IN THE SUPREME COURT OF FLORIDA

HENRY P. SIRECI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 76,087

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is the direct appeal of a sentence of death imposed in the Circuit Court of Orange County by the Honorable Gary Formet following a new penalty phase. In 1977, a jury found Henry Sireci (Sireci) guilty of the first-degree murder of Howard Poteet. The conviction and death sentence were upheld in Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Sireci subsequently moved for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 because his two court-appointed psychiatrists, Doctors Herrera and Kirkland, did not conduct competent psychiatric evaluations. Judge Formet granted an evidentiary hearing, a ruling that the state unsuccessfully appealed. See State v. Sireci, 502 So.2d 1221 (Fla.1987)("A new

sentencing hearing is mandated in cases which entail psychiatric examinations to grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage."). After the evidentiary hearing, Judge Formet granted a new capital sentencing hearing based on the following:

> The Court finds there is substantial evidence that the Defendant's organic brain disorder existed at the time the defendant murdered Henry Poteet. That circumstances existed at the time of the defendant'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 failure of the Court appointed psychiatrists to discover these circumstances and to order additional testing based on these circumstances known deprived the defendant 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.

State v. Sireci, 536 So.2d 231, 233 (Fla.1988). This is the direct appeal of the death sentence imposed following the new penalty phase in which Judge Formet refused to permit Sireci to waive a new jury sentencing recommendation.

STATEMENT OF THE FACTS

The following letters written and received by Sireci just before the murder of Poteet (R1422) speak volumes:

> Dear loving mother,
>
> How have you been? I am doing fine feeling good. I have my loving wife along with me and we are getting along fine. Please get my W-2 form from Liebovich and send it with your answer.
> I am getting tired of getting put around the bush about this and that. Suzy and some of my other cousins have told me that your husband isn't my real father. The last few years I was living at home he showed in many different ways that he wasn't my real father.
> I spent X-mas with Irene and Bill Lowe. I knew that you and Irene were very close friends when they lived up north. So I asked Irene if you my dear mother said anything to her about my real father and me. She told me that you were still <u>in love</u> with my real father and always will be. I figure that I am a grown boy now and know (sic) more playing around. Just please tell me <u>who is he</u>.
>
> P.S. Please don't get mad at Irene for telling me about what you had said to her.
>
> Your loving son,
>
> Haven't figured out what name yet!

Defendant's exhibit #3. Two weeks later Sireci received a reply which read substantially as follows:

> Dear loving Henry, Perry Sireci,
>
> I think you are the lowest, dirtiest, rottiest (sic), lying, stupidiest (sic), jackass I've ever seen! (God forgive me for lowering the jackass). The jackass has more of a conscious (sic) and more sense than you

ever dared to have. Your (sic) insane. Are you ever going to grow up and be a man. But I don't think the human race would ever claim you. You figure you're a grown boy. Ha! Ha!

Henry is the only father you had and ever will have and the sooner you realize this the better off you will be. As you will be beating your head against a brick wall the rest of your life & for nothing. As for the way we have treated you, you were fed, clothed and had a lot more than I ever had when I was a child. You also had the love of a father and mother who helped you out time and again when you got in trouble with the law and with money problems. Tell me one rotten dirty thing we have done to you to deserve the rotten dirty things you have been doing to us. You can but won't face up to the fact all this trouble you brought on yourself and no one else. So now you're running away and seeing if that will help. Go ahead blame everybody else for your troubles. Keep on running, lying, cheating. You're gone so for now hell and purgatory won't even except (sic) you.

You asked how have you been and do you really care? The way you drag me down in the gutter and hurt our feelings at every bend in the road. You know your dad is sick and never will be well but you, with such a dear sweet heart, kicking him in the teeth and not excepting (sic) him as your real father and you know we have money problems but do you give a damn. Hell no. Ma will pay my loan I ran out and what about the other money mom and dad helped you with. That's their hard luck. I got to play pool. I spend money on girls and see how many pants I can get in & fuck & get a venereal disease then see how many I can pass it on to. That really shows intelligence. Who cares. I don't. I'm on the tallest pedestal. I won't ever get knocked off. Ha, ha.

Well Benny Blackstone, alias Henry Perry Sireci consider yourself an orphan as we don't claim you as our once loved first son any more.

Your loving mother

> Call yourself Benedict Arnold. I will get your tax and W-2 forms and that is all from now on don't call or write as we don't ever want to hear about your so called real father again.

Defense exhibit #11.

Sireci's wife was with him when he wrote the letter to see if Henry Sireci Sr., was his real father (R1421) and she was present when Sireci got the response, a letter she read several times not believing that any mother could write some- thing like that to her son. (R1429) Sireci would sit and stare at the letter and read it over and over again. He carried it around with him everywhere and could not leave it alone:

> Q. (defense counsel) Ruth, before the break we were talking about a letter that Butch received from his mother that you read.
>
> A. (Ruth Blackstone) Yes.
>
> Q. When you say that he read it, did you sit there and read it every word?
>
> A. Yes. I've read it several times.
>
> Q. Why did you read it more than once?
>
> A. I couldn't believe that a mother would write something like that to her son.
>
> Q. What kind of impact did the letter have on Butch?
>
> A. He would sit and stare at it. He'd read it over and over and over again. I could be out in a different room, come in and catch him reading the thing over and just gazing at it. He carried it around with him. Everywhere he would

> go, the letter went. I never got so sick of seeing anything in all the days of my life was that letter. It was just like something he couldn't keep his hands off of. He kept on reading it and looking at it.

(R1446). Mrs. Blackstone testified that, after receiving the letter, Sireci went to Florida in October of 1975 to find a job simply because someone came to the service station where Sireci worked and remarked that good jobs could be had in Florida. (R1422-24;1466)

Once in Florida, Sireci picked up Barbara Perkins, a hitchhiker, and shortly thereafter moved in with her in Orlando. (R968-70) Perkins had three children and was married but separated, and Sireci agreed to help pay her bills. (R971) Sireci did not sleep much; he would go to work at five or six in the morning yet not go to bed until three A.M. (R1018) Perkins noticed that Sireci did not catch on to things as did other men his age. (R1018) He would get down in her floor while playing with her children as if he were one of them. (R1018) Though not intimate with Perkins, Sireci placed her on a pedestal and would do anything for her. (R1016;1020-21)

Perkins learned that Sireci had robbed a 7-11 store to get money for her as follows:

> Q. (defense counsel) The first part of December in 75, there was kind of a turning point in your relationship with Henry or Butch, in that you had decided to leave Orlando?
>
> A. (Perkins) Yes.
>
> Q. But you didn't have any money, and

that he wouldn't be able to stay with you anymore because there was no money and you wanted to leave town?

A. Right.

Q. The next thing you knew he came back to you and said -- Well, I am sorry. The next thing, you said you knew that he had robbed the 7-11 store?

A. Right.

Q. And when you asked him about it, and he said to you, "I thought you said you needed money"?

A. Right.

(R1021). The robbery of the 7-11 store resulted in the murder of John Short, the clerk who was knifed to death by Sireci.[1] Sireci then went to Poteet Motors to steal an automobile. (R1023-24)

Q: (defense counsel) But he was going to get another car. And the purpose in going to the car lot was to get a car?

A: (Perkins) Right.

Q. That's what he told you?

A. Right.

Q. He didn't tell you he was going to go there and kill anybody?

A. No.

---

[1] Following the conviction for the Poteet murder, Sireci pled guilty to the first-degree murder of John Short in return for a sentence of life imprisonment. Sireci subsequently moved to withdraw the plea, contending that his attorney misinformed him about the consequences another first-degree murder conviction would have should his prior sentence for first-degree murder be vacated. The trial court denied the motion to withdraw the plea; Sireci appealed and the denial was affirmed per curiam by the Fifth District Court of Appeal. Sireci v. State, 565 So.2d 1360 (Fla. 5th DCA 1990). See (R2579-2609)

Q. He didn't tell you he was going to go there and confront somebody and hit them or hurt them or threaten them, but he told you he was going to get to go there to get a car?

A. Right.

Q. To steal a car?

A. Hmm-hmm.

Q. To get the keys so that he could get a car. And that's what you thought was going on: Is that correct?

A. Right.

(R1024).

Perkins drove Sireci to Poteet Motors and dropped him off. (R1025) As usual, Sireci carried two knives, a hunting knife on his belt and a folding knife in his pocket. (R1026) Sireci also took a tire iron with him. (R985) Perkins related the following:

Q. (defense counsel) He didn't take knives with him to go steal a car, that he didn't always have on him?

A. (Perkins) Right.

Q. Henry told you -- Butch told you that he was going to go find out where the keys were so he could steal a car?

A. Yes.

Q. That was what he told you before it happened?

A. Right.

Q. And then after it happened he told you that he was trying to find out where the keys were and there was an argument between himself and Mr. Poteet?

A. Right.

Q. That the argument escalated into a fight that resulted in him striking him with his tire iron that we've been talking about?

A. Yes.

Q. And when Mr. Poteet continued to fight after being struck with a tire iron, that's when Butch stabbed him.

A. I think so, yes.

Q. Anyway, that's what he told you?

A. Right.

Q. At no time did he tell you that the reason he went there was to kill him?

A. No.

Q. Or that he planned to kill him as part of a scheme to steal the car?

A. No.

(R1027-28).

