IN THE SUPREME COURT OF FLORIDA

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HENRY PERRY SIRECI,

Appellant,

v. CASE NO. 76,087

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state makes the following additions to the appellant's statement of the case and facts. On December 4, 1975, Howard Poteet was found stabbed to death at his place of business, a used car lot (R 1062; 1119). Sireci was convicted of first degree murder and sentenced to death. The conviction and sentence were affirmed on appeal. Sireci v. State, 399 So.2d 964 (Fla. 1981). [1]

The United States Supreme Court denied certiorari on May 17, 1982. Sireci v. Florida, 456 U.S. 984 (1982). Sireci filed a motion to vacate which was denied, and the denial was affirmed on appeal. Sireci v. State, 469 So.2d 119 (Fla. 1985). On September 19, 1986, the governor signed a death warrant. Sireci filed a second motion to vacate, and the trial judge stayed the

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[1] The issues decided in this opinion include: 1) the state proved premeditation beyond a reasonable doubt; additionally there was sufficient evidence for felony murder; 2) the testimony of Holtzinger, Sireci's former cellmate, that Sireci planned to kill his brother-in-law, Wilson, was admissible as evidence of an attempt to evade prosecution from which consciousness of guilt can be inferred; 3) the trial court did not abuse its discretion in refusing to strike Holtzinger's testimony due to a discovery violation; 4) the defense failed to show an abuse of discretion regarding restriction of cross-examination of Barbara Perkins; 5) admitting the statements of Sireci was not a comment on his right to remain silent; 6) excusing certain mothers form jury service does not violate due process; 7) the state is not required to notify the defendant of aggravating circumstances it intends to prove; 8) the trial court did not double the aggravating circumstances of pecuniary gain and robbery; 9) the trial court properly imposed the death sentence where there was at least one aggravating factor and no mitigating factors; 10) the trial court did not fail to give proper weight to the defendant's mental or emotional problems; 11) "lack of remorse" can be offered to the jury and judge as a factor which goes into the equation of whether the crime was especially heinous, atrocious or cruel; 12) the Florida death penalty statute does not unconstitutionally limit the consideration of mitigating factors.

execution and granted an evidentiary hearing. The state appealed. This court held that the state may appeal from an adverse ruling in a rule 3.850 proceeding, but affirmed the trial court's order mandating a limited evidentiary hearing on whether the two court-appointed psychiatrists conducted competent and appropriate evaluations. State v. Sireci, 502 So.2d 1221 (Fla. 1987). [2] An evidentiary hearing was held May 28-July 7, 1987, after which Judge Formet granted Sireci a new death penalty sentencing hearing. The state appealed. This court affirmed the trial court in all respects, stating that:

> This is a classic illustration of a case in which the appellate court should not substitute its judgment for that of the trial judge who has personally heard the pertinent testimony.

State v. Sireci, 536 So.2d 231, 233 (Fla. 1988). Resentencing began April 9, 1990.

STATE'S CASE

The state presented the following evidence at the resentencing hearing:

Eddy Nelson: Nelson was the victim of an armed robbery which Sireci committed in 1970 (R 934). During the robbery of the gas station Sireci had Nelson lie on the floor and when asked whether he was going to kill Nelson, Sireci said he guessed he would have to since he had robbed the gas station before and that was the safest way to keep Nelson from saying anything (R 941-42). Nelson tried to talk his way out of it by saying he was on

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[2] A petition for habeas corpus was also filed, but the sole issue in the petition was procedurally barred.

probation and had trouble with the law himself (R 942). Nelson felt sure Sireci was going to stab him because of the look on his face (R 943). A car pulled up. Sireci said "if you tell on me, I'll come back and kill you" and ran out the door (R 944). Nelson got the license number from Sireci's car and called the police (R 946). Nelson identified Sireci, who ultimately plead guilty to the armed robbery (R 933, 945, State's Exhibit #1).

Judgment and Sentence: First degree murder of John Short resulting in a life sentence (R 967, State's Exhibit #2).

Barbara Perkins: Perkins met Sireci while she was hitchhiking to a store in Orlando and they began living together a couple weeks later (R 969). [3] Sireci worked in construction and helped pay the bills for Perkins and her three children (R 970-971). At some point Sireci told her he robbed a convenience store and stabbed the young convenience store clerk (John Short) because he didn't want any witnesses (R 972, 976). Sireci also told Perkins that someone had seen him in the store and "he wished he knew who it was so he could kill them because he didn't want no witnesses." (R 976).

The day after the Short murder Sireci told Perkins he was planning a second robbery (R 980). Sireci wanted her to drop him off at an abandoned motel beside a used car lot and then go to the gas station across from the car lot so the man at the gas station wouldn't see him go into the car lot (R 980). Sireci planned to steal a car and money (R 978, 980). Sireci called the

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[3] Sireci had left his pregnant wife in Tennessee to "find a job" in Florida (R 1424, 1469).

used car salesman and expected him to be there when he arrived (R 1047). When Perkins dropped Sireci off at the motel, he had a lug wrench and knife (R 985). When she later went back to the motel to pick him up, Sireci did not have his coat on (R 989). He told her the salesman wouldn't give him the car keys so he hit him over the head with the lug wrench and the man started struggling with him so he stabbed him (R 990). Sireci said he killed the man (R 952). They went back to Perkins' trailer and Sireci threw a wallet, credit cards and money in the bathtub to wash them because they were bloody (R 991-992). He had cut his hand (992). He said he had to discard things in the dumpster so no one would find it on him (R 993). Sireci said he needed an alibi and they should go to a bar where they hung out so people would think he was there all night (R 994, 996). Two days later they left for Tennessee (R 998).

During the time Perkins knew Sireci, he never did or said anything to make Perkins think there was anything psychologically wrong with him (R 977). He never exhibited hostility toward her or her children nor did he ever say anything that didn't make sense (R 1006). Sireci had no trouble making decisions handling money (R 1011).

Investigator Hanson: This Orange County sheriff investigator was called to the scene on December 4, 1975 (R 1062). There was blood splattered all over the used car office, a window broken out, chairs upset and things broken (R 1062, 1065, 1071, 1095). He found a Levi jacket with blood in the abandoned motel next to the car lot. There were also bloody towels and bloodstains in the shower area (R 1086).

Howard Poteet, Jr.: The victim was Howard Poteet. His son, Howard Poteet, Jr. worked at the car lot and was familiar with the procedures as to opening and closing, tag storage, number of cars on the lot, where money was kept and the placement of a large sign reading "spot cash for your car" (R 1114-1131).

Polly Poteet: The victim's wife testified that the victim always kept his wallet on a chest of drawers and when he left that morning she was sure he had the wallet even though she didn't actually see him put it in his pocket (R 1145). After her husband's death, she began receiving credit card bills for gas and called a detective (R 1144).

David Wilson: Wilson was Sireci's brother-in-law who gave the appellant a job in his maintenance shop in Illinois in January 1976 (after the murder) (R 1186). Sireci told him he stabbed the victim so many times because "he believed in leaving no witnesses." (R 1195).

Trial transcript of Harvey Woodall: This witness (who had died before resentencing) knew Sireci in jail (R 1206). Sireci told Woodall he stabbed the victim "60-something times" and wasn't going "to leave nobody who could identify him, no witnesses to testify against him" (R 1209).

Trial transcript of Detective Arbisi: Sireci told the detective he lived short a distance from the victim's car lot and had visited the victim on several occasions (R 1222).

Dr. Ruiz: The medical examiner testified that the victim had fifty-five stab wounds disseminated all over the body, among which were defense-type wounds on the arms and palms of the hands

(R 1251). All wounds were inflicted before the victim died (R 1261). In the doctor's opinion the victim was conscious when the defensive wounds were inflicted because they demonstrated affirmative activity (R 1273). A person would have to lose one third of the blood in his body to lose consciousness (R 1283).

