IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

HENRY PERRY SIRECI,

Appellee/Cross Apppellant.

CASE NO. 70,937

REPLY BRIEF OF APPELLANT/CROSS APPELLEE

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TABLE OF CONTENTS

I. 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.

ARGUMENT

The majority of the appellee's assertions are contradicted by either the record or appellant's initial argument and further elaboration is not needed. Several points, however, warrant further development.

The state's challenge to the decision below is not a factual one alone. The state does not simply disagree with the trial court's determinations of credibility and other assessments of the facts before it. It is the state's position that the trial court in derrogation of all concepts of finality rendered a legally untenable decision.

Even under Dr. Halleck's "standard of care" for psychiatric examinations there were no discernable behaviors during the mental status examinations of Sireci to suggest the need for further tests in order to differentiate between organic illness and functional illness (R 257-266). The appellee points to no specific medical record to support the "conclusion in 1965 that Sireci suffered a basilar skull fracture" which resulted in brain damage. See, Answer Brief of Appellee/cross appellant, p. 30, n. 15. Certainly counsel should know upon what records his experts

relied. Two of the defense experts could not even plug in the brain damage to Sireci's behavior at the time of the murder. Dr. Pincus could only plug it in in combination with a paranoid thought disorder, which was not demonstrated not to have been of recent origin and was found only recently by Dr. Lewis. It is clear that the lower court erred.

II. ARGUMENT ON CROSS-APPEAL

The state appealed from the circuit court's order granting Sireci's request for an evidentiary hearing and application for stay of execution. The trial court held that a limited evidentiary hearing was necessary to address the claim that Sireci was deprived of his rights to due process and equal protection because the two psychiatrists appointed before trial to evaluate his sanity at the time of the offense, failed to conduct competent and appropriate evaluations. The trial court further held that the hearing was necessary solely to determine the effects, if any, this claim may have had on the sentencing hearing. The court specifically found that the alleged violation of due process/equal protection had no bearing on the prior determination of Sireci's guilt. This court agreed. State v. Sireci, 502 So.2d 1221 (Fla. 1987). Such determination by this court is now the law of the case.

Since the state appealed the granting of a stay and an evidentiary hearing, Sireci was certainly on notice of the issues involved and was provided further notice by the order of the trial court limiting the hearing to sentencing issues only. Had Sireci felt sufficiently aggrieved by such order, the instant cross-appeal could have been properly filed at that point in time. Sireci raised this issue in a motion for rehearing before this court and relief was denied. The filing of a cross-appeal at this point in time as to this issue seems to be the result of Sireci's inexplicable modicum of success below, which he would

like extended. A cross-appeal at this point in time, however, untimely as it is, constitutes an attempt to gain a second rehearing before this court. The cross-appeal should be dismissed or summarily denied.

Even if the "belated" cross-appeal could now be entertained, no relief could be granted. Dr. Herrera testified below that even if there was organic damage, it was not of such severity as to prevent Sireci from knowing what was happening (R 59), and even in light of the most recent diagnosis he could not state that neurological deficits caused the multiple stabbing (R 117). Dr. Kirkland also testified that he does not believe that Sireci had a significant mental disorder that would have played a part in his plight, and it was important that Sireci told someone afterwards that he had stabbed the man fifty-five times because he did not want any witnesses (R 177). Defense expert, Dr. Lewis, did not even evaluate Sireci's state of mind at the time of the stabbing (R 317-318). Defense expert, Dr. Pincus testified 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 and was goal directed and rational (R 475-476). Defense expert Dr. Vallely could find no correlation between the alleged organic damage and the multiple stabbing (R 530). Dr. Pollock did not believe that stabbing someone fifty-five times was an inconsistency in behavior for Sireci, an individual who was constantly involved in altercations (R 586).

Sireci could have been convicted of first degree murder

under a felony murder theory, in any event. This court rejected Sireci's argument on direct appeal that the evidence was legally insufficient to support a finding of intent to rob. Sireci v. State, 399 So.2d 964, 966-68 (Fla. 1981). Logic dictates that even if Sireci had planned to steal some keys, his plan converted into one to rob when he encountered the victim, talked to him, then subsequently hit him with a wrench and stabbed him.

Sireci's new retrospective postulations as to the state's possible willingness to plea bargain are the height of speculation and are in conflict with the facts of this case.

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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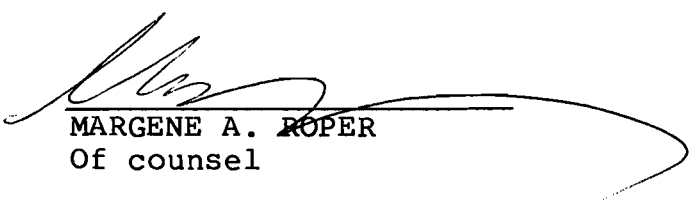
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Reply Brief of Appellant/Cross Appellee, has been furnished by mail to **Julius L. Chambers, Richard H. Burr, III, Deborah Fins, Esquire,** 99 Hudson Street, 16th fl., New York, New York 10013, and **Mark E. Olive, Esquire,** Office of the Capital Collateral Representative, 1533 S. Monroe Street, Tallahassee, Florida 32301, and counsel for the Appellee/Cross Appellant, this 11th day of April, 1988.



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