Following the murder, Sireci and Perkins drove to Macon, Georgia, and then to Nashville, Tennessee. (R1028) Perkins, knowing that Sireci would get caught, asked him to go into a K-Mart and steal a jacket for her because she was cold. (R1029) When Sireci tried to do so and was caught, Perkins left and headed to Las Vegas, using along the way credit cards taken from Poteet's wallet. (R1030-35) Perkins was apprehended in Las Vegas while using the stolen credit cards, and she gave a statement to authorities implicating Sireci in the murder. (R1035;1001-04)

In order to best understand Henry Sireci, it is necessary to consider his childhood. As the letters set forth at the beginning of this brief demonstrate, the man who raised Sireci was not his real father. Sireci's mother was 16 and unwed when she became pregnant with Sireci. In order to give her baby a father, she married a man 20 years older than her, a man she hated. (R1559;1568;1372) The Sireci's, an Italian family, lived in a predominantly German rural farm area located in Rockford, Illinois. (R1296;1306) While pregnant, Sireci's mother ingested poisons and abused herself trying to abort his birth, later stating, "evidently, it didn't work." (R1415;1560) When Sireci was born, doctors used forceps which deformed Sireci's head and blinded his right eye. (R2016) Use of the forceps in that manner may have caused organic brain damage, as could have the mother's ingestion of poisons prior to Sireci's birth. (R2016)

Henry was treated differently than the other children born to the Sireci's. He was made to work when the others were not, he was punished when the others were not, he was not given toys or clothes though the other children were, and he had to deal with a father who clearly hated him. (R1317;1349-50;1367; 1411-13) Neighbors observed that Sireci's father was very abusive toward Henry:

> Q. (defense counsel) Let's talk about Henry, Sr., for a little bit. How would you describe him in terms of his demeanor and his attitude in the way he dealt with Butch?
>
> A. (Mr. Doetch) Well, when we'd be over there mowing or raking or baling the

hay, before we started employing Butch to help us with the haying, his father was, would yell at him. He would -- we could hear him out in the field. He would holler very loudly and then the chase would begin. Henry would run from him. And his dad would catch him. And when he'd catch him, he'd beat him up. He'd hit him and knock him down and kick him and pick him up and knock him down and hit him and kick him.

Q. When he would hit him, did he hit him with an open hand or closed fist?

A. He just hit him. He, he would get very violent, and after the chase when he caught -- Henry was very nimble when he was trying to get away from his dad.

Q. This is how old?

A. Oh, he would have been probably eight, nine years old.

* * *

Q. Did you see his father actually catch him sometimes?

A. Many times. He usually caught him.

Q. Hmm-hmm.

A. And sometimes, sometimes the chase would last longer, but he most always caught him.

Q. When he caught him, would you see him actually hit him in a way that didn't seem to you -- well, I don't want to tell you.

A. He hit him like he was fighting another man is the best way I can describe it. And it wasn't that Henry offered resistance or was fighting back. But when he would catch him, he would be, would be so violently raged that he just, he just punched at him. There were times when Henry had swollen eyes from being beat up. I mean, he, he hit him

> anywhere. I mean, it was just, it wasn't necessarily in the head or in his rear end. He may have kicked him in the legs, he may have had picked him up and punched him in the face or may have hit him, you know, upside the head. It was just like an uncontrollable rage when he got his hands on him.

(R1792-94) Doetch described another incident where Sireci's father chased Sireci up a tree, and then obtained an ax and chopped the tree down in order to get at Sireci. (R1796) Henry never complained or talked about the beatings. (R1795-96)

Sireci was a thief; he would always get caught. "He would do things in class that would be disruptive and he would take things that weren't his. Henry was always a known thief. He always would steal things. He would take things that weren't his. And he always got caught. One of the trademarks of everything Henry did in school was he, he always got caught. Whatever he did." (R1797) A neighbor described the Sireci household as a shanti and remarked that Sireci, after stealing things, would always conceal them in the same place and turn them over immediately whenever someone came to him and asked for the property. (R1800-02) When asked whether Sireci every sold the things that he stole, the answer was, "No. As far as I know, everything that he ever stole, people got back. Because they, they knew he took it. And they knew where it would be." (R1802)

In school, Sireci was socially passed, but finally dropped out. (R1798-99) When Sireci became bigger, he began working for the farmers. He was described as always being a good

worker who never complained, doing whatever he was told and doing it well. (R1800) At sixteen years old, Sireci was involved in an automobile accident and was thrown through the windshield; he received a head injury that left him semi-conscious for two weeks. (R1331-32;1527) Described as "goofy" and hyperactive before the accident (R1790;1758-59), Sireci's demeanor changed for the worse after the accident; he was disfigured and at times became disoriented and angry:

> Q. (prosecutor) So that's about a two year period after the accident that you were around him a good deal?
>
> A. (Mr. Lowe) Yes.
>
> Q. Did there seem to be any change in his intellectual capacity, from the way it had been when you were children together?
>
> A. I think so, yes. There was a change. There's a definite change, yes.
>
> Q. How was he changed?
>
> A. He was more "goofy", I think would be the word. He didn't seem to -- he was not aware of some of the things going on around. Some of the things that would go on around us, he was not aware.
>
> Q. Did he seem to be oriented as to where he was and what was going on most of the time?
>
> A. I wouldn't say most of the time, no.

(R1332-33;1368-69)

One of Henry's close friends testified that, prior to the accident, Henry did not really know right from wrong, but the

friend was able to keep Henry from getting in trouble. (R1323-24) Another friend likened Sireci's traumatic childhood to the friend's experiences in Viet Nam. (R1328-30) Sireci just did not seem to be able to anticipate the logical consequences of his acts. (R1468;1823-25) An example of this is found in Sireci's decision to change his name to Butch Blackstone;

> Q. (defense counsel) Did you know of his name changing in the old days from Henry Sireci to Butch Blackstone?
>
> A. (Mr. Doetch) He - he told me about him changing his name. In fact, I think when I got reacquainted with him, he told me his name was Butch Blackstone. And I said, well, how did you arrive at Butch Blackstone? He said, well, I ran into a street sign one night and I looked up and it said Blackstone. I thought it would be a nice name. So I changed my name to Butch Blackstone.

(R1822-23).

At thirteen, Henry Sireci acted like a seven year old -- sweet but real slow. (R1351-52) Henry Sireci could be easily manipulated (R2125), especially by women. He was described as a follower who misunderstood relationships between men and women, doing whatever women wanted him to do. (R1353-54;1360-61) Certainly, Sireci was impulsive when women were concerned. For instance, while living in Tennessee, Sireci met a waitress on a Sunday morning and married her the following Friday. (R1394-95) She once remarked that she liked a leopard skin coat they observed in a store. Sireci later went back and spent $3,000 to purchase the coat. (R1397) Though truly excited and grateful, Sireci's wife quickly returned it because she realized they could

not afford it. (R1397-99)

Sireci was known as a person who failed to appreciate the consequences of his acts, who sought approval and was starved for affection. (R1400) Several acquaintances observed that Sireci did not learn from repetition. (R1401-03;1772) He was unable to handle money matters and could not plan ahead due to his failure to appreciate the consequences of things. (R1399-1403;1776) He is unable to think abstractly, which is consistent with organic brain injury. (R1534-45)

While visiting Sireci's family, Henry's wife observed bizarre behavior from both Sireci's mother and father. She noted that, when Sireci and his father met, "You could see the hate in his eyes" (R1411), referring to Sireci's father's eyes. Henry had to have his wife accompany him into the bathroom when he took a shower in order to prevent his mother from coming in and watching him. (R1415) His mother would embrace him in a "lover's" hug, definitely <u>not</u> a motherly-type hug, which Sireci would endure with his hands hanging at his sides. (R1415-16) Sireci's mother wanted to know how her son was in bed. (R1416) When Sireci's wife talked to Sireci's first wife (Pam), Pam warned her to keep Sireci's mother away from children because she (Pam) had once caught Sireci's mother fondling her (Pam's) son. (R1417)

Sireci's wife spoke of specific acts of abuse against Sireci. For instance, when Sireci was a child a furnace blew up and burned him severely, but Sireci's parents refused to take him to the hospital. He slept outside in the cold because the burns

were too painful for him to sleep inside in the heat. (R1418-19) Another time, Sireci found a hair in his food and pulled it out, saying, "I'm not going to eat this." For this, Sireci's mother stabbed him in the back with a fork. (R1419)

Though he acted functionally retarded, Sireci could perform mechanical tasks. (R1315) At 19, Sireci was a very good shear operator, a very unpopular job due to its physically demanding requirements. (R1755-56;1773;1313-14) He did twice the work of others, but was teased and called goofy. (R1756-58) It seemed that he was always at work; he sometimes worked 92 hours a week. (R1420;1766) If he liked you, he would do anything for you. (R1763) However, he acted like a little boy (R1762) and seemed unable to plan ahead or appreciate the consequences of his conduct. (R1770;1758-61; 1764;1766) Sireci experienced frequent blackouts, even though he never drank or used drugs. (R1821) One example of this occurred when Sireci did not remember where he left his car, and could not explain why it was found in a farmer's field. (R1821)

While working at the Liebovitch steel fabrication shop, Sireci would take dares. (R1805-07) When bet that no one could rob a service station with a knife, Sireci took the bet and robbed Eddy Nelson on November 17, 1970. (R1807-08;938-40) Nelson testified that a person came in and requested a fill up, and then stated, "This is a robbery." (R939-40) Nelson believed it was a joke at first because Sireci had forgotten to display the knife. (R953-54) Nelson was not hurt, only threatened and

made to lie on the floor. (R940-42) After robbing Nelson, Sireci went to eat at a nearby diner and was picked up approximately fifteen minutes later. (R1808)