DEFENSE CASE

David Lowe: Lowe was Sireci's best friend and knew him during the ages of 12-13 and 17-19 (R 1335, 1299, 1332). [4] Sireci was a healthy 13-year old, and he and Lowe had scooters they rode through fields (R 1300-01). Sireci's father would yell at Sireci but Lowe never saw the father hit Sireci, nor did he ever see bruises or injuries (R 1322). Lowe did not notice anything unusual about Sireci's relationship with his mother (R 1320). Sireci didn't get into trouble (R 1326). Lowe thought that Sireci was "different" after his automobile accident at age 16 but he couldn't say how (R 1334). Lowe saw Sireci during the ages of 17-19 during which time Sireci worked and got married (R 1333).

Wanda Evans: Evans is Lowe's sister (R 1348). She knew Sireci when he was thirteen (R 1349). She thought Sireci was sweet and thought he had a crush on her (R 1351, 1363). Sireci would help her with her chores (R 1363). She had not seen Sireci since he was fourteen except one time in 1975 (R 1357). She

[4] Sireci was 27 at the time of the murder. His date of birth was July 17, 1948 (R 2308, 1526) and the murder occurred December 3, 1975.

never saw him physically abused and felt he knew right from wrong (R 1358).

Irene Lowe: Irene Lowe is David and Wanda's mother (R 1363). She was friends with Sireci's mother (R 1366). She never saw Sireci's father physically abuse him (R 1367). Sireci was very close to her and her husband (R 1374). They showed Sireci a lot of love and he called them "mom" and "dad" (R 1374). There was nothing which lead her to believe Sireci's mother was sexually abusing him (R 1376, 1378). Sireci was an expert car mechanic and could fix cars that others couldn't. Sireci worked a lot with her husband (R 1381). She never saw Sireci where he was uncontrollably restless (R 1383).

Ruth Blackstone: Blackstone married Sireci in 1972 (R 1394-1396). When Sireci left for Florida in 1975, she thought he was going to get a good job so they could get a house and be a family (R 1468). She was 2-3 months pregnant at the time (R 1469). Sireci owned property in Illinois and Tennessee and had money coming from houses they rented (R 1469). Although Sireci's mother, Laura, had written him a letter saying Sireci was no longer her son, she and Sireci went to stay with Laura when they were down on their luck (R 1472-73). Sireci did not "take money and throw it out the window," but if they needed something, they got it (R 1473). Ruth felt he did buy unnecessary things to please her because he loved her (R 1473). When Laura wrote Sireci about money he owed her, she was referring to the money from the insurance she had on the car he wrecked. Sireci collected the money but never gave it to Laura (R 1476).

Dr. Lewis: Dr. Lewis does studies of inmates on death row with a team which includes Dr. Pincus (another defense witness) (R 1482-83). She rarely testifies for the state and usually testifies for defendants (R 1492). Most of her work is with adolescents (R 1496). In almost all her studies she found that extremely aggressive individuals had some sort of trauma to the central nervous system, but that alone does not cause violence (R 1499). However, when extraordinary physical abuse and paranoia are present with impaired functioning, it results in a violent individual (R 1500). The first time she met Sireci was during a 1984 study of eight to ten individuals incarcerated at Starke (R 1519). Sireci told her he had a car accident and had been comatose (R 1520). Background information showed that Sireci was born by forceps delivery, hit in the head with a coke bottle at age 8, knocked off a motorcycle at age 14, sustained multiple falls from high places, and had a car accident at age 16 (R 1527). The right facial nerve was severed during the accident (R 1533). A graduate student administered psychological tests (R 1537). Dr. Lewis diagnosed Sireci as having severe organic impairment and being psychotic with pervasive paranoid ideation (R 1551-53). She met with Sireci after 1984 because she was asked to testify for him (R 1554). She learned of sexual abuse from the wife (Pam), of Sireci's brother, Dominick (R 1556). Pam said that Dominick said that Sireci slept with his mother and sexually abused his brothers and sisters (R 1557). Dr. Lewis also reviewed a March 23, 1962 report by Dr. Christa Newton which indicated Sireci had possible organic brain syndrome (R 1572-

75).[5] Dr. Lewis believed that Sireci was in an uncontrollable state both when he stabbed Short and two days later when he stabbed Poteet (R 1588-1589). Dr. Lewis believed Sireci was paranoid because he thought other people were talking about him (R 1669). [6] She thought Sireci could not focus because he was asking the examiner, a young Jewish woman, personal questions (R 1680). The doctor felt that Sireci's 1975 letter to his mother was much more directed and organized (R 1682). [7] Dr. Lewis had reviewed Dr. Vallely's report from a May, 1985, examination (R 1686). Dr. Vallely said Sireci was alert, attentive, oriented, articulate and able to express thoughts in a logical, relevant and coherent fashion but Dr. Lewis thought Sireci just "had a very good day" (R 1686). She had reviewed Dr. Upson's (State expert) report stating Sireci had no signs of delusions, but felt it was consistent with her report and any difference was semantical (R 1687-88). She attributed any difference between her opinions and those of Dr. Vallely and Dr. Upson to the theory that Sireci "fluctuates" and "may have been in better shape when he met with them" (R 1690). She attributed Sireci's ability to give a coherent 40-page statement to the theory he had been "rehearsed" (R 1693-97). Dr. Lewis said that Sireci was

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[5] Sireci was thirteen years old in March of 1962.

[6] Other witnesses testified that people did talk about Sireci as he had one eye smaller than the other, wore glasses, was poor, was Italian in a predominantly rural German community, and was large for his size (R 1297, 1306, 1326, 1352, 1354, 1355).

[7] The letter was written before the murder in 1975 since he received a response 1-2 months before the murder (R 1422).

perfectly capable of deciding to rob a person then kill him to eliminate a witness (R 1733-34).

Bob Kienz: Kienz worked with Sireci at Arnitzen steel fabrication shop in Illinois (R 1755). Sireci was a shear operator and was a valued employee who received top pay (R 1756-57; 1766). People teased Sireci but he would laugh it off (R 1758).

Ron Doetch: The Doetch family members were dairy farmers in Illinois (R 1780). The children did lots of chores and work was more important than school (R 1780). Their only friends were the people they baled hay with (R 1781). Ron Doetch met Sireci when Sireci was in the 2nd grade and Doetch in 3rd grade (R 1789). Sireci didn't fit in with the other kids because he was always getting into trouble and the kids knew if they got a spanking at school they would get another when they got home (R 1790). Sireci helped Doetch bale hay in the summer and was a very good worker (R 1790, 1800). Doetch lost track of Sireci when Sireci was in grade school then saw him in 1970 when Doetch gave him a place to live (R 1805-06). Doetch felt the people at the steel mill were a bad influence, and hired Sireci to work for him (R 1809). Sireci always had money and did not spend excessively (R 1809). Sireci's previous car accident left him with a deformed or club left foot which made him clumsy (R 1816, 1829). Sireci never drank or took drugs (R 1822). He changed his name because he thought it would give him a clean slate and

he could start over (R 1823). [8] Doetch and others saw Sireci's father chase him but they weren't concerned nor was there any reason to intervene (R 1827). In grade school the principal administered punishment and Doetch's father "kicked his rear end" when he did things wrong (R 1827). In those days, they didn't think of this as child abuse (R 1828). Sireci planned a lot (R 1830). One time he carried through a plan to steal his father's tires in the middle of the night (R 1830). The only way the tires were found was because Sireci told them where they were (R 1830). Sireci had a long history of anti-social acts leading all the way to childhood (R 1832).

Mark Morrison: Mr. Morrison is the clinical service supervisor at Family Advocate in Illinois (R 1836). Sireci's brother, Dominick, was referred to him in 1982 for abusing his (Dominick's) children (R 1845). The information in his report was not all true; for example, Sireci did not kill three women in Florida (R 1855). Dominick told Morrison his mother, Laura, was an evil, wicked woman who slept with Sireci and physically abused her children (R 1867-68). Morrison never verified the information by talking to Laura or Sireci's other siblings, Virginia and Peter, other family or friends (R 1880, 1883). Morrison's report said Dominick was exclusively self-serving (R 1881). Mr. Morrison examined Dominick because he was charged with a criminal offense (R 1881).

