

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

CASE NO. 70,937

HENRY PERRY SIRECI,

Appellee/Cross-Appellant.

FILED

SUPREME COURT

FEB 2 2008 ✓

CLERK, SUPREME COURT

By *ac*

Deputy Clerk

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Henry Perry Sireci went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of the car lot. He went there for the purpose of robbing the owner and 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. Although Sireci told someone that he had killed the victim with a five or six inch knife, the wounds varied in penetration depth (SR 138), and it is possible that the wounds could have been caused by more than one instrument (SR 139). There were incisive-type wounds on the hands, sometimes caused by grasping a knife (SR 134-135). Shortly after the murder, Sireci threw his small pocketknife into a toilet when the police came into the place where he was playing pool and drinking (SR 164-165). He also owned a hunting knife about nine inches long (SR 172). The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The knife never touched the heart (SR 135). The neck was slit.

Sireci 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, Sireci asked where the money was, but the man wouldn't tell him, so he stabbed the man. He told Perkins that he killed Poteet. He also admitted taking the wallet from the victim.

Harvey Woodall, Sireci's cellmate when he was arrested in Illinois, testified that Sireci had described the manner in which he killed the victim. According to Woodall's testimony, Sireci hit the victim with a wrench, then a fight ensued in which windows were broken, and Sireci stabbed the man over sixty times. Sireci stated that he wasn't going to leave any

witnesses to testify against him and that he knew the man was dead when he left. He told Woodall he got around one hundred and fifty dollars plus credit cards.

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

Sireci 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. Sireci was convicted of murder and sentenced to death for the killing of Howard Poteet.

On direct appeal, this court affirmed both the conviction and sentence. The facts as recited above are as set out in the opinion of this court. Sireci v. State, 399 So.2d 964 (Fla. 1981). The United States Supreme Court subsequently denied certiorari. Sireci v. State, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Sireci subsequently sought post-conviction relief, the denial of which was affirmed, as well, by this court. Sireci v. State, 469 So.2d 119 (Fla. 1985).

On September 19, 1986, the governor signed a death warrant for Sireci. Sireci subsequently filed a successive Florida Rule of Criminal Procedure 3.850 motion in the circuit court. The circuit court entered an order granting Sireci's request for an evidentiary hearing and application for stay of execution. The state appealed from the circuit court's order and this court subsequently determined that Sireci's claim that he was deprived of his rights to due process and equal protection by the failure of court-appointed psychiatrists to conduct competent and appropriate evaluations, as to the

penalty phase only, was cognizable under a second motion as Sireci did not discover the possibility that the court-appointed psychiatrists may have been incompetent until he was examined by a third psychiatrist during the pendency of appeal from the denial of his first motion. This court cautioned that the subsequent finding of organic brain damage by a third psychiatrist would not necessarily warrant a new sentencing hearing, however, **a new sentencing hearing would be mandated if the psychiatric examinations by the two court-appointed psychiatrists were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage.** State v. Sireci, 502 So.2d 1221 (Fla. 1987).

In his second Rule 3.850 motion Sireci specifically alleged that the two psychiatrists appointed to examine him prior to trial diagnosed him as suffering from personality disorders which provided no support for a diminished responsibility penalty-phase defense. He alleged that the court-appointed psychiatrists' evaluations were based solely upon very brief interviews with Sireci and they failed to learn about and review his relevant medical history and did not know that he had previously suffered a severe head injury in an automobile accident when he was sixteen years old, which supposedly resulted in significant changes in his personality and, further, did not conduct diagnostic examinations. It was averred that during the pendency of the appeal from the first Rule 3.850 proceeding Sireci was evaluated by Dr. Dorothy Otnow Lewis, a professor of psychiatry at New York University, who concluded that at the time of the homicide he suffered from severe organic impairment secondary to brain injury, as a result of the auto accident, as evidenced by a right-sided weakness of the face and from psychosis, which may also have been secondary to brain injury or which may have developed independent of that injury, which contributed substantially to

his behavior at the time of the homicide by severely impairing his ability to inhibit and control his violent behaviors. Sireci is also blind in his right eye, which has a cataract in it, and is smaller than the left. This injury was alleged to have been caused by a forceps delivery which could have caused brain damage as well. Neurological evaluation of Sireci was performed by Dr. Jonathan H. Pincus, a professor of neurology at Yale University, who found evidence of central nervous system damage. Dr. James Vallely, a neuropsychologist, found damage primarily to the left side in the temporal and frontal regions of Sireci's brain, which deficits lead to impulsive, poorly developed decisions and a reduced ability to cope with crisis, stress, or highly emotional situations which could cause Sireci to be overwhelmed by strong impulses and could have existed during the stress of the robberies, which induced compromise of judgment and impulse control. The substantial difference in opinion between Dr. Lewis and the court-appointed psychiatrists was alleged to be due to the below-standard evaluations of Sireci by Drs. Kirkland and Herrera.

A post-conviction evidentiary hearing was begun on May 28, 1987 and concluded on July 9, 1987, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County Florida before the Honorable Gary L. Formet, Sr.

The medical records from St. Joseph Hospital in Belvidere, Illinois, reflect that Sireci was involved in an automobile accident when he was sixteen years old, and admitted as a patient on January 15, 1965 at 7:30 a.m. The summary sheet reflects a fractured mandible or jaw, possible dislocation of the lens of the right eye and "possible" skull fracture. While the history and physical examination reflects that he was semi-comatose upon admission, the nurse's notes indicate that he was able to talk, stating that he "feels

okay" only an hour and a half later, and continued to respond thereafter but was moaning from pain, for which he was given demerol, and generally slept. He was discharged on January 17, 1965, and admitted to the Swedish American Hospital in Rockford, Illinois, the same day. A physical examination revealed multiple contusions of the scalp, lacerations of the face, deformity of the jaw due to fractures, and congenital cataract of the right eye from birth. Although the operative record of January 17, 1965 shows a "possible" basilar skull fracture and the report of Dr. Halvorson of January 17, 1965, recommends addition X-rays because of a radiolucent line across the temporal area, the later report of Dr. Halvorson and Pap of January 21, 1965 shows that films of the skull **"show no evidence of cranial or intracranial injury or evidence of cranial or intracranial pathology and that the bones of the cranial vault appear to be intact."** Notes also indicate that the right seventh nerve palsy improved and there was some right face motion (Defense Composite Exhibit 3).

Sireci testified as to his facial weakness, stating that it began in the hospital after his car accident in February of 1965 (R 188), has been like that ever since, and has stayed the same (R 189). He does not remember the substance of any conversations with the court-appointed psychiatrists in regard to his head injury (R 190-191). He further testified that **he was unable, himself, to notice any difference in his behavior after the accident** (R 192-193). During the penalty phase in 1976, he testified that he did not knowingly and consciously inflict the wounds on the victim and was not aware of what he was doing (SRAS 54; 57).

Dr. Seymour Halleck, a psychiatrist, testified as an expert on behalf of Sireci, over the objection of the state, as to the "national" standard of psychiatric health care, even though such standards are not specifically promulgated or written and the American Board of Psychiatry does not recognize

any single book on the topic as authoritative (R 323; 237; 254; 559).

According to Dr. Halleck, the elements of the standard of care for a psychiatric evaluation would consist of taking a thorough history, including a history of the present illness, family history and a history of the individual's past life, including development, education, occupation and marriage with some assessment of personality styles. The traditional mental status examination involves testing the way the individual is functioning at the moment in terms of perception, orientation, thought, feelings and behavior (R 263). If there is a history of previous illness it should be checked out to see what extent it is currently influencing the individual. Certain behaviors during the mental status examination suggest the need for further tests in order to differentiate between organic illness, which has a medical or neurological basis, and functional illness which has a psycho-social or unknown cause (R 257; 265). Such behaviors include difficulty in keeping track of conversation, disorientation, hallucinations, trouble switching from one idea to the next, never reaching the point in conversations and going from one subject to the other, forgetting the topics, being easily distracted, inappropriate emotional response, such as talking about things that are quite terrible and smiling, and confabulation or covering up a deficiency (R 264-265). A history of head injury also generally suggests brain damage and calls for further testing (R 265-266). Such further diagnostic steps would include a complete blood test, urinalysis work-up and, if a neurological disorder is suspected, a CAT Scan, electroencephalogram, neurological and neuropsychological evaluation (R 267).

There are a variety of questions designed to test mental functions. For testing abstraction, the individual may be asked the manner in which certain things are similar or different and may be asked, as well, to interpret

proverbs. Concentration and memory may be tested by asking the individual to subtract certain numbers or to repeat certain numbers, first forward and then backwards.

Dr. Halleck agreed that it would be an extremely difficult task to determine what Sireci was like some twelve years ago, although a psychiatrist is capable of making some **speculations** as to what he may have been like (R 241).