Though Sireci did not know how to handle money, he did not appear money hungry --- he was content with what he earned. (R1809-10) He would do precisely what he was told to do, which at times produced absurd results. For instance, once while working on Doetch's farm Sireci was told to unload some silage from a silo. When Sireci asked how much to unload, after having done it every day as a routine chore, Doetch unwittingly stated, "Unload it until you get tired." Hours later, Doetch heard calls for help, and found Sireci trapped in the silo, having thrown out so much silage that he was unable to come down the exit shoot. (R1811-13;1018-20)

MEDICAL TESTIMONY/EVALUATION OF SIRECI

Dr. Lewis, a board certified psychiatrist accepted as an expert in the field of psychiatry without objection by the state, explained the effect of Sireci's childhood on his mental status. (R1479-97) Dr. Lewis testified that while conducting a study in 1984 she examined Sireci as one of a large group of people convicted of murder to determine the relationship between brain damage and violence. (R1516-24) Sireci showed signs of prenatal injury (R1521-22) and injuries related to the automobile accident. (R1527-28) Because Sireci's brother had gone to prison for sexually molesting his children, Dr. Lewis investigated Sireci's history and determined that Sireci had been sexually

abused by his mother. (R1529-30)

Sireci's neurological tests showed organic damage to both sides of the brain, as well damage to the right frontal cortex and the deeper structures of the brain. (R1532-34) Sireci was given other tests to explore suspected severe organic impairment and secondary brain injury which may have occurred at birth. (R1551-52) Dr. Lewis also detected signs of psychosis and schizophrenia. (R1552-53) Her conclusions are as follows:

> Henry Sireci is, I think he's one of the most impaired, aggressive individuals that I have evaluated. And he certainly meets this picture of the type of youngster who if not assisted early on, will go on to be uncontrollable. He has brain injury. He has problems in thinking. He is paranoid. He distorts reality. He cannot conceptualize. He can't understand the consequences or balance things out.
>
> And, but again, you can get impaired people, you can get retarded people, you can get crazy people who will not be violent. But if I take someone so impaired, with this ability to lash out, to be impulsive or whatever, then you raise them -- when you think of them, I think I must have mentioned this to you, I think of the way people have trained pit bulls where you beat them and you beat them and you subject them to terrible things in order to kind of get them stimulated and roused up. He was treated in that way in his home. I think he was brutally abused and he was sexually abused and when you get that combination, he fits, I guess he, he very much fits the picture that we have seen in the past eighteen years.

(R1583-84)

Dr. Lewis believed to a reasonable degree of medical

certainty that Sireci was under the influence of extreme mental or emotional disturbance when the crime was committed, and that the capacity to appreciate the criminality of his conduct was substantially impaired. (R1584-89) Insofar as the number of stab wounds on the victim, the doctor believed that, because of Sireci's organic brain impairment, once he began stabbing Poteet, he could not stop. (R1589)

A radiologist conducted an MRI and a CAT scan on Sireci. (R1742-46) He testified as a state witness that the test showed that Sireci had "mild" brain. (R1746-47;1749-50)

Mark Morrison, an expert in clinical evaluation and the treatment of sexually and physically abused children (R1836-45), interviewed the Sireci family. Morrison determined that Sireci had been sexually abused by his mother for an extended period of time and physically abused by his father. (R1864-87) Sireci was forced by his mother to sexually abuse his brother, Dominic, and Dominic witnessed Sireci's mother abusing Sireci. (R1878;1887)

Kevin Sullivan, an expert clinical social worker, also analyzed the Sireci family. (R1897-1913) In his expert opinion, "without a doubt" Sireci was emotionally, verbally, physically, and sexually abused by the Sireci family. (R1932) Sullivan feels that there is no question but that sexual abuse occurred in the family. (R1941) Sullivan learned that Sireci's mother was caught fondling her grandson while the baby was still in diapers. (R1943) Sireci's mother was also violent at times, having stabbed both Sireci and Dominic with a fork. (R1947) Other Sireci

children became violent, and two of Sireci's brothers were convicted of committed crimes. (R1951-52) Sullivan believes that Sireci today is a product of the abuse he suffered as a child. (R1952-53)

Dr. Jonathan Pincus is a neurologist. (R1988) He is the chairman of neurology at Yale University, with credentials beyond reproach. (R1990-2009) Dr. Pincus was one of the experts who examined Sireci in 1984 as part of the group study of violent offenders. (R2010,2013) After reviewing all of the data available, Dr. Pincus determined that Sireci at 16 suffered a basal skull fracture when he was thrown through the windshield during the traffic accident, and deemed the trauma "a highly significant brain injury." (R2015)

In December of 1989, Dr. Pincus re-examined Sireci. (R2017) The examinations established that Sireci suffered brain damage which was not feigned. (R2018-19) There clearly was frontal lobe brain damage. (R2022) Dr. Pincus described Sireci as child-like, easily led, and lacking in appreciation of the consequences of even obviously dangerous acts. (R2026-28) An MRI test showed that Sireci had bilateral frontal lobe damage --- the type of brain damage caused by a bi-frontal leukotomy/lobotomy. (R2030-31) The brain damage was confirmed by a CAT-scan. The test results are so clear that Dr. Pincus uses them in classes at Yale to teach to his students what organic brain damage looks like in CAT-scan and MRI testing procedures. (R2037-38)

Dr. Pincus explained the three basic categories of

brain damage as follows:

> (DR. PINCUS): Well, you get into the mild, moderate, severe situation. People who are severely brain damaged, I mean, you always say compared to what. But people who we would consider to be severely brain damaged are in a vegetative state. They are lying in bed with a feeding tube and that's it, they are not violent.
>
> There are people who have moderate brain damage, who might be able to take care of their activities of daily living but do need supervision in a controlled environment. Let's say, need to have somebody making sure they don't, that they don't leave the stove on or that they go to the bathroom properly and they dress and hook up their clothing properly when the leave and go out of the house and have to be led around and, to some extent be supervised.
>
> And there's people who have mild brain damage and can function and look relatively normal and yet will have devastating changes in personality and the capacity to act in society which makes life difficult or impossible for spouses, children, co-workers, etc. And so the mild brain damage can have a devastating effect on the way a person lives his life, even though able to walk and talk and put on his clothes and get dressed and eat breakfast and do the kinds of things a person has to do just in order to take care of the basics.

(R2008-09).

Dr. Pincus explained how brain damage affects impulsivity control. (R2002) He further explained that at times people with certain types of brain damage, like Sireci's, act as if they are intoxicated. "But having brain damage is a little like being intoxicated all the time." (R2003) After having examined Sireci, the tests and the results of the CAT-Scan and

the MRI scan, Dr. Pincus concluded as follows:

> Q. (defense counsel) Would the brain damage that you have shown on those films, that film, as a behavioral neurologist, be sufficient in your expert opinion to cause behavioral changes?
>
> A. (Dr. Pincus) Absolutely.
>
> Q. When would those behavioral changes be present or when would the affects of brain damage --
>
> A. Well, the time that people who have suffered mild brain damage -- and I think that we could, we could characterize this as mild using as our range mild, moderate, severe that I indicated before, severe being vegetative; moderate being requiring supervision in the activities of daily living; and, mild being able to get around but nonetheless having behavioral changes as a result of the brain damage. This is mild, yes. People like this don't look. particularly abnormal. Ordinary social intercourse. They can go into a luncheonette and buy lunch and sit down and eat it and go out and carry on that way. <u>But when stressed, they tend to fall apart. That's when the, that's when the effects of the damage become most apparent. And character-istics or quirks of personality which were present before the injury tend to be exaggerated.</u>
>
> Q. What do you mean?
>
> A. <u>In other words, if a person tended to be irritable or peculiar or paranoid, but was able to control those by an effort of will beforehand, he might become more so. If a person tended to be excitable and fight a lot, but was able to control themself by exercising inhibitions on these sorts of impulses that he had, for one reason or another, he would loose that capacity to inhibit the impulsive behavior that he had a</u>

> tendency to have before, but which was controlled.
>
> Q. Am I hearing you that a pre-disposition toward a type of behavior, whether that behavior was within the norms of society or outside the norms of society, would factor into how or the brain damage manifests itself in the ultimate behavior?
>
> A. Exactly. That's exactly right.

(R2040-41)(emphasis added). Sireci had been diagnosed as having neurological problems before his traffic accident at 16. (R2093)

Dr. Pincus concluded that Sireci's organic brain damage, documented through testing, affected his self-control: "We have evidence of [organic brain damage] from many different sources. It's the neurologic examinations, psychological tests, MRI scan, history, all point to brain damage here. And I think that in this case, it is very, very clear that, that, brain damage has constrained free will." (R2138)

When asked to explain Mr. Sireci's statement that Poteet was killed to eliminate him as a witness, Dr. Pincus explained that Sireci was simply trying, in retrospect, to provide a plausible explanation for a stupid act:

> He doesn't want to look like a fool. He doesn't want to look foolish or stupid or dumb because people have called him that and he hates it. And he's just done something which is the dumbest thing a person could possibly do. He's gone in and has brutally murdered, say Poteet, for example. Gotten absolutely no gain out of it, didn't do the thing that he wanted to do. The whole purpose of it was to steal a car. He didn't get the car. He went into a car dealership and went out without a car, having gone

> there to get a car. Murdering a man in order to, to accomplish that. He comes out and says, I did it to eliminate the witness.
>
> The master criminal speaking. I don't believe that. I think he was just trying to make himself look better. Just to give some reason for, for, for having done what he, what he did when he was, in fact, out of control. He didn't want to say I was completely out of control. He was incredibly stupid. I acted stupidly. I don't think he would be capable of saying that.