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[8] The Nelson robbery was in March, 1970 and Sireci changed his name in November, 1971. (State Exhibit X, Defense Exhibit #6).

Kevin Sullivan: Mr. Sullivan is a clinical social worker who conducted a family analysis of the family in which Sireci grew up by going through interviews and records (R 1931). He talked to a lot of people, reviewed records, and drew conclusions (R 1932). He reviewed records from Wadell Mental Health Clinic which showed Laura and Sireci were referred to the clinic by the school when Sireci was 13-14 years old (R 1936-37). Social worker Forest Price conducted an interview in March, 1962 (R 1936). Sireci was being seen by the medical doctor of the facility and a psychologist, and the social worker was seeing Laura (R 1936). Sireci was having problems in school (R 1936). The head of the team, Dr. Newton, recommended doing a psychological by Mr. Brown (R 1936). Other recommendations for family intervention were not followed through (R 1938).

Dr. Pincus: Dr. Pincus is the neurologist who participated in Dr. Lewis' study of murder defendants in 1984 (R 1988, 2010). He saw Sireci only a few minutes (R 2011). He relied on some data which he later found to be incorrect, i.e. Sireci was not comatose two weeks after the car accident and the reason he could not hop on his left foot was because it was deformed, not because of brain damage (R 2165-66). Sireci's medical records after his car accident showed he arrived at the hospital unconscious and was restless and confused for several days (R 2014). The accident caused many scars on his body (R 2104). Dr. Pincus conducted a neurological exam of Sireci in 1989 (R 2017). Sireci told Dr. Pincus he deserved any beatings he received (R 2100). Sireci was never hospitalized for any abuse (R 2103). Sireci

exhibited anti-social personality characteristics before the car accident (R 2096-2108, 2153). However, Dr. Pincus believed Sireci had an organic personality disorder, not an anti-social personality disorder (R 2111). [9] He also stated that if a person has brain damage he can't be diagnosed as anti-social (R 2185). In fact, in his opinion it is impossible to diagnose an anti-social personality disorder in a brain damaged person (R 2171). Dr. Pincus agreed that most people who have brain disease are not violent (R 2147). However, more than one half repeated violent people have three factors: abuse, paranoia, and neurological deficit (R 2130). Forty percent of violent offenders have two of the factors (R 2130).

STATE REBUTTAL

Dr. Ball [10] : Dr. Ball is a radiologist who interpreted the CAT Scan and MRI test done on Sireci (R 1742-44). Sireci's tests showed small abnormal areas indicating mild brain injury (R 1746, 1748). "Mild" is the lowest rating (R 1746).

Dr. Upson: Dr. Upson was qualified as an expert in neuropsychology (R 2207). He performed psychological tests on Sireci October 11, 13, and 18, 1989 and spent approximately eleven hours testing him (R 2708). He reviewed data from Sireci's friends, Dr. Lewis, prior tests, Dr. Pincus' report, Dr. Vallely's report, police reports, photographs, interview summaries, Dr. Pincus' deposition, background information and a

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[9] Dr. Pincus had previously explained that the term "psychopathic" is now "anti-social personality disorder" (R 2086).

[10] The witness was presented out of order.

clemency hearing (R 2209-10). Some of the tests conducted were the Wechsler Adult Intelligence Test Revised (WAIS-R), Bender Gestalt, house/tree/person, bicycle test, wide-range achievement, Stroop color and word, Wisconsin card sorting, trail-making, sentence completion, Weschler memory scale, Boston naming test, Welch figure preference and the Minnesota Multiphasic Personality Inventory (MMPI) (R 2215, 2227, 2229, 2231, 2244, 2246, 2248, 2250, 2251, 2252, 2253, 2260).

Sireci has a full-scale IQ of 95. Normal is 90-110 (R 2219). His overall abilities are that of an average person. The verbal performance was not as good as motor performance. Verbal was 89 which is just below normal. Motor was 106 which shows average intelligence (R 2220). Sireci was high average in picture arrangement and logical social relationships which indicates he understands how events ought to transpire and how the rules are played (R 2222). The results of the WAIS-R done by Dr. Lewis' graduate assistant in 1984 were similar to his results (R 2223). Dr. Upson found errors in the 1984 test which indicated Sireci's abstracting abilities are better than what the 1984 test showed (R 2224).

Mr. Brown gave the same test to Sireci in 1962 (before the car accident) and got an IQ of 93 (R 2225) The tests done by Mr. Brown (in 1962) confirmed the absence of any organic impairment (R 2277). Although Dr. Newton mentioned organic problems (at age thirteen), Dr. Brown ruled them out through testing (R 2420). Brown's testing indicated mild psychopathology at worst (R 2277). Brown also said Sireci admired and respected his father (R 2279).

Although other people presented a negative picture between Sireci and his father, the non-interested third party evaluation presented a pretty good relationship with mom and dad, but not so much with mom (R 2280). Brown saw the father/son relationship as positive (R 2282). Sireci's father showed him how to do things such as work on automobiles and farm (R 2280).

The 1962, 1984, and 1989 test scores were comparable (R 2225-26). Sireci has no learning deficit and has achieved what you could expect from a person with an IQ of 95 (R 2228). The tests basically showed no major problems and no organic impairment (R 2230, 2231, 2234, 2238, 2244, 2246, 2248, 2250, 2251, 2263, 2270). The bottom line was the tests showed no brain damage although some tests came close (R 2248, 2270). Dr. Upson's opinion was that Sireci was borderline with no clear brain damage so it was a judgment call (R 2271). He concluded Sireci had minimal brain damage which the CAT Scan and MRI showed (R 2272-73). In his opinion, even though there was physical damage, it did not have a significant impact on the testing (R 2273). Dr. Upson concluded that although there is some brain damage, he would have a difficult time putting it into account for what is observed because Sireci had problems very early (R 2285). Sireci's data indicated anti-social factors, not organicity (R 2274). So even though the scans showed some damage, it appeared not to have a significant impact on his testing for organicity, but rather comes out "very minimally if at all" (R 2275). The MMPI showed anti-social behavior which was also present in Sireci's early life (R 2265, 2275).

Sireci's problems started when he was four and his brother was born (R 2285). Dr. Upson's perception was that the family was somewhat isolated from the community, lived in a fairly small home and some of the father's characteristics were cultural (Italian) not simply violent (R 2282).

The set of data when Sireci was thirteen showed no organic problems (R 2280). The 1962 testing showed no brain damage; the intellectual assessment after the car accident showed no brain damage, and the current intellectual assessment showed no brain damage. Yet Dr. Upson thought that the neuropsyche indicated there may be some brain damage. Therefore, it was a judgment call (R 2286). Dr. Upson did not think the car accident made a significant impact although there may have been some damage (R 2286). Sireci probably suffered a closed head injury since the shell wasn't broken (R 2286). With closed heard injuries there can be fairly strong organic signs right after the accident but over time the symptoms subside and within two years the person is back to normal (R 2287). Dissipation of organic signs is typical.

Dr. Upson saw both the Short murder and the Poteet murder as acts that were planned (R 2292). His opinion is that the brain impairment was not significant in the instigation of those acts (R 2292). He also explained that brain damage and an anti-social personality can co-exist (R 2416-18). He diagnosed Sireci as having anti-social personality characteristics and effects of brain damage which may have occurred through forceps delivery and/or the car accident (R 2419). The testing revealed Sireci

compensated for a lot of the brain damage and there was little change from the age of thirteen to the current age (R 2419). Therefore, the car accident did not make a significant change (R 2419). Any change was near in time to the accident and Sireci had compensated (R 2420). Sireci is not functionally retarded and is able to hold a job (R 2420). Dr. Upson found no paranoid ideation; neither through testing nor through his interview (R 2422). Neither was paranoia picked up in the testing at age thirteen (R 2422). Sireci knew the consequences of his acts (R 2422-2424). Dr. Upson found no evidence of perseveration (a person cannot stop what he is doing (R 2425).