The defense called as witnesses the two doctors who conducted the pretrial evaluations of Sireci. Without objection from the state the court granted defense counsel the right to examine the doctors as if on cross-examination, either as adverse witnesses or as court called witnesses (R 4).

Dr. Edward A. Herrera became board certified in psychiatry in 1975 and in forensic psychiatry in 1981. He has been a full-time forensic psychiatrist since 1981, and has evaluated at least two thousand criminal cases in his career. At the time of Sireci's evaluation in 1976 he had evaluated one or two hundred cases and was qualified as an expert in psychiatry (R 109).

Dr. Herrera testified in the penalty phase for the state at Sireci's trial in 1976 and indicated, in contrast to Dr. Kirkland, that based on his examination, he could not conclude that at the time of the murder Sireci was under the influence of extreme mental or emotional disturbance (SRAS 94). It was brought out that the purpose of Dr. Herrera's examination was to determine whether Sireci was able to distinguish between right and wrong, although he would have looked into the presence of mental illness in determining that (SRAS 95-97). On cross-examination, Dr. Herrera testified that, although it was not the specific purpose of his examination, if he had to, he would classify Sireci as a sociopath (SRAS 98).

Dr. Herrera first saw Sireci on July 13, 1976 (R 8), and saw him a second

time during the course of trial, although he does not recall the purpose of the second visit (R 15). The purpose of his evaluation was only to determine sanity at the time of the offense and competency to stand trial, not to evaluate factors in mitigation for the penalty phase. Altogether, he saw him for an hour and a half (R 9). He took a psychiatric history, which included questions about his physical health (R 10-11). In the first interview Sireci denied that he had any problems, but during the second interview Dr. Herrera learned that Sireci sustained a head injury in an automobile accident when he was sixteen years old (R 11). Dr. Herrera did not secure the medical records of such injury or speak to the attending physicians, conduct a physical or neurological examination, do psychological testing or order an electroencephalogram, CAT Scan or diagnostic studies as Sireci did not report suffering any consequences from the injury either physically, mentally or emotionally, told Dr. Herrera that he had no seizures afterwards, and reported no violent behavior. He never hurt his son and only slapped his wife once in the face after she had slapped him. No relatives contacted Dr. Herrera to report any personality changes in Sireci after the accident, nor did Sireci's attorney report such changes, although a traumatic and marked personality change would be a red flag (R 67). Usually either the attorney or relatives point this out to the psychiatrist (R 12-14).

Dr. Herrera, as part of his interview, would initiate a conversation with the individual and the focus of inquiry would be the circumstances surrounding the offense. Inquiry would also be made as to past physical and psychiatric history, including head injury, seizures, drug and alcohol abuse and family history (R 19). His notes in regard to Sireci indicate there was no problem in terms of memory and reality and that he understood the proceedings against him (R 20). Sireci seemed to have a good idea of the sequence of the things

he had done, had recall as to the car accident and knew exactly when it happened. He was able to relate his prior record and employment history and a number of other things that one would not expect in a person who is brain damaged or, at least, brain damaged to the degree that it would be apparent in a regular examination (R 21).

In Dr. Herrera's opinion brain damage does not necessarily have to be severe to show up in an interview and in this particular case he stated "there are a number of things that just don't jibe." (R 22) Although frontal lobe damage may be difficult to detect on a standard mental status exam (R 23), demonstration of cognitive impairment by neuropsychological testing in Dr. Herrera's opinion, is no more certain evidence of organic brain disease but may simply reveal subtle losses that **point** toward organic dysfunction (R 26). Dr. Herrera did not see Sireci as a **treating** physician but to determine whether he was **sane** at the time of the murder and **competent** to stand trial and was satisfied that such determination could be made by means of his examination, without the need for neuropsychological testing (R 28).

It was Dr. Herrera's further opinion that Sireci does not fit the description of one suffering from organic personality syndrome. Prior to 1980 when the American Psychiatric Association published a new edition of DSM there was no specification for organic personality syndrome, (R 33) although the syndrome had been recognized for many years prior to 1980 and Dr. Herrera was aware of it (R 37). Psychiatry and psychology are still considered soft sciences and much is written and published regardless of relative merit (R 40). Dr. Herrera does not believe that when he sees what appears to be a personality disorder he has an obligation to figure out whether it has an organic or non-organic basis as his role is **not** that of a **treating physician** and many times a defendant is sane and competent regardless of the presence of

psychiatric disorder(R 42).

Even after talking to Sireci the second time, Dr. Herrera could not find any reason to believe that Sireci was under severe emotional or mental disturbance at the time of the murder or did not have the ability to appreciate the wrongfulness of his acts (R 43-44). Sireci suffered only from sociopathy in which an individual does not have a very well developed sense of values and, even though they may know right from wrong, do not feel guilt and do not learn from past mistakes. Such a person would also have poor impulse control, and would be indifferent to the effects of his behavior on other people (R 45). Sireci started doing anti-social things at age twelve, such as stealing an answer book from a teacher and setting a fire. He subsequently was convicted of robbing a gas station and lived by the dictum "I do what I want when I want to." (R 48). He also shoplifted some sort of security chain in Tennessee. He had no guilt about any of these things. Sireci denied that he had killed Poteet and indicated that his girlfriend was trying to protect the person who committed the murder and would not testify in his favor (R 33-34). When Dr. Herrera told him that someone had been killed at a used car lot he said that "it was a messy job, silly, not the way to kill a man." From the way Sireci said this Dr. Herrera took it to mean that Sireci preferred such a method of killing (R 49). This would indicate a lack of feeling for your fellow man (R 50).

Dr. Herrera saw no evidence of organic damage when he talked to Sireci and if there was any Dr. Herrera felt that it was not of such severity as to prevent him from knowing what was happening. Even during the second interview Sireci wouldn't tell Dr. Herrera that he had killed someone (R 59). For all Dr. Herrera knew Sireci may have been innocent (R 70). His denial did not come across as a memory loss because his memory seemed to be very good for

everything else and Dr. Herrera felt that such denial was self-serving. Sireci suffers from no seizure disorder which would justify memory loss for the murder (R 60).

Sireci informed Dr. Herrera that he had a head injury and may have told him that his skull was broken. He also told him that he was semi-comatose for two or three weeks (although the hospital records do not support this) however, the majority of patients that have that type of injury recuperate very well (R 62). Dr. Herrera was not concerned with whether there was any change observed in Sireci after the accident. Usually when there is memory impairment there is no memory for the **accident itself**, either when it happened or how it happened, and if there is memory for the accident itself, that negates everything else (R 63). If an individual is able to recall the details of an accident and the periods preceding and following it, then he would not expect to find much in the way of organicity of enough severity to have any bearing on the purpose of his evaluation (R 19). Dr. Herrera did not get the impression that Sireci learned about the accident from what people had told him (R 64).

Dr. Herrera believed that Sireci's personality progression was established in taking the history from him, and considering what he had done before, he was not surprised at what had happened (R 68). He felt that there was a pre-existing sociopathy or defect in character as he has seen many people with strokes and other problems who don't rob gas stations or try to steal a car (R 69). Explosive individuals with personality disorders are capable of stabbing someone fifty-five times (R 71), and there are things other than organic brain damage which could cause Sireci to stab the victim fifty-five times (R 98). Even in light of the most recent diagnosis he could not state that neurological deficits caused the multiple stabbing (R 117).

Upon examining Sireci during the proceedings below Dr. Herrera agreed that the right side of his face is now weak (R 78) and there is a problem in the right eye. Dr. Herrera did not see that when he examined him in 1976 or he would have noted it to check it out further (R 83). Right-sided facial weakness is an important sign in neurology but not an important sign in psychiatry and doesn't necessarily mean a thing (R 81). Since it has been ten years since he saw Sireci in jail, he has no way of knowing but that Sireci's facial weakness was caused by a fight in prison (R 113). Dr. Herrera would now send Sireci to a neurologist if he were a treating doctor, rather than for the narrow purposes of his examination, if he wanted a further diagnosis (R 84, 119-120), but the connection between neurological deficits and behavior of this nature is so tenuous that he doesn't know that it would make a difference (R 85). Although a neurologist would have been able to actually diagnose possible brain damage, Dr. Herrera doubted that any of the neurological psychiatrists would have been able to transfer the brain damage into behavioral terms (R 120). Neither behavioral neurologists nor neuropsychologists were available in Orlando in 1976 (R 101).

Based on the material that Dr. Herrera had in 1976 and the state of the art of his profession, there is no question in his mind that he did everything he could to perform a competent evaluation of Sireci (R 104), and spent an appropriate amount of time examining him (R 110). There were other psychiatrists in the Orlando area at that time and what he did was similar to what they were doing (R 113). In 1976 it was not the practice to give a person like Sireci a battery of tests when you were doing an evaluation and he had never heard of such a thing being done in Orlando in the three years that he was there (R 114).