(R2184-85). Dr. Pincus also concluded that Sireci's capacity to conform his conduct to the requirements of law was impaired by organic brain damage:

> But it's very difficult to say exactly where one ends and the other begins. This is an abstract thing. But we are not really talking about an abstract thing. We are talking about Mr. Sireci. And Mr. Sireci has demonstrable disease of the brain, which has a demonstrable effect upon his behavior. Now and historically in the past. And I believe that it reduced his capacity to conform his conduct to the expectations and demands of the law and I believe that it made it difficult, if not impossible for him to fully understand the wrongfulness of what he did.
>
> Now, that's my bottom line opinion. He has disease of the brain. The brain is the organ of the mind. His mind is disordered because of it. And his behavior has been in line with that. And many of the things that he's done and the impulses that he's had were caused by other things. Abuse, paranoia, whatever other things along the line. And he wasn't able to exercise his free willfully, to control that, those -- the impulses that he had.

(R2147).

SUMMARY OF ARGUMENTS

POINT I: The trial judge aptly summed up the situation facing Sireci. Under the facts of this case, any half-way intelligent juror was going to figure out that Sireci had previously been sentenced to death and imprisoned on death row. Seeking to avoid a recommendation from a jury which would be tainted by such a consideration, Sireci submitted a written waiver of his right to a jury recommendation pursuant to Fla.R.Crim.P. 3.780 and Section 921.141(1), Fla. Stat. (1989). Evidently because the state objected to the waiver based on State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990), the trial judge convened a jury to issue a sentencing recommendation. Without doubt, these jurors did "figure out" that Sireci had previously been sentenced to death and imprisoned on death row because the prosecutor expressly so told them in direct violation of a pre-penalty phase court order.

It was an abuse of discretion for the trial judge to empanel a jury contrary to Sireci's waiver because, as was readily apparent, a jury would necessarily perceive that a prior death sentence had been imposed for this crime. The prejudice that attends this type of extrinsic information renders the jury recommendation constitutionally infirm and, since Sireci timely sought to avoid the error **before** it occurred, the death sentence must be vacated and the matter remanded for resentencing without consideration of the jury recommendation. Further, because the state has no right to a jury recommendation in a capital case, this court should disapprove of State v. Ferguson, supra.

POINT II: Contrary to court order, the prosecutor directly informed Sireci's jury that Sireci had been imprisoned on death row. The trial judge denied Sireci's contemporaneous motion for mistrial and did not give a curative instruction because, going into the penalty hearing, the trial judge realized "that this jury would probably figure out that Mr. Sireci had, in fact, been sentenced to death and been on death row . . . . that any half-way intelligent juror was going to make that determination based upon the facts of this case." (R2687-88) Because the trial court made no effort to cure the taint or admonish the jury, reversible error has occurred. The trial court also erred in failing to grant the motion for mistrial and/or in refusing to poll the jury when it was learned by a defense investigator that the jury was greatly influenced by that information when the death penalty was recommended. Because the jury recommendation is unreliable, the death sentence imposed in reliance thereon should be reversed and the matter remanded for a new penalty phase.

POINT III: Applying the CCP statutory aggravating factor, which was enacted in 1979, to this crime that occurred in 1975 violates the ex post facto clause of the United States Constitution. This Court should recede from the erroneous position taken in Combs v. State, 403 So.2d 418 (Fla. 1981), because reliance on that holding by circuit courts will cause the improper imposition of death sentences that are based on other statutory aggravating factors which have been recently enacted.

POINT IV: There was a substantial amount of uncontroverted, competent testimony that Sireci committed this crime while under the influence of extreme mental or emotional distress and that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (R1583-84; 2008-09;2040-41) The trial court erroneously rejected these statutory mitigating factors due to use of a standard contrary to that set forth in Nibert v. State, 15 FLW S415 (Fla. July 26, 1990). Because these factors were proved by a substantial amount of uncontroverted, competent evidence, the refusal to find and weigh these factors in mitigation was arbitrary and erroneous. Accordingly, the death penalty must be reversed and the matter remanded for resentencing.

POINT V: As set forth in Points I and II, the jury recommendation is unreliable because the jury knew of the prior death sentence imposed in this case. Point III establishes that the recommendation is further unreliable because of the presence of a jury instruction permitting the jury to erroneously consider a statutory aggravating factor that, as a matter of law, cannot be applied, thereby impermissible shifting the balancing process in favor of imposition of the death penalty. Additional errors set forth in this point combine to make the recommendation unreliable as well. Improper evidence submitted over timely objection renders the recommendation unreliable under the Eighth and Fourteenth Amendments. Accordingly, the death sentence must be reversed and the matter remanded for resentencing.

POINT VI: The death penalty is unconstitutional on its face and as applied because this Court, rather than the legislature, has provided the substance of the terms set forth in Section 921.141, thereby violating the separation of powers doctrine. Further, the statutory aggravating factors are themselves too broad to sufficiently narrow the discretion of the jury/sentencer in recommending/imposing the death penalty, in that non-statutory aggravating factors are considered under the broad umbrella of a statutory aggravating factor. Finally, the death penalty legislation in Florida is unconstitutional because it places the burden on the defendant to prove that the mitigation outweighs the aggravation and, even when the burden shifting problem is corrected, the "outweigh" standard impermissibly dilutes the State's constitutional burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted in a particular case. For those reasons, the death penalty in Florida is unconstitutional and the instant death penalty must be reversed.

POINT I

UNDER THE FACTS OF THIS CASE, THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT THE DEFENDANT TO WAIVE THE JURY SENTENCING RECOMMENDATION.

Prior to the penalty phase, Sireci tried to waive the jury sentencing recommendation. (R3111-12) The written waiver, signed by Sireci, contained a "verification" clause which acknowledged the right to a jury recommendation and stated a desire to voluntarily relinquish that right. (R3112) The state objected based on State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990). In a written order, the trial court ruled that "the court shall in the exercise of its discreation (sic) empanal (sic) a jury to render an advisory verdict as to sentencing even though the defendant has filed a waiver of a jury." (R3220) Sireci contends that it was an abuse of discretion for the trial court to require a jury recommendation over Sireci's voluntary and intelligent waiver where, as phrased by this trial judge, "any halfway intelligent juror under the facts of this case would figure out that Sireci had previously been sentenced to death and was on death row for this offense." (R2687-88)

ABUSE OF DISCRETION UNDER THESE FACTS TO REQUIRE A JURY RECOMMENDATION OVER DEFENDANT'S VOLUNTARY WAIVER

The consequences which attend a jury recommendation are such that it was an abuse of discretion for this trial judge to refuse to honor Sireci's voluntary waiver of a sentencing recommendation that, due to the facts of this case, necessarily became tainted by the extrinsic consideration of a previous death

sentence improperly imposed by a prior judge/jury for the same offense. Because Sireci could here anticipate that a jury would readily perceive that he had previously been sentenced to death for this offense and timely sought to avoid a recommendation before it was so tainted, reversible error has occurred. This is **not** a situation where the taint occurred unexpectedly without objection, as was found to be harmless error in Teffeteller v. State, 495 So.2d 744 (Fla.1986) with the following admonition:

> We agree that a death sentence which has been vacated by this Court should not play a significant role in resentencing proceedings. The resentencing should proceed de novo on all issues bearing on the proper sentence which the jury recommends be imposed. A prior sentence, vacated on appeal, is a nullity. It offers the sentencing jury no probative information on any of the aggravating or mitigating factors weighed in such proceedings and could conceivably be highly prejudicial to a defendant.

Teffeteller, 495 So.2d at 745 (emphasis added).

This Court first held it to be discretionary for a trial court to obtain a jury's advisory recommendation in cases where a defendant pled guilty to first-degree murder. See State v. Carr, 336 So.2d 358, 359 (Fla.1976)("Trial judge, upon finding of a voluntary and intelligent waiver, may within his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation."); Lamadline v. State, 303 So.2d 17 (Fla.1974) (waiver of jury recommendation following guilty plea valid);

accord Holmes v. State, 374 So.2d 944 (Fla.1979); Thompson v. State, 389 So.2d 197 (Fla.1980). A jury recommendation was waived in a different context in Palmes v. State, 397 So.2d 648 (Fla.1981), where this Court approved the defendant's waiver which was made after a jury trial. This Court held:

> We now come to the question of the propriety of the sentence of death. **There was no jury recommendation because Appellant waived his right to have the jury hear evidence on the question of sentence**. One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided the waiver is voluntary and intelligent. Upon finding such a waiver, the sentencing court may in his discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedure. State v. Carr, 336 So.2d 358 (Fla. 1976); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The record shows that the court inquired into Appellant's waiver and found it to be intelligent and voluntary.

Palmes, 397 So.2d at 656 (emphasis added).

In Huff v. State, 495 So.2d 145, 152 (Fla.1986), this Court **approved** a waiver made by a defendant after retrial and conviction by a second jury, the first conviction having been reversed on appeal. However, there have been no cases such as this, where a judge **disregards** the waiver of a jury by a defendant who previously was erroneously sentenced to death and who files a waiver knowing that a jury will perceive that he has previously been sentenced to death for the same offense for which the jury is to issue a recommendation.

Unless provided an explanation, a jury would not know why Sireci's initial death sentence had been set aside, and even then lay people likely would not be able to totally disregard the irrelevant fact that Sireci had once before been sentenced to death for this offense by another judge/jury. See Jackson v. State, 545 So.2d 260,263 (Fla.1989)("The prejudicial effect upon a jury of testimony that a defendant has been previously convicted of the crimes for which he is now on trial is so damaging that it cannot be said beyond a reasonable doubt that a jury would return a verdict of guilty absent the testimony."); United States v. Williams, 568 F.2d 464, 465 (5th Cir.1978)("Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged.").