The state also offered the testimony of Donald Charles Holtzinger which the court disallowed (R 2201). [11]

On April 20, 1990, the jury recommended a sentence of death by a vote of 11-1 (R 2559). On May 4, 1990, Judge Formet sentenced Sireci to death, finding the aggravating circumstances of

1) prior violent felony
2) committed during a robbery and for pecuniary gain
3) committed to avoid arrest
4) heinous, atrocious and cruel
5) cold, calculated and premeditated

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[11] Holtzinger had testified at the guilt phase at the previous trial that while Sireci was in the Orange County jail he asked Holtzinger to participate in a scheme to eliminate David Wilson as a witness (R 1). Sireci also planned to bribe a jail guard (R 2). The state wanted to offer the testimony to show Sireci was able to plan and calculate. Sireci also vividly described the murders to Holtzinger (R 3).

Regarding the four statutory mitigating circumstances claimed by the defense, Judge Formet found that

> 1) the evidence did not establish extreme mental or emotional disturbance;
> 2) the evidence fell short of showing the murders were committed under extreme duress or substantial domination;
> 3) the defendant understood the criminality of his conduct (and thus his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was not substantially impaired);
> 4) the evidence of the defendant's low emotional age was insufficient to establish this mitigating circumstance.

While the trial judge did not find any statutory mitigating circumstance, he stated there were non-statutory mitigating circumstances as follows:

> In spite of his bleak childhood the Defendant was a hard and steady worker. He manifested a concern for others and was unselfish with his friends and family. He has done well in prison. He has brain damage and has suffered severe abuse as a child.

(R 3299-3307).

The trial court further found that:

> The Defendant's brain damage and history of abuse resulting in his having at least two factors common in aggressive violent persons does not establish an uncontrolled propensity for violence nor can it be found to be the cause of the heinous nature of the offense but does cause this court to give lesser weight to that aggravating circumstance.

(R 3307). This appeal follows.

SUMMARY OF ARGUMENT

Point I: The trial court did not abuse its discretion in seating a jury to render an advisory sentence. The state did not join in Sireci's waiver. It is debatable whether Sireci could make a voluntary and intelligent waiver. A jury recommendation is not binding on the trial judge.

Point II: There was no manifest injustice which required a mistrial. Any information that Sireci was on Death Row was presented first by the defense. After the state's question, the defense witness mentioned Death Row. Any error is harmless.

Point III: This court and the Eleventh Circuit Court of Appeals have previously held that applying the cold, calculated and premeditated aggravating circumstance to a defendant whose crime was committed before the aggravating factor was added to the statute, is not an ex post facto violation. Sireci has presented no reason for this court to reverse itself.

Point IV: The statutory mitigating circumstances were not supported by a reasonable quantum of competent proof. The facts of the crime show Sireci was not extremely mentally or emotionally disturbed, under substantial domination or extreme duress, or unable to appreciate the consequences of his conduct and conform it to the requirements of law. There was no testimony that he had a low emotional age which contributed to his inability to accept responsibility for his actions.

Point V: The state did not violate Booth v. Maryland by presenting relevant testimony of Mrs. Poteet that her husband had his wallet when he left home and when Howard Poteet said his

father went to auctions and carried mementos in his wallet. The state did not present a nonstatutory aggravating circumstance when a witness said Sireci was proud he killed the victim since Sireci's mental state was at issue and his feelings were relevant to whether he understood that he had murdered an individual. Further, the defense opened the door to this testimony by saying Sireci didn't really understand his actions, he was just acting "macho" and "grandiose." Any error was harmless.

Point VI: The Florida capital sentencing statute is constitutional on its face and as applied.

POINT I

THE TRIAL COURT PROPERLY RULED THAT A JURY SHOULD BE IMPANELED TO RENDER AN ADVISORY SENTENCE EVEN THOUGH SIRECI WANTED TO WAIVE THE JURY RECOMMENDATION.

Sireci contends that the trial court abused its discretion in refusing to allow Sireci to waive the jury recommendation. He also contends the jury recommendation was tainted by extrinsic evidence of Sireci's prior death sentence. He alleges that Sireci anticipated the jury would be tainted and therefore moved to waive the jury recommendation. Although Sireci admits that this court has held it is discretionary for a trial court to obtain a jury advisory recommendation, he argues it is an abuse of discretion for the trial court to refuse to waive the jury when a defendant files a waiver knowing that a jury will perceive he has previously been sentenced to death for the same offense. He also argues that because the jury recommendation is "nearly binding", the trial court cannot disregard a defendant's voluntary waiver of the recommendation (Initial brief at p.34). Sireci alleges the trial judge required a jury recommendation because the state objected. He arrives at this conclusion because the judge stated that he exercised his discretion based on State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990). Sireci submits that Ferguson is erroneous and the state is not entitled to a jury recommendation in a capital case under Fla.R.Crim.P. 3.260 since the penalty phase is not a separate trial but is instead a sentencing hearing. It is Sireci's position that Fla.R.Crim.P. 3.780 implements the procedural aspects of Section

921. 141, Florida Statutes (1975), and Rule 3.780 provides that a defendant may waive a jury recommendation. He argues that Rule 3.260, which states a defendant may waive a jury trial with the consent of the state, does not transcend Rule 3.780 since the latter Rule pertains to capital sentencing hearings and the former Rule does not. He further cites Section 921.141(1), Florida Statutes (1975), to support his position that the penalty phase is conducted before a jury only if a defendant fails to waive the jury recommendation. Sireci argues that his position is supported by Furman v. Georgia, 408 U.S. 238 (1972), which bestows constitutional rights on defendants but gives no right to the state to require a jury recommendation. Since Tedder v. State, 322 So.2d 908 (Fla. 1975), requires a trial judge to accept and impose a sentence consistent with the jury recommendation unless no reasonable person could differ, he reasons that the judge is likewise bound by a recommendation of the death sentence and is required to view the evidence in a light most favorable to the death recommendation when finding the aggravating and mitigating factors. Finally, Sireci argues that the murder was not especially heinous, atrocious or cruel, that this aggravating factor is unconstitutionally vague, and if the judge had not viewed it in the light most favorable to a death sentence, he would not have found that aggravating factor.

As Sireci notes, this appears to be a case of first impression in Florida. Usually this issue arises when the trial court allows a defendant to waive the jury recommendation. See Huff v. State, 495 So.2d 145 (Fla. 1986); Palmes v. State, 397

So.2d 648 (Fla. 1981); State v. Carr, 336 So.2d 358 (Fla. 1976). This court held in Palmes that the sentencing court may in his discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedure. Id. at 656, citing State v. Carr, 336 So.2d 358 (Fla. 1976) and Lamadline v. State, 303 So.2d 17 (Fla. 1974). The trial judge properly exercised his discretion. When asked the basis for his ruling, the trial judge stated:

> I may just do it under the auspices of my discretion to use a jury, rather than specifically determining the questions posed in the Ferguson case. Does that answer your question? Wait and see my order. It may or may not address that.

(R 61).

The judge's order states that he is exercising its discretion to empanel a jury to render an advisory verdict (R 3220). The judge did not rely on Ferguson as Sireci argues, even though the reasoning in Ferguson is applicable to this case.

In Ferguson, the court held that the trial court must permit the state to present its penalty evidence to a jury, unless the state consents to the waiver of the jury. Id. at 464. The court also reasoned:

> Assuming that the language of section 921.141 permits the waiver of a jury for the penalty phase after a jury has been employed for the guilt phase, the statutory language cannot override the procedural right given to the state in Florida Rule of Criminal Procedure 3.260. That rule clearly specifies that the defendant can only waive trial by jury "with the

> consent of the State." The legislature has no authority to create a conflicting rule of procedure in section 921.141, Florida Statutes (1987). Only the Florida Supreme Court has the power to adopt rules of practice and procedure for Florida's courts. (cites omitted). Rules relating to waiver of jury trial are procedural rather than substantive. State v. Garcia 229 So.2d 236 (Fla. 1969). Thus, only the supreme court could create a rule overriding rule 3.260. We do not interpret the reference to section 921.141 in Florida Rule of Criminal Procedure 3.780 as a decision by the supreme court to override rule 3.260 during the penalty phase.