Dr. Robert Kirkland is the Medical Director of the Psychiatric Intensive

Treatment Center at Florida Hospital, and is a psychiatric consultant to many courts (R 178). He has been qualified as an expert in the area of psychiatry since 1976, and has made between one hundred to two hundred actual court appearances as such an expert (R 181).

While Dr. Kirkland had records and files from his testimony back in 1976, his personal notes had been destroyed (R 123). Dr. Kirkland saw Sireci on two occasions prior to trial, once on July 14, 1976, and again on October 13, 1976, for a total of one and one-half hours. In his report to the court dated July 15, 1976, he found Sireci sane and competent.

Dr. Kirkland testified in Sireci's behalf at the penalty phase in 1976. He stated that Sireci shows some of the symptoms of a mental disorder, schizophrenia, and such schizoid trends are an accepted mental disorder (SRAS 78). He classified Sireci as a schizoid personality, which is an antisocial personality disorder (SRAS 83-84). Based on Sireci's history and the circumstances of the crime, it was Dr. Kirkland's opinion that because of his development and character structure, Sireci would not handle pressure very well, and could have been under extreme mental pressure at the time of the stabbing (SRAS 81). There does not seem to be much emotional response in a schizoid individual, and Sireci did not show appropriate emotional response in his dealings with Dr. Kirkland in jail (SRAS 88). Dr. Kirkland further testified that a schizoid personality would be unable to control his emotions in a rational, normal manner, and lacks the depth of personality involved in controlling behavior (SRAS 87).

Dr. Kirkland is the brother of Edward R. Kirkland, who was Sireci's defense attorney at trial (SR AS 72). When Dr. Kirkland first examined Sireci pursuant to his court appointment and rendered his report, Sireci had other counsel. It was only later, at the request of his brother, that Dr. Kirkland

made a further evaluation of Sireci (SRAS 73). It is not clear at what point in time this request was made of Dr. Kirkland, but it would appear that it was fairly contemporaneous with the actual penalty proceedings as Dr. Kirkland was asked to render an opinion based on his pretrial evaluation and the testimony he heard during the penalty phase describing what amounts to Sireci's sociopathic history (SRAS 75-76).

At the hearing below, Dr. Kirkland testified that if he were going to label Sireci, he would have labeled him primarily as a sociopath (R 132) based on the fact that Sireci had repetitively been involved in illegal activities (R 134). Sireci also led somewhat of a vagabond existence, had very few ties to society, no continuing relationships, exhibited wanderlust, was alienated from his family, and failed to abide by the rules of society (R 135). Sireci reported that although he was married, he established a relationship with a part-time or full-time hooker, and continued such a relationship with another female (R 136).

Dr. Kirkland's evaluation consisted of primary dialogue during which time a history was obtained, and a mental status examination. The conclusion in this case was that Sireci did not suffer from any major mental disorder, and that he was competent to stand trial (R 137). Based on what was going on in the Orlando community at that time, Dr. Kirkland felt that he made a competent evaluation of Sireci, and spent an appropriate amount of time with him in order to make such an evaluation (R 182).

Dr. Kirkland was aware of the circumstances of the homicide and the number of stab wounds, although Sireci denied committing it (R 148-149). Dr. Kirkland contacted others who were around Sireci such as jail officials, corrections officers and nurses and obtained information from them. He never reviewed any medical records pertaining to Sireci's life (R 140) and was not

aware that he was involved in an automobile accident when he was 16 years old which resulted in a head injury. Since Sireci did not tell Dr. Kirkland about the head injury he had no reason to make any further inquiries. Dr. Kirkland also doubts the personality changes noted by Sireci's family (R 158).

Weakness on one side of the face would have been a sign that Dr. Kirkland would have wanted to take note of (R 142) and he did not recall that about Sireci in 1976 (R 143). If Dr. Kirkland had noticed it, he would have mentioned it in his report as it is a sign of central nervous system damage. Dr. Kirkland stated "I can assure you that the state of Mr. Sireci's face now is not like it was in 1976 within a reasonable medical certainty."

Had Sireci suffered the described head injury, and had he believed there were marked personality changes it would have been significant to Dr. Kirkland (R 146) as it merits evaluation in terms of his actual functioning levels, and he would have wanted to conduct further evaluation such as additional examinations, x-rays, electroencephalograms, and probably some neurological testing (R 181), to determine if there was some organic basis for his illness (R 152). Dr. Kirkland observed, however, that even if Sireci did have some central nervous system damage, that he was handling himself very well (R 147).

Dr. Kirkland further testified that by simply looking at the symptoms you can not tell in some psychiatric disorders whether there is an organic or functional basis. In determining whether there is a need to look further than the one-on-one interview with the patient, a physician looks to his training, judgment and expertise in deciding what is worth pursuing and what is not. One has to be selective and use some judgment in determining what to pursue, and that is the skill of a clinician (R 154). Dr. Kirkland felt that his clinical judgment, based on what Sireci said to him, was an adequate basis

for ruling out organic deficits because doctors utilize a review of systems and do not simply trust the patient to remember but specifically inquire about previous difficulties, childhood diseases, respiratory trouble, kidney trouble, neurologic problems, head injuries, et cetera (R 156).

Dr. Kirkland does not agree with other authorities that as a matter of good practice in obtaining a history that you need to gather material from sources other than the patient. (R 163). There are many indicators of organicity, such as memory difficulties, orientation, judgment, emotional tone and intelligence which can be picked up during a mental status examination (R 166-167). Whatever organic brain damage that Sireci may now have, or may have had then, Dr. Kirkland feels is not relevant to the issue in which he was involved. His opinion was based on his examination of Sireci, his clinical skills, judgment and expertise and he was never called upon to determine whether or not Sireci had frontal lobe deficit (R 172). Dr. Kirkland agreed, however, that such a deficit could make someone less culpable for his or her behavior at the time of the homicide, and could have contributed to Sireci stabbing the victim fifty-five times (R 174), although things other than a frontal lobe deficit could have been responsible for it, such as anger, greed, a wish to carry out a plan to obtain a car and leave the area, and frustration in being thwarted. That Sireci told someone afterwards that he had stabbed the man fifty-five times because he did not want any witnesses, is important (R 177). Dr. Kirkland does not believe that Sireci had a significant mental disorder that would have played a part in his plight.

Dr. Halleck testified that forensic psychiatrists for the most part always look first to find some evidence of organicity as it is a strong arguing point for mitigation (R 262), as doubts juries have about the nature of mental illness tend to evaporate when a demonstrable lesion can be shown (R

262).

In Dr. Halleck's opinion the evaluations of Drs. Herrera and Kirkland were inadequate because they failed to delve deeply enough into Sireci's history and learn of his head injuries and did not know that Sireci had inflicted fifty-five wounds on the victim, which would be characteristic of organic deficiency. They also failed to observe the right facial paralysis which suggests neurological damage (R 270). Such weakness is evidence of peripheral nerve injury not within the brain itself but where the facial nerve exits from the brain (R 273). A neurological work-up including testing, a CAT Scan and an EEG would be imperative (R 274). If the injury was not there in 1976 at the time of the evaluation, however, that would be different (R 283). In general, the failure to be concerned with a neurological dysfunction in an individual with a history of antisocial behavior is below the standard of care (R 270). A mental status examination alone would not be sufficient to rule out an organic basis to his mental condition (R 271). It was his opinion that the examining psychiatrists should have detected the history of head injury by thoroughly going over Sireci's history and asking specific questions (R 271-272). Even though Sireci denied having any medical problems in 1976 and his attorney and family did not point out any problems, the evaluating psychiatrists should have been more diligent in trying to get a more objective history (R 284-295). Dr. Halleck would be suspicious of a prisoner who de-emphasized psychopathology (R 287) and would have drilled Sireci about his past medical history (R 290). Other than letters from Sireci's parents and friends, however, reporting personality changes there is nothing to substantiate any emotional impairment and Dr. Halleck never spoke to them (R 302). There was nothing in the discharge summary from Rockford Hospital to indicate there were any neurological impairments (R 302). Dr. Halleck also

admitted that it would be very difficult to determine what Sireci was feeling when he stabbed the victim over fifty times and such a description of his feelings would not be terribly accurate (R 293).

Although Sireci may have been suffering from a functional personality disorder Dr. Halleck concluded that Drs. Herrera and Kirkland were remiss in not ruling out the possibility of a neurological disorder or brain dysfunction as in a homicide where there are fifty stab wounds there is a very high likelihood of an organic deficit which influenced Sireci's behavior at the time of the crime (R 275) by diminishing his capacity to control himself, diminishing his judgment and, depending on the neurological location, increasing rage reaction or the impetus to commit a violent act (R 276).