A juror's knowledge that someone else believes death to be appropriate in a given case is prejudicial. See Stockton v. Commonwealth of Virginia, 852 F.2d 740, 743-45 (8th Cir. 1988) (new sentencing proceeding required where jurors recommended death sentence after being told by lay-person during deliberations that "they ought to fry the son of a bitch."). This premise is so basic that even Judge Bork adheres to the view that the government must show that a juror's exposure to such extra-judicial information as is present here did not affect the deliberations. See United States v. Butler, 822 F.2d 1191, 96-96 (D.C. Cir. 1987) ("Irrespective of the source of the alleged taint, it is the burden of the government to demonstrate that the

jury was impartial, and that extrinsic information did not contribute to the verdict.")(emphasis added).

An excellent analysis of the effect such extrinsic information has on the impartiality of a jury is found in Weber v. State, 501 So.2d 1379, 1383 (Fla. 3rd DCA 1987), where the court agreed with many other courts "that information that the defendant has been previously convicted of the crime for which he is being tried **almost stands alone in its capacity to prejudice**."

> Implicit in [United States v. Williams, 568 F.2d 464 (5th Cir.1978)] and its progeny, as evidenced by the very discussion of the quality of the admonition given to the jurors and the quality of the assurances given by the jurors, is that the exposure of sitting jurors to this prejudicial material does not ipso facto require that a mistrial be granted or that the jurors so exposed be stricken.

Weber, 501 So.2d at 1383 (emphasis added). Here, it was an abuse of discretion for a trial judge to disregard a voluntary waiver of a jury that was anticipated to become presumptively biased.

This crime was committed in 1975; Sireci was convicted and sentenced to death in 1977. He spent the next ten years on death row before obtaining relief following a successful motion for post-conviction relief under Fla.R.Crim.P. 3.850. As noted by the trial judge, any "halfway intelligent" juror was going to pick up on the fact that Sireci had previously been sentenced to death for this offense. (R2687-88) Significantly, relief was afforded Sireci because the initial psychiatric examination performed in 1976 had been grossly defective.

Thus, the initial judge and jury did not hear all of the relevant mitigation before the death sentence was imposed. Judge Formet, who in this case granted the post-conviction relief, knew of Sireci's prior death sentence, but judges are presumed due to training and experience to be able to separate irrelevant considerations such as a prior, **erroneous** sentence of death from the relevant considerations. See Dragovich v. State, 492 So.2d 350, 351-52 (Fla.1986)(Judge's having previously presided over trial of man allegedly hired by defendant to murder victim and judge's sentencing man in earlier prosecution to death over jury's recommendation of life sentence was not sufficient showing that defendant would not receive fair trial before judge to support disqualification.).

As noted by defense counsel when an attempt was made to formulate an appropriate jury instruction to address the lapse in time between the commission of the crime and this recommendation hearing, there was simply no effective way to deal with the gap without alerting the jurors that a prior death sentence had been imposed. (R10-16;93-101) Where, as here, a penalty phase is being conducted ten years after an initial conviction and death sentence and a defendant does not want it revealed to a jury that a prior death sentence was imposed for the same offense, it is simply an abuse of discretion for a trial court to disregard a defendant's voluntary waiver and require a nearly binding advisory recommendation from a jury which, as perceived by this trial judge, necessarily will realize under the particular facts

of the case that a prior death sentence had been imposed. A recommendation from a jury that, without the consent and over express objection of a defendant, **unnecessarily** knows of a prior death sentence denies due process under the Fifth and Fourteenth Amendments and results in a violation of the Eighth Amendment because the recommendation is unreliable.

This type extra-judicial knowledge is so prejudicial that any recommendation rendered in light thereof is unreliable under the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution. See Robinson v. State, 438 So.2d 8, 9 (Fla. 5th DCA 1983)(new trial required where trial court failed to poll jury concerning exposure to newspaper articles entitled "Retrial in Murder Case Begins Today" and "Murder Suspect Charged in Attempted Jail Escape"). It cannot be emphasized enough that here Sireci sought to avoid the near binding effect of a jury recommendation where it was evident that the jurors would necessarily become aware of Sireci's prior death sentence. This was **NOT** a situation where information was divulged and an objection followed, as occurred in Jennings v. State, 512 So.2d 169 (Fla. 1987):

> It is not uncommon that jurors become aware that the case before them may have previously been tried as a result of references to prior testimony. **There is no indication that the jurors knew what had occurred at Appellant's previous trial**. We conclude that the judge made the appropriate response and committed no error in denying Appellant's motion for a mistrial.

Jennings, 512 So.2d at 174 (emphasis added). Sireci could anticipate the jury's perception of his prior death sentence and avoid being prejudiced by voluntarily waiving a recommendation. The refusal of the trial judge to honor the waiver under these circumstances was an abuse of discretion.

THE STATE'S OBJECTION WAS INVALID.

It appears that the trial judge here required a jury sentencing recommendation because the state objected. After Sireci's waiver was rejected, defense counsel asked whether the court made any findings, and Judge Formet stated, "I did not make findings. Based upon Ferguson, I just exercised my discretion to empanel a jury." (R77). The reference to Ferguson indicates reliance thereon.

The Second District Court of Appeal in State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990), **after first noting that it was not clear whether Ferguson had even attempted to waive a jury for the penalty phase**, reasoned that the state has the right a jury sentencing recommendation under Fla.R.Crim.P. 3.260. The court said:

> 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. (citations 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 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.

State v. Ferguson, 556 So.2d at 464 (emphasis added). The Second District Court of Appeal held, "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." Ferguson, 556 So.2d at 464. It is respectfully submitted that the holding in Ferguson is erroneous and shows a lack of understanding as to the purpose and substance of the penalty phase in a capital case.

The state simply is not entitled to a jury sentencing recommendation in a capital case. Fla.R.Crim.P. 3.260[2], entitled **"Waiver of Jury Trial"**, concerns the constitutional right to a jury trial in a criminal case. That right concludes when a verdict is returned. The proceeding which follows a guilty verdict in a capital case is **not** a separate trial; it is instead a sentencing hearing. See Spaziano v. Florida, 468 U.S. 447, 459 (1984)("The fact that a capital sentencing is like a trial in the respects significant to the double jeopardy clause, however, does

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[2] Fla.R.Crim.P. 3.260 states: **Waiver of Jury Trial**. A defendant may in writing waive a jury trial with consent of the state.

not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial."); Hildwin v. Florida, 490 U.S. __, 109 S.Ct.2055, 104 L.Ed.2d 728, 732 (1989) ("The Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by the jury."). Fla.R.Crim.P. 3.260 is simply irrelevant after a verdict is returned.

The rule relevant to a capital sentencing hearing, oddly enough entitled **"Sentencing Hearing for Capital Cases,"** is Fla.R.Crim.P. 3.780[3], a rule that makes no mention of a jury, but instead implements a procedure "consistent with the requirements of the statute." The respective committee note states, "This is a new rule designed to create a uniform procedure to be followed, which will be consistent with both Section 921.141, Florida Statutes (1975) and Dixon v. State, 283 So.2d 1 (Fla. 1973)." Thus, **this** rule implements the procedural aspects of Section 921.141, which expressly provides that a **defendant** may waive a jury recommendation. Rule 3.260 does not transcend rule 3.780, the rule that expressly pertains to capital sentencing hearings.

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[3] Fla.R.Crim.P. 3.780 states:

Sentencing Hearing for Capital Cases:

(a) In all proceedings based upon section 921.141, Florida Statutes (1975), the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, **consistent with the requirements of the statute**. Each side will be permitted to cross-examine the witness presented by the other side. The state will present evidence first.

(b) The trial judge shall permit rebuttal testimony.

(c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first. (emphasis added).

Specifically, Section 921.141(1), Florida Statutes (1975) provides:

> If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose, **unless waived by the defendant**.

The statute makes no mention whatsoever about the state being involved in the waiver process; there is not the slightest suggestion that the state has any right to a jury recommendation or the ability to prevent a defendant from waiving the jury recommendation. Section 921.141 was passed in response to Furman v. Georgia, 408 U.S. 238 (1972) to satisfy the Eighth Amendment. Procedural aspects of Section 921.141 necessarily implicate some constitutional rights of the defendant, but not the state.

For instance, the rules of evidence are relaxed whereby any evidence "which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, **provided the defendant is accorded a fair opportunity to rebut any hearsay statements**." Section 921.141(1), Fla. Stat. (1975) (emphasis added); See Gardner v. Florida, 430 U.S. 349 (1977)(use of portion of presentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut or challenge the report denied due process). Many of the constitutional protections afforded a trial simply do not apply to a sentencing phase hearing, simply because the sentencing proceeding occurs **after** the determination of guilt.

See Lusk v. State, 446 So.2d 1038 (Fla. 1984), cert. denied, 469 U.S. 873 (1984)(a violation of double jeopardy does not occur if a jury recommends life but the trial court sentences a defendant to death); Provenzano v. State, 497 So.2d 1177, 1185 (Fla. 1986), cert. denied, 481 U.S. 1024 (1986)("Appellant's contention that the Sixth Amendment right to a jury trial is violated by Florida's death penalty procedure because a trial court determines the facts anew after the jury issues its recommendation is without merit"). See also Spaziano, supra; Hildwin, supra.