Ferguson, 556 So.2d at 464.

Although Sireci argues Ferguson is erroneous, this court obviously does not agree since it recently denied review. Ferguson v. State, 564 So.2d 1085 (Fla. 1990).

When this issue was presented to the trial court in the motion to vacate and to this court on appeal, Sireci argued that the judge and jury should have heard the mental health mitigating evidence. (See Florida Supreme Court Case No. 70.937 Answer Brief). The trial court's order states that Sireci requested a new sentencing trial and ordered a "new trial as to sentence". (See Appendix A). This court affirmed the circuit court's order in all respects. State v. Sireci, 536 So.2d 231, 234 (Fla. 1988). The trial court would have abused its discretion if it had failed to impanel a jury since this court upheld the order of a new sentencing trial.

Furthermore, had the trial court allowed Sireci to waive the jury recommendation, this issue inevitably would be before the court as to whether the waiver was voluntary and intelligent. See Palmes v. State, 397 So.2d 648, 656 (Fla. 1981). Sireci has spent the last four years convincing this court and the circuit court he has brain damage which inhibits his ability to understand the consequences of his actions or function coherently, yet he asks the trial court to allow him to waive the advisory sentence.

Furthermore, contrary to Sireci's statement that the jury recommendation is "nearly binding" on the judge, the capital sentencing statute, United States Supreme Court case law, Eleventh Circuit Court of Appeals case law and recent opinions of this court illustrate that the jury recommendation is not binding, but is advisory. Section 921.141(2) calls for an advisory sentence to the court. Section 921.141(3) states that "notwithstanding" the "recommendation" of the jury, the court shall enter a sentence of life imprisonment or death. In Spaziano v. Florida, 468 U.S. 447 (1984), the United Supreme Court upheld Florida's capital sentencing scheme, specifically noting that in Florida the jury is not the final sentencer as it is in the majority of jurisdictions. Id. at 463-464. See also Proffitt v. Florida, 428 U.S. 242 (1976). As the Court stated in Spaziano:

> Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding

> aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla. Stat. §921.141(3)(1983). The Florida Supreme Court must review every capital sentence to ensure that the penalty has not imposed arbitrary or capriciously. §921.141(4).

Spaziano, 468 U.S. at 466.

Therefore, not only is the jury recommendation not binding on the trial court, the Supreme Court of Florida independently reviews every capital sentence. This court's decisions demonstrate that the jury recommendation is in no way considered final, but is advisory only. See Penn v. State, 16 FLW S117 (Fla. January 15, 1991) (jury recommended death sentence, Florida Supreme Court remanded for life sentence); Jackson v. State, Case no. 71,564 (Fla. Jan. 18, 1991), (same); Nibert v. State, 16 FLW S3 (Fla. Dec. 13, 1990) (same); Farinas v. State, 569 So.2d 425 (Fla. 1990), (same); Livingston v. State, 565 So.2d 1288 (Fla. 1988) (same). This was specifically stated in Cave v. State, 529 So.2d 293, 296 (Fla. 1988).

Although Sireci argues that the jury recommendation is nearly binding because of the standard set forth in Tedder, the Tedder standard is that used in an override situation, not where the jury recommends death. Further, whether Tedder has been extended too far has been the discussion of several concurring and dissenting opinions. See Dolinsky v. State, Case No. 64,743 (Fla. Jan. 18, 1991); Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988). If, as Sireci

argues, the jury recommendation were allowed to be binding, Furman v. Georgia, 408 U.S. 238 (1972), would be violated. See dissent in Grossman, 525 So.2d at 848. Therefore, Sireci's argument that a defendant has the right to waive the jury recommendation because it automatically dooms him, fails to account for the fact that the judge is the final sentencer with the ability to override the jury recommendation. This authority extends to overriding both death and life recommendations. See Bassett v. State, 541 So.2d 596 (Fla. 1989); Tedder, supra; §921.141(3) Florida Statutes.

The Eleventh Circuit Court of Appeals discusses the role of the advisory jury as follows:

> . . the function of the jury in a capital case in Florida, insofar as sentencing is concerned, is not final. Fla. Stat. Ann. §921.141 (west 1985); Foster v. State, 518 So.2d 901, 902 (Fla. 1987); Herring v. State, 446 So.2d 1049, 1056 (Fla. 1984), cert. denied sub nom, Herring v. Florida, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Thompson v. State, 328 So.2d 1, 5, (1976). Under the Florida death penalty law, the jurors, after finding the defendant guilty of first-degree murder, are required to hear and consider any further evidence touching upon aggravating circumstances, mitigating circumstances, the crime, and the defendant, and then return an advisory verdict in favor of the death penalty or in favor of life imprisonment without eligibility for parole for 25 years. The judge presiding at the trial actually imposes the sentence which may be, under certain circumstances, agreeable to the advisory verdict or different. Thus, the final

> responsibility as to sentence rests upon the judge. Fla.Stat.Ann. §921.141 (West 1985).

Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988). Stewart deals with the role of the jury in a capital case in the context of Caldwell v. Mississippi, 472 U.S. 320 (1985). As discussed therein, the role of the jury is important, but a defendant is not "automatically doomed" by its recommendation. Stewart, 847 F.2d at 1492.

This court's leading case on the Florida capital sentencing scheme, State v. Dixon, 283 So.2d 1 (Fla. 1973), states that the "trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury". Id. at 8. (Emphasis added).

Sireci's argument that the trial judge said he was "required" to impose a death sentence because the jury recommended it, is misleading. The trial court's order states:

> This court finds sufficient aggravating circumstances proved to the exclusion of every reasonable double to justify the imposition of a sentence of death. The aggravating circumstances significantly outweigh the mitigating circumstances. The imposition of a sentence of death is required. (Emphasis added)

(R 3307). The trial court's statement that a sentence of death is required when the aggravating circumstances outweigh the mitigating circumstances is an accurate interpretation of the death penalty statute. Dixon, supra at 9.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL BECAUSE THE DEFENSE HAD ALREADY PRESENTED TESTIMONY FROM WHICH THE JURY COULD CONCLUDE HE WAS ON DEATH ROW.

Sireci claims the trial court erred in denying the motion for mistrial because the prosecutor informed the jury Sireci had previously been sentenced to death. The cite to the record shows that the comment was not a direct statement to the jury that Sireci had been previously sentenced to death but was a question posed to Dr. Lewis whether her findings were what she would expect from this man on death row (R 1673). It was not the defense attorney who caught the comment but the witness and the court as follows:

> Q. Maybe it's not a paranoid ideation, is that correct?
> A. Maybe it's not, but I would put my reputation on the fact that it is. It is -- I mean, it's demonstrated. It's one of the research criteria.
> Q. It's what you expected to find of this man on death row, isn't that correct?
> A. No, it is not. I had no idea. I beg your pardon, sir. What did you just say?
> Q. Isn't that correct?
> THE COURT: Just a moment, counsel. Approach the bench, please.
>
> (discussion at the bench)
>
> THE COURT: Mr. Lerner? Keep control of what your comments are, please. You just mentioned death row.
> MR. LERNER: My gosh. Okay.
> MR. WEST: Certainly would move for a mistrial. It's been clear that there's to be no mention that Henry Sireci ever had death row status. We have taken great pains to do that. And now the cat

> is literally out of the bag and there's no way to come back from it. There's certainly no cautionary instruction that would cure the taint. It would only draw more attention to it. And that the only recourse could be, at this point, a mistrial.
>
> THE COURT: I'm going to deny your motion for mistrial. I caution you.
>
> MR. LERNER: I'm sorry, your Honor.
>
> THE COURT: Okay.