On April 23, 1984, Dr. Dorothy Otnow Lewis, a professor of psychiatry, along with a student assistant, Marilyn Feldman, and Dr. Jonathan Pincus, flew down to Florida State Prison and evaluated eight prisoners, all on death row, including Henry Perry Sireci (R 327; 306). This was at the behest of Sireci's counsel Richard Burr (R 375). The Public Defender's Office paid for the trips. Dr. Pincus was paid \$2,000.00; Marilyn Feldman was paid \$500.00; and the New York University School of Medicine was paid \$8,000.00 for Dr. Lewis' time (R 394). Dr. Lewis hoped to be paid \$1,000 plus expenses for her courtroom testimony, as well (R 395). The prisoners were all evaluated in a large room that had been divided off (R 378). The prisoners were each aware of the purpose of the visit and the fact that they were talking to psychiatrists and neurologists. Dr. Lewis found that some of the other prisoners, as well as Sireci, suffered from brain damage or deficiency, although only one other prisoner had the degree of neurological damage as did Sireci (R 379).

Marilyn Feldman, a student in psychology, administered the psychological

tests and interpreted them with the supervision of a senior psychologist (R 373). The neurological was done by Dr. Jonathan Pincus and the neuropsychological by Dr. James Vallely (R 328). Dr. Lewis had previously worked with Dr. Pincus on at least two hundred cases (R 372). Twenty of these cases all involved inmates on death row (R 459). Much of Dr. Lewis' research and publication has been directed only toward adolescents (R 310). She only spent an hour and a half with Sireci and would have liked to have spent more time with him (R 378), particularly since his behavior and mental state were documented to fluctuate at different times (R 327). Dr. Lewis usually spends about three hours in interviews (R 377). She was accepted by the court below as competent to testify in the field of psychiatric evaluation over the objection of the state (R 318-319).

Dr. Lewis testified that she did not evaluate Sireci's state of mind at the time of the stabbing, and would not be able to establish his exact state of mind without a lengthy evaluation and without interviewing all of the people involved (R 317-318). She could not, therefore, determine whether Sireci was under the influence of extreme mental or emotional disturbance or had the ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the murder in December, 1975. All she could do was make **inferences** from the fact that he was severely brain damaged and from the nature of the act, but she could not be certain because she was not there at the time and "had not probed that time extensively enough" (R 368).

Dr. Lewis' psychiatric evaluation of Sireci consisted of obtaining a medical and family history, mental status, psychological testing and neurological assessment (R 327). She was unable to get an electroencephalogram or a CAT Scan, although Dr. Pincus strongly recommended

that both be done, and Dr. Halleck would have required them had he been in her position (R 279; 328). She did not rely on Sireci's hospital records for her assessment, but feels that they subsequently confirmed her findings and her testimony is based in part upon these records (R 329). The records of Sireci's injuries sustained in the automobile accident were obtained from St. Joseph American Hospital in Belvidere, Illinois, and the Swedish American Hospital in Rockford, Illinois and were admitted into evidence as Defendant's Exhibit 3 over the objection of the state that the records were not self-authenticating, lacked a seal, and no one knew whether they were from the above hospitals, as purported (R 120; 122-123). In conducting her evaluation, Dr. Lewis also reviewed statements by family members concerning Sireci's psychiatric history (R 335). She also talked to his mother and sister on the telephone (R 336). The written statements of family members were admitted into evidence as Defendant's Exhibit 4, over the objection of the state that no predicate under the Florida Evidence Code had been laid for their introduction (R 339-340).

Based upon her evaluation Dr. Lewis concluded that Sireci suffers from extensive brain damage and has been episodically psychotic (R 340). One of the specific signs was the fact that his right eye is recessed and a bit smaller than the left eye, allegedly the result of a difficult forceps birth, although such delivery is not documented by any records (R 341-342). Another sign was the facial paralysis (R 342), and medical records documenting a severed nerve injury, as well as the fact that Sireci's mother told her that she stayed with him night and day for two weeks, and he was in and out of consciousness (R 343). Thus, Dr. Lewis believes that Sireci suffered brain damage at two different times (R 383). Dr. Lewis' interpretation of Dr. Pincus' neurological findings, the psychological findings (R 347), and the

neuropsychological evaluation of Dr. Vallely were also consistent with brain injury (R 349).

Dr. Lewis also testified that the mental status evaluation supported a diagnosis of brain injury. Sireci was rambling in his thoughts and concrete at times, but could not give a really coherent sequential account of things, would become sidetracked, was unable to direct and focus on something, could not abstract, and was inappropriately jocular and happy for someone on death row (R 350). He could only recall four digits forward, while the normal is seven, and three digits backward, while the normal is five. Such memory problem is also evidence of organicity. Moreover, his different stories about the murder suggest confabulation in which brain injured people who cannot totally remember something fill in the details (R 351). She also learned from Sireci's mother that subsequent to the accident he was extremely violent and once punched a refrigerator door in a rage (R 352). His sister told of an incident where he was furious because his shop teacher had kept the class over because someone had broken another person's piece of work, and he did not understand why the person would not confess, but a few days later they found out that he had done it (R 354).

Although Dr. Lewis could not pinpoint what Sireci was like on the day of the murder, she speculated that overkill by stabbing someone fifty times is the kind of repetitive, aggressive behavior characteristic of an organically damaged or extremely psychotic individual who, once he begins an act, is unable to stop until he wears himself out. It is also characteristic of organically impaired individuals to overreact if they are thwarted, and it occurred in this case in the context of trying to get a key to steal a car. In Dr. Lewis' opinion, Sireci's judgment would have been significantly impaired, and it is very unlikely that he would have been able to

conceptualize the consequences of what he was doing (R 355-356).

Dr. Lewis further opined that Sireci is paranoid and extremely suspicious, feels threatened and is very quick to retaliate. She feels that brain damage is only half of his problem, and that he is also a psychotic individual whose perception of reality is impaired (R 356). A recurrent theme in his interview was the fact that people try to smart-mouth him, which he could not stand, and his temper outbursts were sometimes the result of feeling put down (R 356-357). He easily got into fights because he believed that people provoked him or said things that they had not (R 361). The findings on his psychological tests were characteristic of the responses of psychotic individuals (R 358). His verbalizations are loose, rambling and illogical. There were strange and inappropriate intrusions of idiosyncratic material where no one else would respond that way. In the middle of the picture arrangement sub-test, while arranging cards in logical sequence in order to make a story, Sireci stopped and asked the examiner, "What's your opinion of a government system built on religion? They tried to force the Indians to go with Christ and few other religions." (R 359) Sireci showed perseverative tendency in his preoccupation with the Indian theme, which is an organic symptom. During another task he asked, "Do you have Indian blood? I have a picture of my great, great, great grandmother who was part Mohawk." He said he was interested in Indians because of the way they are misused. The test administrator concluded, "These idiosyncratic preoccupations and inappropriate intrusions, his loose rambling thought processes and bizarre logic, inconsistent responses, the Wechsler Adult Intelligence Scale and projective tests suggests a diagnosis of schizophrenia (R 360). Sireci's sister also felt that he was not in touch with reality, and his neighbors did not want to be associated with him because he was so peculiar (R 362).

Dr. Jonathan Pincus, a neurologist, testified as an expert in the area of neurology (R 215; 221). He described for the court the typical neurological examination, which has six sections. There is an examination of the cranial nerves which supply the muscles and sensory mechanisms of the head and neck. A disorder of the cranial nerves could be due to a brain disorder or a disorder in the nerves, and there is criteria for determining the cause. A sensory examination is also done for the primary modalities of touch, pinprick, vibration, position sensing, and cordal modalities involving double simultaneous stimulation, identifying the shape of objects with the eyes closed (R 437). Reflexes are tested, as well as the cerebellar functions, i.e. coordination, and then a mental status exam is performed to determine whether the person is oriented to time, place and person (R 438). The way a person thinks is very relevant to the neurological assessment of an individual. A formal mental status examination is the same in neurology or psychiatry (R 439). Dr. Pincus further testified that the total evaluation of a patient must include a history, which constitutes about eighty percent of the diagnosis. The physical examination constitutes about ten or fifteen percent of the diagnosis and is confirmatory or non-confirmatory. Inaccurate information can lead to inaccurate assessment (R 441).

As previously mentioned, Dr. Pincus saw Sireci the same day a large number of other death row inmates were examined and Dr. Pincus was actually unable to do a complete examination as Sireci was the last person he saw and Dr. Pincus was under pressure to catch an airplane. He found Sireci to be rambling and could not obtain a history or perform a mental status examination. He only assessed the cranial nerves, motor, sensory reflexes and cerebellum. It usually takes him over an hour to assess a patient completely. He only had twenty-five minutes with Sireci (R 443).