This Court has consistently held that the right to receive a jury sentencing recommendation belongs to the defendant. See Floyd v. State, 497 So.2d 1211, 1215 (Fla.1986) ("Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury.")(emphasis added); Richardson v. State, 437 So.2d 1091, 1095 (Fla.1983)("It is a defendant's right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function.").

The only authority standing for the premise that the state has any right to a jury sentencing recommendation comes from the erroneous, gratuitous dicta in State v. Ferguson, supra. The right to a jury recommendation in a capital case is that of the defendant. Fla.R.Crim.P. 3.780; Section 921.141(1), Fla. Stat. (1975). This Court should take this opportunity to expressly reject the erroneous holding in Ferguson so that, in the future, trial judges will not be influenced by the state's

position when deciding on whether, in an exercise of its discretion, a defendant's waiver should be disregarded.

PREJUDICE CAUSED BY UNRELIABLE JURY RECOMMENDATION:

The override standard requires that a trial judge accept and impose a sentence consistent with the jury recommendation unless no reasonable person could agree with the recommendation. Tedder v. State 322 So.2d 908 (Fla.1975) See LeDuc v. State, 365 So.2d 140, 150-51 (Fla.1978)(applying Tedder override standard in situation where jury recommended death). This limits the trial court's ability to reject borderline aggravating factors and/or find borderline mitigating factors because the court must view the evidence in a light most favorable to the jury recommendation.

A burden is cast upon a defendant to overcome a jury's recommendation of death. Under Tedder, the sentencing judge must follow the recommendation a reasonable person could not agree.

> Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing.

Valle v. State, 502 So.2d 1225,1226 (Fla.1987)(footnote omitted). See Riley v. Wainwright, 517 So.2d 656 (Fla.1987)("If the jury's recommendation upon which the judge must rely, results from an

unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."). Here, the trial judge stated that he was "required" to impose a sentence of death. (R3307)

Because this jury recommendation was tainted by the knowledge that a prior death sentence had been imposed, the judge's reliance thereon in imposing the death sentence was misguided. The requirement that he view the evidence in a light most favorable to the death recommendation when finding the aggravating and mitigating factors had a great effect here. Though Sireci may have stated that Poteet was killed, the experts concluded that Sireci's explanation was done in retrospect to provide a logical reason for his actions. Thus the court could well have rejected the presence of the aggravating factor concerning avoidance of arrest/witness elimination had it not been for the recommendation of death.

Further, the judge found that the murder was especially heinous atrocious, cruel. Sireci argued below that this factor is unconstitutionally broad on the basis of Maynard v. Cartwright, 486 U.S. 356 (1988), and he respectfully maintains that claim here based on the same argument rejected by this Court in Smalley v. State, 546 So.2d 720 (Fla.1989). This Court is urged to reconsider the holding in Smalley and find he HAC aggravating factor, as passed by the Florida Legislature, unconstitutionally vague.

However, even assuming that the factor is constitutional,

the trial court yet may have disregarded it factually here, where the evidence could support a finding that Poteet was dazed after initially being struck with the tire iron and therefore was only semi-conscious when fighting with Sireci. See Herzog v. State, 439 So.2d 1372, 1380 (Fla.1983) (HAC factor rejected where victim, who was smothered and then strangled to death, may have been unconscious.).

Even assuming that the victim was here conscious, Sireci's mental impairments at the time the crime was committed could, when viewed in the light of a jury recommendation of life, offset the heinousness of the crime. See Amazon v. State, 487 So.2d 1, 13 (Fla.1986)(jury recommendation of life reasonable even where judge found four statutory aggravating factors and nothing in mitigation.). Significantly, the same aggravating factors present in Amazon are present here, assuming that the CCP aggravating factor is inapplicable and the others are, yet a life sentence was reasonable under substantially these same facts. The state cannot show beyond a reasonable doubt that the faulty recommendation did not affect the factual findings made by the trial judge and the following death sentence imposed by the trial judge. Accordingly, the sentence must be reversed and the matter remanded for resentencing without consideration of the jury recommendation.

POINT II

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL MADE WHEN THE PROSECUTOR REVEALED TO THE JURY THAT SIRECI WAS ON DEATH ROW AND BY THEREAFTER PREVENTING SIRECI FROM INTERVIEWING THE JURORS WHEN IT WAS LEARNED THAT THE JURORS ATTRIBUTED GREAT SIGNIFICANCE TO THE PRIOR DEATH SENTENCE.

Sireci submits that the trial court erred in denying the motion for mistrial made contemporaneously with the prosecutor's improvident and apparently intentional revelation to the jury that Sireci had previously been sentenced to death and was on death row when the psychiatric evaluations were performed:

> Q. (prosecutor): Maybe it's not a paranoid ideation, is that correct?
>
> A. (Dr. Lewis): 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?

(R1673) Defense counsel objected and moved for a mistrial, arguing, "It's been clear that there is 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 is no way to come back from it. There's certainly no

cautionary instruction that would cure that taint. It could only draw more attention to it. And that the only recourse could be, at this point, a mistrial." (R1673-74) Counsel further elaborated that the revelation rendered the jury recommendation unreliable under the Fifth, Sixth, Eighth and Fourteenth Amendments. (R1674) The motion for mistrial was denied and no cautionary instruction was given. (R1674)

Prior to trial, Sireci secured a ruling prohibiting the state from revealing that a prior death sentence had been imposed for this offense. (R2868-69;3189) The trial court's ruling on the motion in limine was re-affirmed prior to the penalty phase hearing, and the trial court specifically stated, "I would expect there to be no mention of prior trials." (R10-11) The state's argumentative question to Dr. Lewis was wholly unjustified and a clear violation of the prior ruling, an error that imparted irrelevant and prejudicial information to the jury which rendered the death recommendation unreliable under the Eighth and Fourteenth Amendments. See Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. __, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)(death sentence obtained in violation of the constitution where, during closing argument, prosecutor read from prayer and argued personal characteristics of victim based upon prayer and voter registrations card also found among victim's possessions). Here, neither rebuke nor retraction could remove the sinister effect of the jury's knowledge that a prior death sentence had been imposed for this offense by another judge/jury.

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.

That is just another reason why a jury recommendation was inappropriate here. A judge would be able to divorce irrelevance from relevance, that is, the judge already knew of Sireci's imprisonment on death row, so that aspect of the testing could be appreciated without the taint that the revelation of that information causes to the jury. As shown by the affidavit accompanying Sireci's later motion to interview the jurors based on the prosecutor's revelation that Sireci was on death row, this jury recommendation is without question unreliable under the Eighth Amendment because of the influence that the extra-judicial knowledge evidently had on the jury. These problems could **and would** have been avoided had the waiver of the jury been honored.

Sireci respectfully contends that the trial court erred in refusing to poll the jury concerning its use of this extra-judicial information. The failure of the trial court to determine the extent that Sireci's prior death sentence played in their recommendation is reversible error. Kruse v. State, 483 So.2d 1383, 1389 (Fla. 4th DCA 1986), petition for review dismissed, 507 So.2d 588 (Fla. 1987); Robinson v. State, 438 So.2d 8, 9 (Fla. 5th DCA 1983), petition for review denied, 438 So.2d 834 (Fla. 1983).

Specifically, following the sentencing of Mr. Sireci, defense counsel moved to interview the jurors (R3404-06) based on an affidavit from a defense investigator who spoke with one of the jurors at the time of sentencing and was told the following:

> In the course of telling me about what the jury had considered and the process that went on, Mr. Miller spontaneously indicated that up to the time that Dr. Lewis testified, they had not known Mr. Sireci had been sentenced to death by a previous jury and had been on death row. Mr. Miller went on to indicate that finding out that Mr. Sireci had been sentenced to death by another jury had a great affect on them. He indicated that it put an entirely different light on how they viewed the case and made it easier for them to recommend the death penalty as well.

(R3408) Defense counsel, in pertinent part, argued as follows:

> (Defense counsel): Mr. Harris sets those circumstances forward in paragraph 5 of the affidavit. It would seem, therefore, certainly prima facie that there has been a taint of this jury so as to make their death recommendation unreliable, since it is based in large part on prohibited information,

information that this Court had earlier ruled was not to be provided to the jury

Therefore, this Court cannot say that the jury was not tainted, because it is clear that they were. And we need to ascertain the extent of the taint, the ultimate effect of the contamination before this Court can definitively rule on the motion for rehearing, I suspect. I am asking that the jurors --

THE COURT: I disagree and will deny your motion. I will not permit you to interview the jurors.

DEFENSE COUNSEL: I don't think that we need to interview all of the jurors. I think we need to only interview at this point Mr. Miller, who is the juror who came forth and offered this information concerning --

THE COURT: I am not going to allow you to interview the jurors in this case. Even if this information did come out in the manner that it came out and even if they did consider it, it has not tainted their verdict and I --

DEFENSE COUNSEL: Mr. Miller says exactly the opposite.

THE COURT: **One of the considerations this Court made when I originally granted the motion in limine was that this jury would probably figure out that Mr. Sireci had, in fact, been sentenced to death and been on death row. I think any halfway intelligent juror was going to make that determination based upon the facts of this case**. And I don't see that that's going to render their verdict invalid. And I don't think you're going to find that out through interviewing the jurors. I am going to deny your motion to interview the jurors. Okay. Thank You.

(R2687-88)(emphasis added).

Based on the concluding statement of the trial judge

above, being that he knew that jurors would figure out that Mr. Sireci had previously been sentenced to death, it appears evident that the trial court abused its discretion in requiring a jury so tainted in the first place. (See Point I). When the information was squarely put before the jury by the prosecutor over timely pre-penalty phase court order and objection by defense counsel, reversible error occurred.

