciding that the Ake violation had no effect on the determination of Mr. Sireci's guilt or innocence. There are three reasons this ruling was in error:

(1) The psychiatric defense which Drs. Kirkland and Herrera missed spoke directly to Mr. Sireci's capacity to commit

a premeditated murder. As Dr. Pincus testified in the hearing before the trial court, Mr. Sireci's abilities to premeditate and intend to kill were seriously compromised at the time of the offense:

> [H]e went tiptoeing off into the car lot to get the keys ... [b]ut when he was confronted by somebody, a confrontation occurred. How did he respond to that? Things changed. Now here we're dealing now not with a person who is like you or me, we're dealing with a person who is brain damaged, who has psychotic trends in his thinking, and he is confronted suddenly.
>
> Now, is his response to that rational or not rational? Is he under control or not under control? I think he's not under control under those circumstances....
>
> [M]y understanding of [capital murder] is it's supposed to involve planning. You're supposed to have an intent to murder somebody, and in order to have an intent you have to be able to frame that intent and you have to have your free will operating more or less unconstrained by mental illness or neurological damage, and I think we have evidence of neurological damage.

(R. 478-79).[19]

(2) One might argue that even if there could have been a psychiatric defense to premeditated murder, Mr. Sireci still

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[19] This testimony was elicited by the state on cross-examination. Because the scope of the hearing was limited to matters affecting only the sentence determination, none of the other experts was asked questions going to a guilt-innocence defense. However, it is plain that they would have agreed with Dr. Pincus' analysis. See, e.g., R. 355 (Dr. Lewis' explanation that at the time of the murder Mr. Sireci would not have been able to conceptualize the consequences of what he was doing); R. 613 (Dr. Pollack's opinion that Mr. Sireci would have had "a very high probability of losing control" when he was confronted by Mr. Poteet).

would have been convicted of first degree murder under a felony murder theory, since he went to the car dealership intending to commit a robbery, and so the determination of guilt was unaffected by the Ake violation. Such an analysis, however, would ignore the defense Mr. Sireci already had to first degree felony murder. At trial, only two state witnesses were able to attribute an intent to "rob" to Mr. Sireci. At the very least, however, there was genuine ambiguity in their testimony as to whether Mr. Sireci's intent was an intent to "rob" or simply an intent to "steal," for his apparent purpose in going to the car lot was to "steal" a set of keys. See Transcript of Trial Proceedings, at 251-52, 197-98, 453, 470-73. Indeed, on direct appeal Mr. Sireci argued that the evidence was legally insufficient to support a finding of intent to rob. While the Court rejected this argument, Sireci v. State, 399 So.2d 964, 966-68 (Fla. 1981), it did not hold that no reasonable juror could have found only an intent to steal. Plainly, the evidence would have permitted a reasonable juror to make such a finding.[20]

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[20] On this issue as well, competent evaluation of Mr. Sireci would have aided his defense. Expert testimony might not have established that he had no capacity to form the intent to steal, but it could have supported the view that he had formed only the intent to steal, not the more complex intent to rob. As Dr. Valley explained,

> I would say that the [brain] damage does contribute to the entire act.... [S]somebody with frontal lobe damage is going to have extremely bad judgment, poor resources to deal with stress and crisis, so they are going to act impulsively and overreact to certain situations. Therefore, in the incredible stress of committing a robbery or

Significantly, if the jury had resolved the ambiguity in the testimony in favor of an intent to "steal," murder in the third degree, not in the first degree, would have been the crime established.

(3) Finally, if the psychiatric evaluations had been conducted adequately, the state would likely have been much more willing to plea bargain with Mr. Sireci. With the substantial defense to premeditated murder which the psychiatric evaluations could have provided, the state would have been left with only the ambiguous evidence of intent to rob as its best case for first degree murder. In these circumstances, the state could well have been motivated to take a plea to murder in the second degree (since there was evidence of "depravity of mind") rather than risking a conviction of only murder in the third degree. See Burger v. Kemp, ___ U.S. ___, 97 L.Ed.2d 638, 652, 107 S.Ct. ___ (1987) (illustrating that prejudice can be shown from ineffective assistance of counsel if the defaults by counsel prevented meaningful plea negotiations from taking place).

Accordingly, the trial court erred when it held that the Ake error had no effect upon Mr. Sireci's guilt determination and on that basis, limited the scope of the evidentiary hearing to sentencing issues. Because the evidentiary hearing was limited in accord with this ruling, Mr. Sireci should be given an

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> in even deciding to deal with life by committing a robbery, frontal lobe deficits are clearly going to have an impact....

(R. 531-32).

additional opportunity to present evidence showing that he could have presented a reasonably credible guilt-phase defense or could have persuaded the state to plea bargain if he had been provided constitutionally adequate psychiatric evaluation.

CONCLUSION

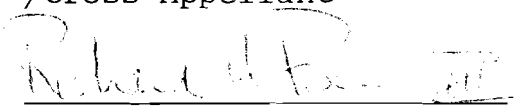
For all the above stated reasons, the decision of the trial court granting post-conviction relief and vacating Mr. Sireci's sentence of death should be affirmed. The case should be remanded for further hearings concerning the effect of the unconstitutionally inadequate evaluations on the guilt phase of the trial.

Respectfully submitted,

JULIUS L. CHAMBERS
RICHARD H. BURR, III
DEBORAH FINS
99 Hudson Street, 16th fl.
New York, New York 10013
(212) 219-1900

MARK E. OLIVE
Office of the Capital
Collateral Representative
1533 S. Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

Counsel for Appellee
/Cross-Appellant

By: 

CERTIFICATE OF SERVICE

I, RICHARD H. BURR, III, hereby certify that a copy of the foregoing has been served on counsel for Appellant/Cross-Appellee by mailing a copy of the same, first class mail, postage pre-paid, to Margene A. Roper, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 17th day of March, 1988.

Richard H. Burr, III