In his brief examination Dr. Pincus found that Sireci was blind in his right eye, had a cataract in it, and the right eye was smaller than the left. There was a weakness on the right side of his face with contractures where the face is more furrowed than on the other side. Sireci did not have the use of the right side of his face (R 445). The weakness produced an asymmetrical appearance. According to Dr. Pincus, the injury to the eye occurred at birth due to the smallness of the eye, which indicates it hadn't grown. The cataract indicates trauma. A forceps delivery which caused that much damage to an eye could also do damage to a brain (R 446), and is a well-known factor in brain damage. Dr. Pincus does not know from what material he reviewed that he concluded there had been a forceps delivery (R 465). The facial injury involved a peripheral injury to the facial nerve which runs superficially somewhere around the ear, out under the ear, and comes out to the face. The injury itself is not indicative of brain damage. Sireci also had hyperflexia in his legs (R 447). This means that the reflexes were excessively active. There was a repetitive response on the right side and ankle to the knee-jerk with a hammer. Such a response is always abnormal and indicates disease in the cortico-spinal tract within the central nervous system. In the cortico-spinal tract the nerves start in the motor cortex on the left, run down the brain stem of the medulla, cross over to the opposite side and go down the spinal cord (R 448). Although you can tell such injury is within the central nervous system, it can't be determined exactly where the injury is in the spinal tract (R 448). In view of the forceps birth and the history of the car accident, which supposedly caused unconsciousness for two weeks, Dr. Pincus believed that the brain damage occurred either at birth or at the time of the later injury (R 449).

Other findings of significance were hyperflexia on the left side of the

body, especially in the leg and in the left Babinsky response or reflex, which is one of the most unequivocal findings in neurology. When you stroke the bottom of the foot the toes are supposed to turn down, but in a Babinski response the large toe goes up and the other toes fan (R 450). This indicates cortico-spinal damage anywhere from the motor strip down to the spinal cord. Since there was no evidence of spinal cord damage, no sensory level or incontinence, Dr. Pincus opined that these findings were probably the result of brain injury. Sireci also walks with a marked limp, which indicates that the left leg is weak, indicative of a left hemiparesis or weakness and relates to damage to the right side of the brain (R 451).

There are a number of things that he would want to do to check out his finding of brain damage such as a mental status examination, neuropsychological, EEG and a Cat Scan. Dr. Pincus felt that a Cat Scan and EEG, which were not done, were mandatory as confirmation of the abnormality, although a negative Cat Scan would not have negated his findings (R 466). Without the Cat Scan and EEG he believes that his opinions are ninety percent accurate (R 467).

On the basis of these findings alone it was Dr. Pincus' opinion that Sireci was suffering from brain injury, although he could not obtain a history and do a mental status (R 451). The fact that Sireci did not respond simply to a simple question was a sign of thought disorder, which can be a sign of schizophrenia, manic-depressive psychosis or a brain injury. Because of the hard neurological findings, Dr. Pincus suspected that the basis was brain injury (R 452). Dr. Pincus reviewed Dr. Lewis' mental status exam and put it together with his findings on his physical examination. The mental status exam provided confirmatory data in that had Dr. Pincus made the same findings it would have confirmed his suspicion that Sireci's brain was affected. Dr.

Pincus believed that the motor damage was the result of involvement of the cortico-spinal pathways, although he was not sure about the thinking disturbance (R 454). There was probably diffuse damage to the brain at least bilaterally, although the exact point of such damage cannot be determined (R 455).

Dr. Pincus rendered a further opinion about the general effect such damage would have on Sireci's behavior (R 455). According to Dr. Pincus the vast majority of people who have brain damage aren't violent and haven't engaged in any antisocial activity. Brain damage itself is not enough to produce violence but it removes inhibitions in people who are in some way predisposed to be violent because of paranoid thought disorders or the experience of having been abused, in combination with a paranoid thought disorder (R 455). It is likely that the brain damage operating at the time of the crime was sustained before (R 456). Stabbing an individual fifty times was an excessive response to whatever the provocation was and suggests that Sireci was out of control at the time. The brain damage and psychotic thinking was a factor in his behavior at the time of the crime (R 457). Dr. Pincus admitted, however, that a scheme to go to the car lot, get keys and eventually use those keys to take a car from the lot and drive to a certain location is evidence of planning and antisocial thinking (R 475). He stated "I would have to say that sounds as if it was goal directed and rational in its way (R 476). Despite the fact that Dr. Pincus further admitted that he could not turn back the clock to 1975 and determine what Sireci's state of mind was, but only his likely state of mind with only fifty to one hundred percent accuracy, he further opined that at the time of the crime, Sireci was acting under the influence of a mental and emotional disturbance that interfered with his capacity to conform his conduct to the requirements of

the law (R 484).

Dr. Pincus admitted on cross-examination that, although he is not against the death penalty as a matter of principle, it should be used very sparingly. He believes, in accordance with the Old Testament, that execution for murder should be restricted "to people who are witnessed by two people, not at the hand of one, not at the mouth of one witness, but two witnesses." (R 462).

Dr. James Vallely, a clinical psychologist was called to testify on Sireci's behalf (R 489). He was accepted by the court as competent to testify in the area of neuropsychology (R 504).

He testified that Sireci was first administered IQ tests, and then a determination was made as to what other tests were appropriate (R 514). He had a mild language dysfunction which is known as a word retrieval problem, where a word is forgotten or misplaced and another substituted for it, but he was articulate enough to begin intellectual testing. His general IQ was within the average range but his abstract verbal thinking ability was significantly lower than his general verbal act and he was very concrete in his interpretation (R 515). He was within the average range on the performance task except for the Digit Symbol, which is a task which involves describing symbols and is a psychomotor speed test, but his deficit on this test was probably the result of a limitation of physical movement due to the fact that he had handcuffs on (R 516). The only thing that stood out as below average was his score on the abstraction problem, which was significant because it is indicative of potential left hemisphere problems in an individual who is right-handed. In Dr. Vallely's opinion, all IQ scores should be even and there should be an even level of functioning ability (R 516).

Sireci was then given a number of specific tests for frontal lobe deficits including: (1) the Trail, which requires an individual to sequentially track circles with numbers and letters in it; (2) Wisconsin Card Sort, which involves matching cards according to color, shape or number of symbol, and; (3) the Thirstone Word Fluency Task, where an individual must spontaneously say words that come to his mind that begin with the letters F, A or S (R 517). On the Wisconsin Card Sort, Sireci could not shift from matching colors to numbers or from numbers to shape. On The Thirstone Word Fluency Test he was extremely slow, giving very little spontaneous output. In making repetitive drawings he had difficulty shifting from making an arc to a square, which indicates a motor programming kind of problem. Based on such testing, Dr. Vallely concluded that there was clearly frontal lobe dysfunction (R 521). He felt that the severity of the damage was moderate and affected such higher order concepts involving motivation, which relates to job advancement or demonstrating motivation and initiative on the job (R 522). Such damage would severely limit Sireci's alternatives (R 524) as to how he attacks and solves problems, which may cause him to feel defeated and react very frustratedly (R 525). Sireci also has an impaired ability to recall information from his store of knowledge, suggesting damage to the island part of the temporal lobes (R 525), involving the left part of the brain which handles verbal skills, which would severely limit his ability to learn things (R 526). He can learn but it is very slow and it is very labored (R 527).

Dr. Vallely opined that the closed head injury Sireci suffered could have accounted for the deficits that he picked up in neuropsychological testing. Basilar skull fracture on the right side would be consistent with right facial paralysis (R 528). Dr. Vallely could not draw a conclusion as to whether such deficits had any relationship to stabbing the victim fifty-five times.

Frontal lobe damage can lead to a loss of control and result in repetitive acts, but he doubts whether such behavior would be related to these injuries as the injuries are not so severe that Sireci would be completely out of control so as to explain a multiple stabbing of that nature. What the multiple stabbing would reflect is an individual who could not handle stress very well, would become extremely impulsive and act with extremely bad judgment based on those impulses (R 530).

On cross-examination, Dr. Valley testified that there are no psychological tests designed for the purpose of determining whether an individual, at a given moment in the past, was capable of distinguishing right from wrong, or was capable of appreciating the consequences of his actions or conforming his behavior to the requirements of law (R 533).

The state called Dr. Robert Pollack, who has testified as an expert in the area of psychiatry in one or two hundred cases of which sixty or seventy percent were criminal cases (R 555). Dr. Pollack has been practicing psychiatry since 1973. He attended Egelston Medical Center in New York City, Kings County Hospital, graduating in 1973 and as part of a sub-internship or residency, went to the University of Florida, was the chief resident in psychiatry, and then became Assistant Professor in the Department of Psychiatry. He was on the faculty and was the co-director of the adult and adolescent in-patient unit and was also the director of psychiatric emergency services at the University of Florida (R 550). For the past ten years he has been in the general practice of psychiatry with his major interest in the area of biochemical and neurochemical disorders and has developed the only mood disorder clinic in Central Florida as well as establishing a large private psychiatric clinic in Winter Park (R 551). He serves on several forensic psychiatry committees (R 552).