(R 1673-74). The question rises whether the defense made a contemporaneous objection. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). One page later, the witness stated that she was talking about the Death Row study and was cautioned by the court (R 1675-76).

Dr. Lewis stated on direct examination that she conducted studies of inmates on Death Row with a team, including Dr. Pincus (R 1482-83). Dr. Pincus also testified for the defense (R 1988). Dr. Lewis said that people on Death Row often deny child abuse (R 1504). She later said Sireci blocked out abuse (R 1556). She said she first met Sireci during a study of eight to ten individuals incarcerated at Starke (R 1519). It can hardly be said it was the prosecutor who brought forth testimony that Sireci was on death row when the defense witness on direct examination made Sireci's status quite apparent. Any information the staet provided was cumulative to Dr. Lewis to Death Row referring before and after the state's question.

Furthermore, Sireci argued in Point I that the reason he wanted to waive the advisory jury was because he was certain they would know his death row status. Thus, he anticipated the obvious. In fact, the Initial Brief states:

> Due to the gap between the crime/conviction and the penalty phase, combined with the fact that much of the psychiatric information was accumulated while Sireci was imprisoned on death row, this jury could not help but perceive that a prior sentence of death had been imposed in this case. Even so, there was absolutely no reason for the prosecutor to ignore the prior court order and directly so inform the jury during his questioning of Dr. Lewis. The argumentative question was apparently asked to discredit the psychiatric tests which were performed in that setting. While it may arguably be relevant that many of the psychiatric tests were performed while Sireci was imprisoned on death row, the prejudice of that information far outweighs its probative value, and the trial court's order makes that information presumptively inadmissible.

Initial Brief at 46.

The standard for granting a mistrial is not whether the defendant was prejudiced, since all state evidence prejudices a defendant, but whether the error was so egregious as to vitiate the entire trial. Cobb v. State, 376 So.2d 230 (Fla. 1979); State v. Murray, 443 So.2d 955 (Fla. 1984). Any error in the prosecutor's question was harmless beyond a reasonable doubt. State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

This court recently addressed this issue in Robinson v. State, 16 F.L.W. S107 (Fla. Jan. 15, 1991). In Robinson, a sign described the proceeding as a "criminal re-sentencing." This court held that Jennings v. State, 512 So.2d 169 (Fla. 1987) controlled. As in Robinson, there is no indication in the record that the jurors knew anything about what transpired in the previous trial. The jurors were aware Sireci had been convicted

of murder and were to make a recommendation of life or death. They were presented the facts of the case so it was quite obvious it was a murder. Even if the jurors were aware Sireci was housed on Death Row, this does not mean they were aware a previous jury had sentenced him to death. In a layman's mind, Death Row residence could mean death eligibility. Furthermore, there was never any definite statement that a previous jury recommended death. The jury could have recommended life and the judge overridden the recommendation.

Sireci contends that the affidavit from a defense investigator shows the jury was tainted. The affidavit only alleges that up until the time Dr. Lewis testified the jury had no knowledge Sireci was on death row. As previously discussed, Dr. Lewis made it quite clear on direct examination that she had met Sireci while doing studies of death row inmates. This cannot be attributed to the state.

Sireci also claims the trial court erred in denying his motion to interview juror Miller. This court recently discussed a similar issue at length in State v. Hamilton, Case No. 75,717 (Jan. 17, 1991). In Hamilton, the issue as whether the jury was tainted by unauthorized publications being brought into the jury room. This court noted that the Florida Evidence Code absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors. §90.607(2)(b) Fla. Stat. (1987); Hamilton, slip op. at 11. The test to be used is a harmless error analysis with the inquiry as whether there was a reasonable possibility the breach was prejudicial to the defendant.

Hamilton, slip op. at 14-15. Any inquiry must be limited to objective demonstration of extrinsic factual material disclosed to the jury and not the thought process of the jurors. Hamilton, slip op. at 14. An evidentiary hearing need not be conducted when an unreasonable allegation of juror misconduct is made. Hamilton, at 17. In the present case, the prosecutor's question was harmless beyond a reasonable doubt since the defense had already placed the information before the jury. Furthermore, as the trial judge indicated, any halfway intelligent juror would figure it out anyway (R 2688). The trial court was also concerned that the defense approached a juror (R 2685). See also, Tanner v. United States, 483 U.S. 107 (1987).

Finally, Sireci claims he had to forego presenting relevant mitigating evidence concerning his potential for rehabilitation. There was no proffer of any evidence that Sireci could be rehabilitated. The issue is waived. Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986). The defense position was that Sireci had severe organic brain damage, could not be held accountable for his actions, and could be completely normal one day and out of control the next. There was some testimony from a state witness, Dr. Upson, that Sireci could function better in a structured environment (R 2259).

POINT III

APPLYING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE TO SIRECI IS NOT AN EX POST FACTO VIOLATION.

Sireci argues that the application of the cold, calculated and premeditated aggravating circumstance violates the ex post factor clause. He admits this court has previously ruled against him, but urges this court to recede from its position. This court has made its position clear on this position. See, Justus v. State, 438 So.2d 358, 368 (Fla. 1983); Combs v. State, 403 So.2d 418 (Fla. 1981); Stano v. Dugger, 524 So.2d 1018, 1019 (Fla. 1988). Sireci has provided no compelling reason for this court to overrule itself. The Eleventh Circuit Court of Appeals recently held that cold, calculated and premeditated was not an ex post factor violation as follows:

> Francis contends that the trial court's application of the aggravating circumstance "cold, calculated, and premeditated" violated the ex post factor clause, article 1, section 10 of the United States Constitution. (The Florida Legislature added this statutory aggravating factor to the list after the murder occurred but before Francis's conviction.) In Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Supreme Court set out the test for determining whether a statute is ex post facto: "two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 482 U.S. at 430, 107 S.Ct. at 2451 (quoting Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). We hold that no ex post facto violation occurred because the application of the

> aggravating circumstance "cold, calculated, and premeditated" did not disadvantage Francis. As the district court reasoned: [T]he facts on which the trial judge relied in applying the 'cold, calculated, and premeditated' factor were the same facts underlying application of other aggravating factors, such as 'hindering law enforcement' and 'especially atrocious and cruel.' Francis argues that the retrospective application of this factor adversely affected his sentence because the trial judge mistakenly enumerated three, rather than two aggravating factors. The Florida sentencing scheme is not founded on 'mere tabulation' of aggravating and mitigating factors, but relies instead on the weight of the underlying facts. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984).... [I]t was proper for [the trial court] to consider those specific circumstances in sentencing. Francis v. Dugger, 697 F.Supp. at 482.

Francis v. Dugger, 908 F.2d 696, 704-05 (11th Cir. 1990). Even if the cold, calculated, and premeditated were invalidated, the four remaining aggravating circumstances outweigh the mitigating circumstances.

POINT IV

THE TRIAL COURT PROPERLY REJECTED THE STATUTORY MITIGATING CIRCUMSTANCES BECAUSE THEY WERE NOT SUPPORTED BY A REASONABLE QUANTUM OF COMPETENT PROOF.

Sireci claims the trial court did not apply the correct standard and otherwise erred in rejecting the four statutory mitigating factors claimed by the defense.