A defendant who does not seek to inform a jury of a prior death sentence for the same offense must give up the opportunity to present relevant mitigating evidence concerning his potential for rehabilitation, demonstrated by his period of imprisonment. See Skipper v. South Carolina, 476 U.S. 1 (1986)(a defendant's adjustment to prison life is an aspect of his character relevant to the sentencing determination in a capital case.). Of course, to be fair with this type testimony, the state would be entitled to establish that the defendant, since being initially convicted and sentenced, served his time in prison on death row, a more restrictive confinement than could be expected in general population.

Weighing the potential prejudice against the possible benefits, Sireci justifiably relied on the pre-penalty phase ruling that the state would not be permitted to comment on the imposition of a previous death sentence for this offense and forewent amassing and presenting evidence concerning his great potential for rehabilitation shown by an exemplary prison record. It turns out that Sireci gave up that right for nothing.

By violating the prior court order and mentioning Sireci's death row status, the state had the unfair advantage of tainting the jury while at the same time rendering meaningless the sacrifice made by Sireci in foregoing that avenue of mitigation. This resulted in a violation of due process and the right to a fair and reliable jury recommendation under the Fifth, Sixth, Eighth and Fourteenth Amendments. If Sireci can be required to accept a sentencing recommendation by a jury, he is at the very least entitled to one that comports with due process and fairness.

It is irrelevant that the trial court believed that the jury would become knowledgeable of Sireci's prior death sentence on its own. When the jury was expressly so informed in violation of the prior court ruling, the trial court should have addressed the extrinsic consideration of the prior death sentence by sustaining the objection, issuing a curative instruction commensurate with the seriousness of the taint, and inquiring whether the jurors could disregard that information and proceed on fairly and impartially. See Weber v. State, 501 So.2d 1379, 1383 (Fla. 3d DCA 1987)("such exposure raises a **presumption** that jurors will no longer be able to fairly consider the issue of the defendant's guilt, **a presumption that may be overcome only if the jurors are specifically and meaningfully admonished in the very strongest terms and, with a solemnity befitting their oaths, assure the court that the information which has wrongfully come to them absolutely will play no part in their verdicts**.").

Here, the trial judge did nothing when the prosecutor, apparently deliberately, violated the prior court order requiring that he not mention Sireci's prior death row status, a consideration that as a matter of law is presumptively prejudicial. The death penalty was here imposed in reliance on the tainted jury recommendation, unfairly obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 1, Sections 9, 17 and 22 of the Florida Constitution. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT III

USE OF SECTION 921.141(5)(i) FLA. STAT. (1979) TO JUSTIFY IMPOSITION OF THE DEATH PENALTY VIOLATES THE EX POST FACTO CLAUSE BECAUSE THIS CRIME WAS COMMITTED BEFORE THE STATUTORY AGGRAVATING FACTOR WAS LEGISLATED INTO EXISTENCE.

This crime was committed in 1975. (R1061-62) Section 921.141(5)(i), Florida Statutes became effective July 1, 1979. In Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), this Court held that use of this statutory aggravating factor to impose the death penalty for a murder committed prior to July 1, 1979, does not violate the ex post facto clause because the legislation was really a "limitation which inures to the benefit of a defendant." Combs, 403 So.2d at 421. Recently, in Stano v. Dugger, 524 So.2d 1018, 1019 (Fla. 1988), reversed 889 F.2d 962 (11th Cir. 1989), this Court declined to recede from the position taken in Combs.

It is respectfully submitted that it is now time to recede from Combs and to hold that a statutory aggravating factor promulgated after the date of a murder cannot be afforded weight in the decision of whether to impose the death penalty because to do so violates the ex post facto clause, Art. I, Section 10 of the United States Constitution. ("No state shall . . . pass any . . . ex post facto law[.]").

> Our test for determining whether a criminal law is ex post facto derives from these principles. As was stated in [Weaver v. Graham, 450 U.S. 24], to fall within the ex post facto prohibition, 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." Id at 29[.]

Miller v. Florida, 482 U.S. 423, 431 (1987).

Both elements are present here. The legislation was enacted in 1979. To apply it to a crime that occurred in 1975 is without doubt "retrospective application." A criminal defendant is "disadvantaged" when weight is afforded an aggravating factor, weight that must be overcome in order to obtain a sentence of life imprisonment as opposed to a sentence of death. When this is the only statutory aggravating factor present in a case, it becomes clear that the defendant is extremely "disadvantaged" by its application. See Banda v. State, 536 So.2d 221, 225 (Fla. 1988)("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist.") There is simply no way that it can logically be said that the addition of a factor that weighs against imposition of a life sentence does anything but disadvantage a defendant.

The inquiry requiring more serious judicial consideration is whether the finding of a cold, calculated and premeditated murder in this instance was harmful error. The taint of giving the improper instruction over timely objection extends to the jury recommendation and makes it unreliable under the Eighth Amendment because Sireci unfairly had to overcome the additional weight of this statutory aggravating factor in order to obtain a life recommendation. See Jones v. State, 15 FLW 469, 471 (Fla.

November 15, 1990)(under facts of case, error cannot be deemed harmless where court improperly instructed jury on statutory aggravating factor of especially heinous, atrocious or cruel murder over timely objection and "where jury could have believed that such an act was sufficient to find that the killing was heinous, atrocious or cruel and thus supported the death penalty."); Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987) (jury's determination of the existence of sentencing factors, as well as the weight to be given them are essential components of the sentencing process); Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986)(harmful error where Floyd denied right to fair advisory opinion due to improper, incomplete or confusing instructions.) See also Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)("[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.")

In Valle v. State, 502 So2.d 1225 (Fla. 1987), this Court held that the harmless error rule applies to errors which infect the jury recommendation process:

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommenda-

> tion of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing.

Valle, 502 So.2d at 1226 (footnote omitted).

Similarly, a jury instructed that it may weigh against imposition of a life sentence an erroneous statutory aggravating factor over timely objection unfairly "tips the scale" in favor of a recommended sentence of death because valid mitigation which otherwise would in the balancing process offset valid aggravation is instead improperly expended to neutralize the erroneous statutory aggravator. It must be presumed that weight was attributed against imposition of a life sentence based on an express finding by the judge that this improper statutory aggravating factor applied here. (R3307, Appendix A) The death sentence must therefore be reversed and the matter remanded for a new, fair penalty phase.

POINT IV

THE TRIAL COURT ERRED IN REJECTING STATUTORY MITIGATING FACTORS THAT WERE ESTABLISHED WITHOUT CONTRADICTION AT THE PENALTY PHASE.

The sentencing order of the trial court is set forth hereto as Appendix A. Defense counsel advanced four statutory mitigating circumstances, those being; the capital felony was committed while Sireci was under the influence of extreme mental or emotional disturbance; Sireci acted under extreme distress or the substantial domination of another person; Sireci's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and, Sireci's age at the time of the crime. Section 921.141(b), (e),(f),(g), Fla. Stat. (1975). The trial court rejected each of these factors. It is respectfully submitted that the trial judge did not apply the correct legal standard and otherwise erred by rejecting these statutory mitigating factors.

Extreme Mental or Emotional Disturbance.

The trial court rejected the application of this statutory mitigating factor as follows:

> 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**.

(R3305)(emphasis added)

Significantly, the judge did not find that this evidence **did** weigh against the statutory aggravating factors, only that it **may** do so. This is clear error, as was the court's conclusion that no legal basis for mitigation was provided by this testimony. Substantial, competent evidence exists to establish a "legal basis" for this statutory mitigating factor. Uncontroverted testimony from Dr. Lewis was as follows:

> **Henry Sireci is, I think he's one of the most impaired, aggressive individuals that I have evaluated. And he certainly meets this picture of the type of youngster who if not assisted early on, will go on to be uncontrollable. He has brain injury. He has problems in thinking. He is paranoid. He, he distorts reality. He cannot conceptualize. He can't understand consequences or balance things out.**
>
> * * *
>
> He was treated in that way at his home, I think. He was brutally abused and he was sexually abused and when you get that combination, he fits, I guess he, he very much fits the picture that we have seen over the past eighteen years.
>
> * * *
>
> (defense counsel): Doctor, are you able to reach an opinion that this homicide was committed while he was under the influence of extreme mental or emotional disturbance?
>
> A. Yes.
>
> Q. And what is that opinion?
>
> A. **I believe that at the time that,**

that this occurred, he was significantly brain injured and also he, he may have been -- because I've seen him at two different times. I've seen him at a psychotic point and I've seen him when he's thinking more logically. But my inference is that he probably was in the earlier state that I saw him in, and that at the time of this event, he, he was both severely brain injured, functionally retarded, and psychotic.

Q. **Doctor, are you able to form an opinion about Butch's capacity to appreciate the criminality of his conduct, or to conform him conduct to the requirements of the law. What I mean is whether that capacity was, whether or not the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired?**

A. **I think that, that he was severely impaired. I think that he did not have the slightest idea of the magnitude of what he was doing, the consequences. That he, just as in lots of different things that he's done that he simply did not appreciate what he was doing or what it meant.**

(R1583-88)(emphasis added).