Dr. Pollack explained the steps involved in evaluating a prisoner in the jail system when ordered to do so by the court. Sometimes the psychiatrist has the opportunity to speak to the attendant ahead of time, and get a description of what the prisoner's behavior has been like during his incarceration. The evaluation then consists of talking with the individual, and getting a very thorough history as well as ascertaining whether he understands the nature of the evaluation, knows why he is in jail, and what the charges are against him (R 557).

The history will include developmental history, physical difficulties, and medical histories and psychiatric histories. A formal or informal mental status examination can be done depending upon technique, style and procedure. Some psychiatrists feel they can glean sufficient information from the conversation. Others will ask very specific questions in terms of mood, presence or absence of hallucinations and delusions, and will evaluate thought processes that way. Sometimes the psychiatrist will have the opportunity of looking at arrest affidavits and medical files from the holding facility if they are available, or sometimes there is family available to contact if there are further questions. Sometimes information can be had from counsel or the court. If further information is required then the psychiatrist can request it, and hopefully the court will allow further investigation such as the administration of psychological testing (R 559).

Dr. Pollock is familiar with the reports of Drs. Herrera and Kirkland, and has read their courtroom testimony (R 561). He is also aware of the nature of the crime (R 562). As far as the stab wounds, Dr. Pollock testified that first a psychiatrist tries to make sense out of what happened, and if that cannot be done, develops a degree of suspiciousness that something is going on other than what the patient is revealing, but, if in questioning the

individual, there is no indication of any deviation from previous behavior, then there is no real suspicion (R 562-563). On the other hand, if there is a very high degree of suspiciousness to the person's behavior, the first consideration is whether there is an organic or structural basis. In his opinion, Dr. Halleck has the advantage of hindsight and the disadvantage of not having been there, in suggesting that the psychiatrists should be more diligent in pursuing information, but in not revealing how that can be done. Dr. Pollock testified, in contrast, that he does not know what else can be done when there is no family around and no history, other than what an individual is relating (R 564). Having been in that position a number of times, he does not know how a psychiatrist could be more diligent, short of hiring a private investigator to track down a man's history. Very often, psychiatrists cannot even find family members who are supposedly available to get information from so unless the individual being examined gives you information to deal with or such information is conspicuously absent, which indicates something is amiss, Dr. Pollock does not see what else can be done in a situation where there is no evidence of any type of neurological dysfunction and the person does not relate a history of injury or dysfunction (R 566). In the last fifteen years he has never had an individual deny a serious injury (R 619).

Sireci's deformed eye would not be serious enough to pursue as it was a life long condition (R 622). Dr. Pollock spoke to Dr. Kirkland who told him that he saw no evidence of any abnormal facial expression in Sireci (R 567). In his opinion, Dr. Kirkland's psychiatric evaluation of Sireci was adequate and thorough (R 569).

In Dr. Pollock's opinion, it is not reasonable to assume that because Sireci today suffers a right facial palsy and no other known intervening event

has been reported, that the car accident caused it and the court-appointed psychiatrists should have been aware of it (R 574). There could have been an acute onset of palsy of unknown ideology or there could be acute trauma to the seventh nerve resulting in facial palsy, resolving over time, but with scar tissue slowly developing over the years causing the assymetry (R 575), with the scar tissue getting tighter and tighter, resulting in a pronounced nerve palsy over a period of time (R 576). The medical records actually reflect the facial nerve palsy getting better, even after the acute injury (R 606).

Dr. Pollock does not believe that stabbing someone fifty-five times is an inconsistency in behavior for Sireci, an individual who was constantly involved in altercations (R 586). Dr. Pollock further testified that there are no tools to determine what a person was thinking or his state of mind at a given point of time in the past. The best that can be done is speculation based on information-gathering and consistency of behavior (R 608).

In retrospect, knowing there was a history of head injury, Dr. Pollock would question whether such injury precipitated an episodic control syndrome, and would want to do neurological and encephalographic testing (R 615). Not all brain damage, however, leads to explosive behavior as different areas of the brain have different behaviors, and the area of dysfunction would have to be localized before discussing what type of behavior it can produce (R 616),. Given all of the tools available today, determining what effect the accident in 1965 had on Sireci's behavior in 1976 would involve speculation, and Dr. Pollock could not even say that the newly-found lesions would be consistent with that type of syndrome (R 617).

At the conclusion of the Rule 3.850 hearing the lower court found that there was substantial evidence that Sireci's organic brain disorder existed at the time he murdered Henry Poteet, and that evidence of such brain disorder

existed at the time of Sireci's pre-trial examination by the court-appointed psychiatrists which required, under reasonable medical standards at the time, additional testing to determine the existence of organic brain damage. The court concluded that the failure of the court-appointed psychiatrist to discover these circumstances and to order additional testing deprived Sireci of due process by denying him the opportunity through an appropriate psychiatric examination to develop factors in mitigation of the imposition of the death penalty (R 774). Sireci's motion for post-conviction relief as to sentence was, therefore, granted, the sentence of death vacated and a new sentencing trial ordered. A written order granting the motion for post-conviction relief was filed on August 21, 1987 (R 773). A timely notice of appeal was filed by the state on September 3, 1987 (R 776). The state appeals from the order granting post-conviction relief.

For purposes of this appeal, the record and transcript of the Rule 3.850 proceedings below will be designated by the symbol (R). The symbol (SR) will refer to the record and transcript of the trial in 1976 and the symbol (SRAS) will refer to the transcript of the advisory sentencing. These records are before the court from direct appeal and prior Rule 3.850 proceedings.

SUMMARY OF ARGUMENT

The lower court erred in granting post-conviction relief on the basis of incompetent evaluations by the court-appointed psychiatrists as such evaluations were not for sentencing purposes in the first instance, and no duty devolved upon the psychiatrists to explore factors in mitigation. Even if there was a duty, the evaluations were adequate as a thorough history was taken and proper mental status examinations were performed with no signs of organic brain damage revealed, and such evaluations were entirely reasonable under the psychiatric state-of-the-art in 1976. Moreover, since Sireci's mental state was fully before the advisory jury and judge, there is no reasonable probability that additional testing and presentation to the jury of an organic basis for Sireci's mental state would have affected the sentencing outcome.

The new psychiatrists' reports should be viewed by this court with suspicion as they were the result of a brief assembly-line process undertaken at Starke, and based on an undocumented and unsubstantiated history of brain damage and coma as a result of an automobile accident, and involve only the height of speculation.

ARGUMENT

THE LOWER COURT ERRED IN GRANTING POST-CONVICTION RELIEF ON THE BASIS THAT THE COURT-APPOINTED PSYCHIATRISTS SHOULD HAVE LEARNED THAT THE DEFENDANT WAS IN AN AUTO ACCIDENT PRIOR TO THE MURDER RESULTING IN A COMA AND FACIAL PARALYSIS AND SHOULD HAVE ORDERED ADDITIONAL TESTS TO DISCOVER ORGANIC BRAIN DAMAGE WHICH DEPRIVED THE DEFENDANT OF DUE PROCESS BY DENYING HIM THE OPPORTUNITY TO DEVELOP FACTORS IN MITIGATION OF THE IMPOSITION OF THE DEATH PENALTY.

The lower court entered an order granting post-conviction relief on the basis that an appropriate psychiatric examination prior to trial would have disclosed that Sireci was involved in an auto accident at age sixteen which resulted in his being in and out of a coma for approximately two weeks, and a right-sided facial paralysis which should have been observed during the pre-trial psychiatric examination. Such knowledge should have led the psychiatrists to require additional tests to determine if Sireci suffered from organic brain damage, and both psychiatrists testified that had they observed such facial paralysis they would have ordered additional tests, which were available at the time. Dr. Herrera knew that Sireci had been in a coma for two weeks as a result of the accident, but still did not order additional tests. Dr. Seymour Pollack testified that such tests should have been done. The lower court, therefore, found substantial evidence that Sireci's organic brain disorder existed at the time he murdered Henry Poteet, and that additional testing was required under reasonable medical standards to determine the existence of organic brain damage. The court concluded that the failure of the court-appointed psychiatrist to discover these circumstances and to order additional testing deprived Sireci of due process by denying him the opportunity through an appropriate examination to develop factors in mitigation of the imposition of the death penalty (R 773-775). It is the

state's position that such conclusion is in error in several crucial respects.

A. THE EVALUATIONS WERE NOT FOR SENTENCING PURPOSES.

In Ake v. Oklahoma, 105 S.Ct. 1087, 1097 (1985), the United States Supreme Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant **access** to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. The Court felt that a similar conclusion was compelled in the context of a capital sentencing proceeding, when the state presents psychiatric evidence, as the Court has repeatedly recognized a defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. 105 S.Ct. at 1097. The Court noted that "psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." 105 S.Ct. at 1096.