Regarding mitigation, the trial court order reads:

> Based upon the mitigating evidence presented the defense claims four statutory mitigating circumstances exist.
>
> 1. Extreme Mental or emotional disturbance. Based upon the testimony of Drs. Lewis and Pincus it is clear the Defendant has a high potential for aggression and violence. This may be a basis for the medical conclusion he was under an extreme mental or emotional disturbance and may tend to decrease the weight given to the aggravating circumstance of heinous, atrocious or cruel but the evidence does not establish a legal basis for the statutory mitigating circumstance.
>
> 2. Extreme duress or substantial domination. The evidence showed the Defendant was vulnerable to suggestions and the robbery was probably committed to get money for Barbara Perkins but falls short of showing the murders were committed while under extreme duress or the substantial domination of another person. The Defendant was exercising his free will and knowingly committed this murder.
>
> 3. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The Defendant understood the criminality of his conduct. He acted to eliminate

> witnesses to his robberies and avoided the location of one of the robberies after its commission to avoid detection. He prepared in advance for the death of Howard Poteet.
>
> 4. The Defendant's age. The evidence of the Defendant's low emotional age is insufficient to establish this statutory mitigating circumstance.
>
> While the Court does not find any statutory mitigating circumstances there are significant nonstatutory mitigating circumstances which must be weighed. In spite of his bleak childhood the Defendant was a hard and steady worker. He manifested a concern for others and was unselfish with his friends and family. He has done well in prison. He has brain damage and has suffered severe abuse as a child.
>
> The Defendant's brain damage and history of abuse resulting in his having at least two factors common in aggressive violent persons does not establish an uncontrolled propensity for violence nor can it be found to be the cause of the heinous nature of the offense but does cause this court to give lesser weight to that aggravating circumstance.

(R 3305-07).

Although the trial judge found the degree of mental or emotional disturbance was not "extreme" enough to qualify as a statutory mitigating factor, he did give it weight as a nonstatutory mitigating factor under the auspices of brain damage and severe abuse. Additionally, the judge weighed this factor by giving the aggravating circumstance of heinous, atrocious and cruel lesser weight due to the brain damage and history of abuse. Although the statutory mitigating factor is defined as "extreme,"

this does not preclude the trial judge from considering lesser degrees of mental disturbance. See, Blystone v. Pennsylvania, 110 S.Ct. 1078, 1084. This is the approach the trial court used. The facts surrounding the murder do not indicate an extreme mental or emotional disturbance. Sireci announced that he was going to rob a car and money, called ahead to be sure the car lot stayed open, had Perkins drop him off and station herself across the street so he could not be seen, and carried weapons to the scene. After the murder he returned to the motel where Perkins picked him up, went home and washed the bloody items, disposed of the, and proceeded to establish an alibi. This is not the extreme disturbance seen in Cheshire v. State, 568 So.2d 908 (Fla. 1990), where a defendant has been drinking, is emotionally inflamed by being rejected by a woman, then finds his estranged wife in bed with another man. Neither is this the extreme disturbance of Nibert v. State, 16 F.L.W. S3 (Fla. Jan. 13, 1990), where the defendant suffered from chronic and extreme alcohol abuse, had been drinking the day of the crime, was abused as a child, and lacked control over his behavior when drunk. The evidence in Nibert showed that after the murder, he was white, hyperventilating, gasping for breath, had dry heaves, and was freaked out. Although Sireci contends that he presented uncontroverted evidence, the record shows that the defense experts were impeached during cross-examination and contradicted by Dr. Upson. There is hardly a "reasonable quantum of competent proof" on this or the other statutory mitigating circumstances. See, Nibert, supra at S4; Campbell v. State, 16 F.L.W. S1 (Fla.

Dec. 13, 1990). Dr. Upson stated several times that there was no significant connection between the circumstances of the crime and any brain damage Sireci might have (R 2285, 2291, 2292, 2424). The Poteet murder must also be viewed in context of the Short murder. When Sireci realized he could rob and kill without being caught, he quickly planned another robbery/murder. This was a calculated decision, not an impulsive act which arose from an extreme mental or emotional disturbance.

The record does not support the statutory mitigating circumstance of substantial domination. There is absolutely nothing which shows Perkins manipulated, coerced or even encouraged Sireci to commit this murder. To the contrary, Perkins testified she did not want to participate (R 982). Sireci was the person dominating, not the one being dominated.

Likewise, there is no record support for Sireci's allegations he did not appreciate the criminality of his conduct or was unable to conform his conduct to the requirements of the law. What the record shows is that Sireci committed a robbery in 1970 and was caught because he did not eliminate the witness. When he eliminated John Short, he got away with it. It's simple. The consequence of not eliminating the witness is getting caught. So he eliminated Howard Poteet. Sireci's statements to Woodall and Wilson show he understood exactly what he had to do (R 1195, 1209). There was no uncontroverted evidence of this mitigating circumstance. On the contrary, Dr. Upson specifically concluded that Sireci understood the consequences of his behavior and could conform it to the requirements of the law (R 2422-24). In his

1962 testing, Sireci said they lock criminals up so they don't do it again (R 2227).

Sireci was twenty-seven at the time of the murder. There was no testimony that his low emotional age contributed to the crime. Age is a mitigating circumstance only when it is relevant to the defendant's mental or emotional maturity and his ability to take responsibility for his own acts and appreciate the consequences flowing from them. Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). See also, Echols v. State, 484 So.2d 568 (Fla. 1985); Lamb v. State, 532 So.2d 1051 (Fla. 1988); LeCroy v. State, 533 So.2d 750 (Fla. 1988).

The only testimony Sireci points to to establish this mitigating circumstance is that of a co-worker who said Sireci acted like a little boy. He points to no expert testimony to establish a "reasonable quantum of competent proof" of low emotional age. Dr. Upson testified that Sireci's IQ was 95 and his abilities were consistent with his IQ. Sireci was a hard worker and owned property in two states.

The resolution of conflicts in expert or other testimony is solely the responsibility of the judge and this court has no authority to reweigh that evidence. See, Gunsby v. State, 16 F.L.W. S114 (Fla. Jan. 15, 1991); Lopez v. State, 536 So.2d 226 (Fla. 1988); Stano v. State, 460 So.2d 980 (Fla. 1984). In Gunsby, the trial court considered the conflicting testimony, resolved the conflicts among the mental health experts, and to a large extent, rejected the testimony of the expert who concluded Gunsby had a severe mental condition. The trial judge here

discussed the defense expert's testimony and found that it established nonstatutory mitigation (R 3304-05). However, the evidence did not establish statutory mitigation. The record supports the trial court's findings.

POINT V

THE STATE DID NOT COMMIT REVERSIBLE ERROR BY PRESENTING VICTIM IMPACT EVIDENCE OR NONSTATUTORY AGGRAVATING CIRCUMSTANCE. THE LATTER ISSUE IS NOT PRESERVED FOR REVIEW.

Sireci reiterates the allegations of Points I, II, and III and claims that these errors, added together with a Booth [12] violation, and improper introduction of nonstatutory aggravating factor, render the jury recommendation unreliable.

Sireci seems to claim that allowing Mrs. Poteet to testify is a per se Booth violation. He points to no testimony which points to victim impact evidence. The record shows that the court asked the prosecutor to verify that the witness would testify about the victim having his wallet (R 1139). The record shows that the state attorney then told the court that Mrs. Poteet could testify her husband had the wallet (R 1140). On direct examination she testified that Mr. Poteet had his wallet when he left for work (R 1143). When asked on cross-examination whether she actually saw Mr. Poteet put the wallet in his pocket, she said she did not but was sure he had it because he always put it on the chest of drawers (R 1145). She had seen the wallet on the chest of drawers before he left, and it was not there after he left (R 1146). At this point defense counsel objected that the witness only presented circumstantial, not direct, testimony that the victim had his wallet. Defense counsel also objected that the state had elicited testimony about credit card slips (R 1147). There was no contemporaneous objection to this later

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[12] Booth v. Maryland, 482 U.S. 496 (1987).

testimony so that issue is waived. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The state attorney told the court he had asked the witness about her testimony and she said she had seen the wallet, but she backed down on cross-examination (R 1149). The state attorney asked the court to make a finding on the record that the two Poteet witnesses did not show any emotion while they were testifying which the court so noted (R 1151). See, Thompson v. State, 565 So.2d 1311 (Fla. 1990) (identification of victim by family member harmless error where witness showed no emotion).