What is required under Ake is access to a psychiatrist, not concurrence of opinion among psychiatrists. The right to such under Ake is by no means automatic and the defendant must make a proper request. See, Clark v. State, 467 So.2d 699 (Fla. 1985). In the present case, the defendant moved only for a determination of sanity pursuant to Florida Rule of Criminal Procedure 3.210 (SR 31-32), and there was no request that such examination also be had for the purpose of presenting mitigating facts at the penalty phase, nor was any later separate request made. The record does not reflect that such a specific evaluation was made by Dr. Herrera at the behest of the defense, although he would have looked into the presence of mental illness in making his sanity determination (SRAS 95-97). Considering the fact that Dr. Kirkland did

testify at the penalty phase on Sireci's behalf, it can hardly be contended that the evaluation of Dr. Herrera deprived Sireci of due process when the record does not reflect that Dr. Herrera was ever called upon by the defense for purposes of penalty phase mitigation. No formal request of Dr. Kirkland to make such penalty phase evaluation appears in the record and his presence and testimony at the penalty phase seem to be at the ad hoc request of his brother, who was Sireci's later-appointed counsel (SRAS 72-76).

Thus, it cannot, in the first instance, be concluded that due process rights under Ake were ever triggered or attached in Sireci's case.

B. THE EVALUATIONS WERE NOT INADEQUATE.

Alternatively, if the pretrial evaluations of Drs. Herrera and Kirkland could be said to have implicated the Due Process Clause, then such evaluations were constitutionally adequate.

The lower court found Drs. Herrera and Kirkland remiss in not discovering that Sireci had suffered a head injury in an automobile accident when he was sixteen years old, resulting in a two week coma and right-sided facial paralysis, which knowledge should have led to additional testing to determine if Sireci suffered from organic brain damage (R 773-775).

Interestingly enough, while there is no "national" standard of care for treating physicians, no less court-appointed physicians who conduct pretrial evaluations (R 323; 237; 254; 559), the evaluations in the present case fully met the purported "national" standard as set forth by defense expert Dr. Seymour Halleck.

Both psychiatrists took a thorough history (R 10-11; 19; 137; 148-149; 140). Sireci denied that he had even committed the murder, and for all the psychiatrists knew, they could have been examining an innocent man (R 148-149; 59; 70). Although, on the eve of execution, Sireci now freely reveals to new

psychiatrists the full horror of his automobile accident, the fact remains that he did not deign to reveal such fact to Dr. Kirkland, who is now faulted for a lack of clairvoyance (R 158). Dr. Kirkland, however, felt that his clinical judgment, based on what Sireci said to him, was an adequate basis for ruling out organic deficits because he used a review of systems, and specifically inquired about previous injuries, and did not simply rely on the patient to remember (R 156). While Dr. Herrera became privy to the fact of the automobile accident and head injury during the second interview, it caused him no concern as Sireci had no problem in terms of reality and memory (R 20), could recall the details of the accident and the periods preceding and following it (R 19), which one would not expect to find in a person who is brain damaged (R 21), and reported no seizures or violent behavior, nor did others report any personality change (R 67). Although Sireci recounted to Dr. Herrera that he was rendered semi-comatose by the accident, this, also, did not concern Dr. Herrera, in view of Sireci's memory, and because of the fact that the majority of patients that have that type of injury recuperate very well (R 62). While the defense expert, Dr. Seymour Halleck, opined that the psychiatrists should have been more diligent in trying to get a more objective history (R 284-295), he was properly criticized by the state's expert Dr. Robert Pollock for not suggesting how this could have been accomplished, short of hiring a private investigator, considering Sireci's responses and the absence of input from Sireci's attorney or family (R 564).

Neither of the evaluating psychiatrists noticed the right-sided facial weakness or the cataract or smallness of the right eye in 1976 (R 78; 83). The deformed eye, in any event, would not be serious enough to pursue as it was supposedly a life long condition (R 622), especially in view of the fact that, according to his family, all his violent behavior began after the

automobile accident. In regard to the facial weakness, Dr. Kirkland was emphatic: "I can assure you that the state of Mr. Sireci's face now is not like it was in 1976 within a reasonable medical certainty" (R 143). Since it has been some ten years since the psychiatrists saw Sireci in jail, they have no way of knowing but that Sireci's facial weakness was caused by a fight in prison (R 113). The facial weakness could have been the result of an acute onset of palsy of unknown ideology, or there could have been an acute trauma to the seventh nerve resulting in facial palsy, resolving over time, but with scar tissue slowly developing over the years causing the assymetry, with the scar tissue getting tighter and tighter, resulting in a pronounced nerve palsy over a period of time (R 575-576). The medical records actually reflect the facial nerve palsy improving (R 606). Thus, it was never demonstrated below that the right-sided facial weakness was even present in 1976 at the time of the evaluation so that the psychiatrists should have observed it.

There are many indicators of organicity, such as memory difficulties, orientation, judgment, emotional tone and intelligence which can be picked up during a mental status examination (R 166-167), but in this case there was no behavior suggesting the need for further tests to differentiate between organic and functional illness (R 156).

Psychiatry and psychology are still considered soft sciences and much is written and published regardless of relative merit (R 40). Although organic personality syndrome has been hypothesized for some time, prior to 1980 when the American Psychiatric Association published a new edition of DSM, there was no specification for organic personality syndrome (R 33). Neither behavioral neurologists nor neuropsychologists were available in Orlando in 1976 (R 101). The record does not reflect that Dr. Lewis would have come to testify in Florida in 1976 or that she knew of anyone in Florida who shared her views

at that time. Drs. Herrera and Kirkland were, in essence, incorrectly faulted by the lower court for not discovering Dr. Lewis. See, Elledge v. Dugger, 823 F.2d 1439, 1446 n. 14 (11th Cir. 1987).

C. THERE IS NO REASONABLE PROBABILITY THAT ADDITIONAL TESTING AND PRESENTATION TO THE JURY OF AN ORGANIC BASIS FOR SIRECI'S MENTAL STATE WOULD HAVE AFFECTED THE SENTENCING OUTCOME.

The possibility of organic brain damage 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 today's society. James v. State, 489 So.2d 737, 739 (Fla. 1986). In fact, the vast majority of people who have brain damage are not violent, and have not engaged in any antisocial activity. Brain damage itself is not enough to produce violence (R 455).

Sireci was diagnosed as a sociopath by both evaluating psychiatrists (R 132; 45). The sociopathic or antisocial personality disorder is aptly described in DSM III - R:

301.70 **Antisocial Personality Disorder**

The essential feature of this disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood. For this diagnosis to be given, the person must be at least 18 years of age and have a history of Conduct Disorder before the age of 15.

Lying, stealing, truancy, vandalism, initiating fights, running away from home, and physical cruelty are typical childhood signs. In adulthood the antisocial pattern continues, and may include failure to honor financial obligations, to function as a responsible parent or to plan ahead, and an inability to sustain consistent work behavior. These people fail to conform to social norms and repeatedly perform antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing, and having an illegal occupation.

People with Antisocial Personality Disorder tend to be irritable and aggressive and to get repeatedly into

physical fights and assaults, including spouse- or child-beating. Reckless behavior without regard to personal safety is common, as indicated by frequently driving while intoxicated or getting speeding tickets. Typically, these people are promiscuous (defined as never having sustained a monogamous relationship for more than a year). Finally, they generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others. After age 30, the more flagrantly antisocial behavior may diminish, particularly sexual promiscuity, fighting, and criminality.

Associated features. In early adolescence these people characteristically use tobacco, alcohol, and other drugs and engage in voluntary sexual intercourse unusually early for their peer group. Psychoactive Substance Use Disorders are commonly associated diagnoses. Less commonly, Somatization Disorder may be present.

Despite the stereotype of normal mental status in this disorder, frequently there are signs of personal distress, including complaints of tension, inability to tolerate boredom, depression, and the conviction (often correct) that others are hostile toward them. The interpersonal difficulties and dysphoria tend to persist into late adult life even when the more flagrant antisocial behavior has diminished. Almost invariably there is a markedly impaired capacity to sustain lasting, close, warm, and responsible relationships with family, friends, or sexual partners.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, § 301.70, p. 342 (Third Revised Edition, 1987).

As can readily be noted, the above description is a paraphrase of the sociopathic actions and tendencies diagnosed in Sireci by Drs. Herrera and Kirkland and, interestingly enough, also describes traits relied upon by Dr. Lewis in reaching her conclusion. (See, Statement of the Case and Facts.) In retrospect, it would certainly seem that the diagnoses of the evaluating psychiatrists have withstood the test of time. It is also true that, as pointed out by the experts below, functional or psycho-social mental illness is defined as such merely by the inability to find an organic basis which is always suspected. Viewing the entire body as an organism, the defense experts

below essentially postulate an exception to capital punishment based on a suspicion that **all** mental illness is of organic origin in contrast to biblical concepts of good and evil, notions of free will, and the idea of culpability under the law. This case, after hours of testimony below, represents the ludicrous scenario of a "second" trial involving a battle of experts with simply opposing psycho-legal philosophies.

It is highly doubtful that more complete knowledge of Sireci's mental status would have influenced the jury to recommend or the judge to impose a sentence of life imprisonment rather than death. See, e.g., Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986); Porter v. State, 478 So.2d 33 (Fla. 1985). During the penalty phase in 1976, Sireci testified that he did not knowingly and consciously inflict the wounds on the victim, and was not aware of what he was doing (SRAS 54; 57). Dr. Kirkland also testified in Sireci's behalf stating that Sireci shows some of the symptoms of schizophrenia, and that his schizoid trends are an accepted mental disorder (SRAS 78). He classified Sireci as having a schizoid, antisocial personality disorder (SRAS 83-84). Dr. Kirkland further testified that a schizoid personality would be unable to control his emotions in a rational, normal manner, and lacks the depth of personality involved in controlling behavior (SRAS 87). Based on Sireci's history and the circumstances of the crime, it was Dr. Kirkland's opinion that because of his development and character structure, Sireci would not handle pressure very well, and could have been under extreme mental pressure at the time of the stabbing (SRAS 81). The new psychiatrists' opinions are hardly contradictory and no more compelling. Dr. Pincus was forced to admit that Sireci's plan to get a car was evidence of antisocial thinking (R 475), and that the multiple stabbing was evidence that Sireci was out of control--something Dr. Kirkland previously testified to. Dr. Vallely

testified that he doubted that Sireci's brain damage was so severe that he would completely lose control at the time of the stabbing, and that the multiple stabbing suggests an individual who could not handle stress very well, and would become extremely impulsive and act with bad judgment (R 530). Such testimony was a virtual paraphrase of Dr. Kirkland's trial testimony from the new expert in neuropsychology (R 504).

Thus, as in Witt v. State, 465 So.2d 510 (Fla. 1985), the only factor not before the jury was an organic basis for Sireci's mental problems, which was not demonstrated to have been a causative factor in the actual stabbing. Under the facts of this case, there is no question that the jury knew that Sireci was mentally disturbed, and as in Witt, no relief should have been granted.

Also of important note is the fact that the court-appointed psychiatrists, even in the face of additional testing, would not alter their diagnoses of Sireci as suffering from sociopathy although in retrospect they may order additional tests (R 45-50; 69; 132-136). Sireci failed to demonstrate below, therefore, a reasonable probability that the further testimony of the new experts would have affected the sentencing outcome as such testimony would still have been diluted by the testimony of the court-appointed psychiatrist, Dr. Herrera. See, Elledge v. Dugger, 823 F.2d 1439, 1147 (11th Cir. 1987).

D. THE NEW PSYCHIATRIC EVALUATIONS WERE INCOMPLETE, FAULTILY PREMISED AND SPECULATIVE.

The presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See, Strickland v. Washington, 466 U.S. 697 (1984); United States v. Frady, 456 U.S. 152, 162-169 (1982); Engle v. Isaac, 456 U.S. 107, 126-129 (1982). Such presumption was neither honored by the lower court nor rebutted by substantial, competent evidence at the Rule

3.850 hearing below. This case epitomizes the danger involved in a years-later collateral attack entertained not by the trial judge, but a later judge who has not lived with the case for any significant period of time, and may readily undo the efforts of his predecessor jurist at the cost of the taxpayers.

Dr. Lewis spent only an hour and a half with Sireci, but would have liked to have spent more time with him since his behavior and mental state were documented to fluctuate at different times (R 327; 378). She could not even evaluate his state of mind at the time of the stabbing without a lengthy evaluation and without interviewing all of the people involved (R 317-318), and could not determine whether Sireci was under the influence of extreme mental or emotional disturbance or had the ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the murder (R 368). Her observation of Sireci is that it would have been very "unlikely" that he would have been able to conceptualize the consequences of what he was doing (R 355-356). This conclusion goes only to nonstatutory mitigation evidence and is **less** compelling than Dr. Kirkland's penalty phase testimony in Sireci's behalf, which could have been accepted by the jury as a statutory or nonstatutory factor! Dr. Pincus was in a hurry to catch an airplane at the time he examined Sireci, and did not obtain a history or perform a mental status examination. That he found Sireci rambling is hardly surprising since all the prisoners were evaluated in a large room, and each one knew the purpose of the visit (R 443; 378-379). His evaluation was even less complete than that of the court-appointed psychiatrists he criticizes! Dr. Pincus was forced to rely on Dr. Lewis' history and mental status exam, which was so incomplete it would not even allow her to evaluate his state of mind, and yet he opined that Sireci was acting under the

influence of a mental and emotional disturbance that interfered with his capacity to conform his conduct to the requirements of the law (R 484). He was forced to admit, however, that he could only determine Sireci's "likely" state of mind with only fifty to one hundred percent accuracy (R 484). The neuropsychologist did not even feel that Sireci's injuries were so severe as to cause the multiple stabbing (R 530).

Thus, what the lower court essentially relied on in granting post-conviction relief were the non-compelling admitted speculations of experts that were less far-reaching than the actual penalty phase testimony of Dr. Kirkland. Such speculations were based on observations that appear even less thorough than those of the original court-appointed psychiatrists.

The state would further submit that not only were the new psychiatric evaluations less than complete, but the conclusions reached were faultily premised as well. Nowhere in the record is the history relied upon by the experts in reaching their conclusions accurately documented. Nowhere in the record is a "difficult forceps birth" documented, and such information remains the unsubstantiated word of Sireci, a convicted killer. The hospital records of "head injury" were incorrectly admitted, over the objection of the state, as to lack of authentication (R 120; 122-123). Such records do not even slightly provide a basis for the conclusions drawn by the new experts, in any event.

The records from both hospitals reflect that Sireci suffered a fractured jaw. A "possible basilar" skull fracture was initially suspected and films of the skull were taken, yet the actual doctor's reports do not document such a finding at all, although mention of such "basilar fracture" is made on some unintelligible cover sheet on the records purportedly from the Swedish American Hospital. In fact, the January 21, 1965, report of Drs. Halvorson

and Pap shows that films of the skull "show no evidence of cranial or intracranial injury or evidence of cranial or intracranial pathology and that the bones of the cranial vault appear to be intact". The "cranium" to which the term "cranial" applies is defined as "the part of the skull that encloses the brain and is composed of continuous cartilage in the embryos of all craniate vertebrates ..." Webster's Third New International Dictionary, (1986). Thus, this report reflects **no** brain injury at all, nor does any other. (See, Statement of the Case and Facts, pg. 5.) The peripheral injury to the facial nerve is not indicative of brain damage (R 447). Moreover, Sireci's I.Q. is within the average range (R 515). The assertions of Sireci's family that he was comatose for several weeks are refuted by the hospital records. Nurses' notes from St. Joseph Hospital reflect that while he was semi-comatose upon admission, he was talking a little over an hour later and continued to respond, but was given pain-killers for the factured jaw and generally slept. (See, Statement of the Case and Facts, pg. 4-5.)

As far as his alleged neurological and emotional impairment is concerned, there is nothing in the records or hospital discharge summaries to substantiate the same except the affidavits of his family, which are not even based on personal knowledge alone, but recite that the statements are "true and correct to the best of my knowledge and **belief**".

The fact that the new experts found the number of stab wounds significant presumes an adequate weapon. The weapon that Sireci hid in a toilet from the police shortly after the murder was a small pocketknife (SR 164-165). Moreover, Sireci admitted there was a fight and the knife never touched the heart so as to immediately kill the victim (SR 135). Even if such behavior may indicate that Sireci was out of control, that is nothing new as Dr. Kirkland testified to Sireci's inability to control himself at the penalty

phase. Dr. Vallely could not even find any relationship between the alleged organic deficits and the stabbing (R 530).

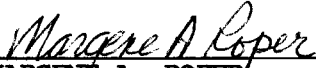
That Sireci may now appear schizophrenic in 1987 is hardly surprising considering the psychological warehouse atmosphere such testing took place in, and hardly reflects incompetency on the part of the court-appointed psychiatrists in 1976 who were aware of "schizoid trends" on the part of Sireci (SRAS 78), which have not been demonstrated not to have escalated with the passage of time on death row. But that is a question for another day. Reports filed by psychologists hours before a scheduled execution should properly be viewed with great suspicion. Card v. State, 497 So.2d 1169, 1175 (Fla. 1986).

CONCLUSION

Based on the above and foregoing argument, the state respectfully requests this honorable court to vacate the order granting post-conviction relief with directions to the lower court to enter an order denying the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above and foregoing have been furnished by mail to Larry Helm Spalding, Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, FL 32301, and Richard H. Burr, III, 99 Hudson Street, 16th Floor, New York, NY 10013, this 1st day of February, 1988.



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