Sireci also objects to the question whether the witness' father was robbed and murdered. Defense counsel objected and the state withdrew the question. Counsel did not request a mistrial. The next objection was when the state asked the victim's son how he became involved in "doing that" after the witness had said he arrived at 7:00 a.m. The witness then answered that his father went to auctions. It is unclear how this testimony can be classified as Booth evidence or how it was even responsive to the question. The witness again gave an unresponsive answer when he offered the testimony that his father kept mementos in his wallet. The court instructed the witness to answer only what the question called for so the state could control what evidence came in (R 1123-24). There was no intent on the state's part to elicit the complained-of answers, neither were the answers pure Booth material.

Although Sireci argues that the testimony of the wife and son was "needless", the wife established that the victim had his

wallet and the son established the operating procedure of the business, particularly that there was a large sign offering "spot cash" for used cars. The defense had also raised questions about the location of the car keys, number of cars on the lot and location of the money. Since the victim's son worked at the car lot, his testimony was relevant to these issues.

The matters complained of do not constitute the type of evidence, or rise to the level of the evidence, condemned in Booth and Gathers. Those cases do not prohibit evidence regarding the victim when such evidence is relevant to the circumstances. of the crime. Booth does not preclude evidence of characteristics of the victim which are relevant to the circumstances of the crime. Mills v. Dugger, 15 FLW S589 (Fla. Nov. 8, 1990); Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293, 1295 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541, 545 (Fla. 1990). The testimony that Poteet had his wallet when he left home was relevant to whether the murder was committed during a robbery.

In Hitchcock v. State, 16 F.L.W. S23 (Fla. Dec. 20, 1990), the victim's mother described her daughter and the state argued her personal characteristics to the jury. This court found:

> Although Booth disapproved admitting victim impact statements at penalty proceedings, it recognized that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime... Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant." 482 U.S. at 507 n.10.

> The complained-about testimony was a dispassionate description of the victim's characteristics and directly rebutted Hitchcock's claim that she consented to having sexual intercourse with him. It was, therefore, relevant. Cf. Bertolotti v. State, 565 So.2d 1343 (Fla. 1990) (testimony that poor health prevented victim from having intercourse with her husband relevant to whether sexual battery had occurred). Although prejudicial because it contradicted Hitchcock's contention, the testimony was not introduced to inflame the jury against Hitchcock or to create sympathy for the victim or her family as prohibited by Booth. We find no error in the admission of his testimony. Hitchcock has demonstrated no reversible error regarding the prosecutor's argument.

Id. at S25. Sireci also protests the family members being in the courtroom. As the trial court observed, family members have the constitutional right to stay informed and to be present at trial (R 1141-42, 1152). See, Art. I §16(b) Florida Constitution.

Sireci next claims reversible error because the prosecutor asked Perkins how Sireci felt about the murders, and Perkins said he as proud of it. Defense counsel started to object then retracted the objection. After the witness answered, defense counsel objected and asked for a mistrial on the basis the prosecutor introduced evidence of a nonstatutory aggravating factor. The court asked counsel:

> THE COURT: Why did you not object? You made a comment and I waited for you to object and you said you had nothing. If you knew what was coming, why did you not object?
>
> MR. WEST: I can't say I knew it was coming. I was concerned about it. But

I have to assume that the prosecutor allows appropriate questions.

The court has given the prosecutor latitude to solicit evidence that might only be admissible on rebuttal, over the objection of the defense.

I assume he took this court's cautionary instruction to hear concerning those matters. And when he is seeking testimony in support of his case, I assume that he would have cautioned his witness not to testify about clearly inadmissible matters.

Certainly, reading it in the paper and "acting proud" has no place in this trial. It can only be inflammatory.

THE COURT: Mr. Lerner?

MR. LERNER: Your Honor, the whole point of this trial is going to be what was Mr. Sireci's state of mine; whether he was able to form intent. Again, this is something that Mr. West has gone into on opening statement.

Aside from which, if this is error, it's not fundamental error. And, as you pointed out, he should have objected.

THE COURT: I'm going to deny your motion for mistrial. I will overrule the objection at this point.

MR. WEST: I'm sorry?

THE COURT: I'm overruling the objection as not being timely.

MR. WEST: You mean that I waived the objection?

THE COURT: Waived by not making it timely, yes, sir.

MR. WEST: The court is not ruling that it's proper testimony, only that the objection was too late?

> THE COURT: I have ruled. And I see nothing wrong with the testimony at this point. I'm going to overrule the objection.
>
> (Thereupon, the side-bar conference was concluded.)
>
> THE COURT: Objection is overruled.
>
> You may proceed.

(R 1008-09).

This is a classic example of defense counsel knowing an error may occur and letting it happen in order to take advantage of it. As the court ruled, the objection could have been made timely but defense counsel withdrew his objection and the witness proceeded to answer. Absent a timely objection, a claimed error is not preserved for review. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). An accused is not entitled to refrain from making timely objection then waiting until the results are in to cry prejudice. See, Barrett v. State, 266 So.2d 373 (Fla. 4th DCA 1972). Unfortunately for Sireci, he is "hoist on his own petard." See, Rondinelli, Inc. v. Safeco Title Ins. Co., 544 So.2d 326 (Fla. 5th DCA 1989); Davis v. State, 383 So.2d 620, 622 (Fla. 1980). The requirement of a contemporaneous objection is based on practical necessity and basic fairness of the judicial system. Nixon v. State, 15 F.L.W. S630, 631 (Fla. Dec. 7, 1990). In this case defense counsel could have prevented the testimony but chose not to. Basic fairness prohibits Sireci from reaping any benefit from this alleged error which could have, and should have, been prevented by a timely objection.

Furthermore, there is no merit to the argument that because the witness said Sireci acted proud of the murder a new trial is required. One of the main issues at re-sentencing was whether Sireci was able to plan a murder and appreciated the consequences of his actions. The fact that he was proud of the murder showed he intended to kill Poteet and was satisfied with his success. This is not like Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990), where the prosecutor asked the jury "Did you see any remorse?" and highlighted the argument during the penalty phase by calling a deputy to testify for the express purpose of testifying Jones showed no remorse. Neither is this case like Robinson v. State, 520 So.2d 1, 6 (Fla. 1988), where the prosecutor argued that according to the mental health expert Robinson showed nor remorse. In this case, the defense presented testimony that Sireci didn't understand his actions and statements made after the murder were "grandiose and macho" because he likes to think he is very tough or important (R 1590-91). The state witness' testimony was similar to the defense testimony and cumulative in nature. It can hardly be reversible error when the defense opens the door.

The trial court did not refer to lack of remorse in his sentencing order. Any statement that Sireci was proud of the murder could be considered only as it relates to the mitigating circumstances regarding Sireci's state of mind at the time of the offense. See, Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990). Even if there was error, it was harmless error. See, Walton v. State, 547 So.2d 622, 625 (Fla. 1989). There is no reversible error, either individually or cumulatively.

POINT VI

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

As his last argument, Sireci presents an array of constitutionality claims. These include:

1) The statutory aggravating factors are vague and overbroad
2) The Supreme Court of Florida is acting as a legislative entity
3) The aggravating circumstances do not limit the class of persons eligible for the death penalty, and
4) The jury instructions shift the burden of proof.

These issues have been repeatedly rejected by this court and the United States Supreme Court. Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242 (1976); Robinson v. State, 16 F.L.W. S107 (Fla. Jan. 15, 1991); Gunsby v. State, 16 F.L.W. S114 (Fla. Jan. 15, 1991); Stano v. State, 460 So.2d 890 (Fla. 1984).

CONCLUSION

Based on the foregoing arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence in all respects.

Respectfully submitted,

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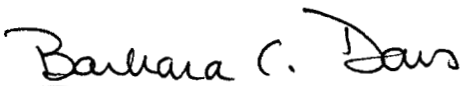

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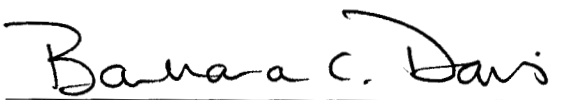
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery in the box at the Fifth District Court of Appeal to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 1 day of February, 1991.



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