Dr. Pincus, a neurologist, likewise testified without contradiction as follows:

> Well, everyone agrees that free will is constrained by disease of the brain. And when, and when -- the law certainly recognizes that. And that's why they have the M'Naughten rule and other rules that say that when a person's judgment can't be brought, when his free will doesn't have free reign because of disease of the brain or because of some psychotic condition or whatever, that that is a mitigating factor or exculpatory. **Now, in this case, we happen to have very strong evidence, evidence of organic disease of the**

brain. Powerful evidence. And the basis --

Q. (Prosecutor): But you believe he would --

DEFENSE COUNSEL: I object. If you will allow Dr. Pincus to finish his answer.

THE COURT: Do allow him to finish the answer.

PROSECUTOR: I thought he had finished. That was the end of the sentence.

A. No. **We have evidence of that from many different sources. It's the neurologic examinations, psychological tests, MRI scan, history, all point to brain damage here. And I think that in this case, it is very, very clear that, that, that brain damage has constrained free will.**

(R2137-38)(emphasis added).

There is also evidence to support the conclusion that Sireci acted under the domination of Barbara Perkins. Sireci is a manipulable person; not manipulative. (R2125) "It seemed quite clear that everyone was in agreement about certain things. He was childlike and he was easily led and he didn't seem to know the consequences of things he would do." (R2026) A co-worker testified that Sireci acted like a little boy, but that if he liked you he would do anything for you. (R1762-63) Childhood acquaintances of Sireci concurred in that assessment. Wanda Evans described him as a follower who misunderstood relationships between men and woman. (R1360) Lay testimony also established that Sireci failed to appreciate the consequences of his actions and that he continuously sought approval and affection of others.

(R1400) Because the foregoing evidence is uncontroverted, the trial court erred in rejecting the respective statutory mitigating factors. See Nibert v. State, 15 FLW S415, 416 (Fla. July 26, 1990)("When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has be proved."); Campbell v. State, 15 FLW S342 (Fla. June 14, 1990). The instant case contains no "positive evidence" to refute the existence of the foregoing statutory mitigating circumstances. See Cook v. State, 542 So.2d 964, 971 (Fla. 1989).

The sentencing order is the best evidence of the trial court's reasoning. See Mann v. State, 420 So.2d 578, 581 (Fla. 1982)(findings of trial judge to be made with "unmistakable clarity" to afford meaningful appellate review.). This order specifically shows that the statutory mitigating circumstances were rejected as having "a legal basis" (R3305), even though they were uncontroverted and shown by overwhelming evidence. The refusal to apply this mitigating evidence is an error of law, not fact. See Slater v. State, 316 So.2d 539, 542 (Fla.1975)("Defendant's should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same."); Nibert, supra. Accordingly, the death penalty based on these arbitrary findings is unreliable under the Eighth and Fourteenth Amendments. The death sentence must be reversed and the matter remanded for resentencing.

POINT V

BECAUSE THE DEATH PENALTY RECOMMENDATION BY THIS JURY WAS UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, THE DEATH SENTENCE BASED THEREON MUST BE REVERSED AND THE MATTER REMANDED FOR A NEW PENALTY PHASE AND/OR RESENTENCING.

The recommendation here was unreliable under the Eighth and Fourteenth Amendments for several reasons. As set forth in Points I and II, the recommendation was tainted because the jury was improperly informed that Sireci had previously been sentenced to death for this offense by another judge/jury. As set forth in Point III, the recommendation was also unreliable due to the improper instruction concerning the cold, calculated and premeditated murder aggravating factor, an instruction which tipped the scales in favor of a sentence of death. These errors, singularly and combined with the following errors, render the jury recommendation constitutionally defective:

Violations of Booth v. Maryland and South Carolina v. Gathers:

Over objection and following an inaccurate proffer by the prosecutor as to what the witness would say, the state presented the testimony of the victim's wife to establish that the victim was carrying a wallet when murdered:

> THE COURT: Your next witness will be Polly Poteet?
>
> PROSECUTOR: Hmm-hmm.
>
> THE COURT: Does she have direct testify (sic) to the effect he had his wallet on that night?
>
> PROSECUTOR: She did the day of trial.

THE COURT: That he had it in his back pocket?

PROSECUTOR: I believe she said he had it in his back pocket.

THE COURT: Okay. If she can testify to that, I'll allow her testimony. But short of that, I don't think I'll allow any further testimony regarding that matter.

DEFENSE COUNSEL: We are willing to stipulate that he had his wallet. That's just not an issue.

THE COURT: It may not be an issue, but I think the state still has a right to present the evidence. But I do want you to assure me that she has specific knowledge of that and will not testify to what's already been covered.

PROSECUTOR: Well, I believe so.

THE COURT: I just want to be sure of that. Because I don't want to present cumulative testimony.

PROSECUTOR: Should I check that?

THE COURT: Why don't you do that, if that's what you want to present this morning.

PROSECUTOR: Thank you, Your Honor. (PAUSE) Yes, that's what she says.

DEFENSE COUNSEL: She's going to say she saw him put the wallet in his pocket?

THE COURT: She's going to make some kind of testimony.

PROSECUTOR: That he had it in his back pocket.

THE COURT: Okay. I will allow that testimony.

(R1138-40) Though Mrs. Poteet stated on direct examination that her husband had the wallet on him when he left for work the day he was murdered (R1143), on cross-examination she clarified that she only assumed that he took the wallet with him because he generally took it with him; she had seen it on the dresser before he left and could not find it afterwards. (R1145) She also stated that her husband customarily carried several credit cards but not much cash, and that after her husband died she began receiving credit card bills for the credit cards that had been in his wallet. (R1144) She revealed that she found out that her husband was dead when she went to his office the next morning; she did not at that time see a wallet in his pocket. (R1144)

Following this cumulative, prejudicial and unnecessary testimony, Sireci moved for a mistrial based on the cumulative effect this testimony had with other improper evidence which had been put before the jury over timely objection. (R1147-49) The trial court ruled as follows:

> THE COURT: I am going to deny the motion for mistrial. I see no fundamental error that would justify the imposition of a mistrial at this point. I don't believe we have engaged in victim impact statements. Although, **it would appear that the overriding reason for presenting Mrs. Poteet was merely to present her to the jury**. Since her testimony was clearly cumulative, with the exception of what I anticipated to be the direct evidence that she would have regarding the placement of the wallet. I think circumstantial evidence, however, would have been sufficient to present that statement. But I do want it clearly understood, Mr. Lerner, that I want some strict controls on your

> witnesses at this point. I want you to be sure that these witnesses know what they are going to testify to and that they do not elaborate on the answers. We've gone far to long in this case to retry or start this sentencing hearing over again. I just am very concerned about the way the witnesses have gone up to this point.

(R1150-51)(emphasis added).

Prior to Mrs. Poteet's testimony, the state presented similar testimony from the victim's as follows:

> Q. (PROSECUTOR): So **at some point was your father robbed and murdered** in this business?
>
> DEFENSE: Objection.
>
> THE COURT: Grounds.
>
> DEFENSE: May we approach the bench?
>
> THE COURT: Yes, you may.
>
> PROSECUTOR: Well, I'll withdraw the question.
>
> THE COURT: Alright. The question is withdrawn.
>
> Q: At some point did your father die?
>
> A: Yes.
>
> PROSECUTOR: Any objection to that? No objection?
>
> DEFENSE: No. I'll let you know.
>
> Q: And did he die at his car lot?
>
> A: Yes, he did.
>
> Q: And **were you the person, you and your mother the people who discovered him** there?
>
> A: Yes, we did.

Q: And about what time of day was that?

A: When we arrived at the lot and found his body?

Q: Yes.

A: It was about seven o'clock in the morning, as close as I can remember.

Q: **How did you become involved in doing that?**

A: Well, my dad went to auctions that they had in the area.

DEFENSE: I objection. May we approach the bench, please?

THE COURT: Yes, you may.

DEFENSE: The habits of the deceased, as they might relate to why this witness went to the car lot, are not relevant to anything other than showing personal characteristics and traits of the deceased; which are not relevant in this proceeding. It is clear he went to the car lot and seven o'clock and discovered his father's body. That's what's relevant.

PROSECUTOR: I'm just trying to get into evidence his mother called him and his father had to go home. Can I have permission to lead?

DEFENSE: Exactly. That's not relevant. That's not properly before the jury for sentencing.

THE COURT: I am going to overrule it. I think there's no problem with saying that.

DEFENSE: Every time the family becomes part of this trial, we have additional victim impact. It's clear under Booth and Gathers that victim impact statements are improper.

THE COURT: To say how he contacted -- I think to the sentencing, why the body was not discovered, I think it's proper.

DEFENSE: To elicit testimony that his mother, the widow, was worried because her husband hadn't come home all night and that she needed someone to find out what was wrong and that she was scared and that she was worried, all of that?

THE COURT: How can that --

DEFENSE: There can be no other reason for that inquiry other than to communicate that. There is no need to explain further. He already said he went there.

THE COURT: Okay. There is not going to be any allegation as -- Well, alright. I'll sustain the objection. Let's just move along. You may proceed.

PROSECUTOR: So when you went to the car lot alone, was anybody with you?

A. (Poteet): My mother went with me. I picked her up and took her with me.

Q: And the two of you arrived around seven, seven thirty in the morning?

A: Right.

Q: **And you found your father there.**

A: **We sure did.**

Q: **And was your father in the habit of carrying a wallet?**

A: **Oh, yeah. <u>He kept a lot of mementos and things in his wallet</u>.**

DEFENSE: Objection. May we approach the bench, please?

(At bench)

DEFENSE: Judge, I filed a motion in limine on exactly these issues. The

> court has ruled on exactly these issues. We've now been to the bench already this morning on exactly these issues.
>
> THE COURT: Have you talked to the witnesses about this?
>
> PROSECUTOR: Yes.
>
> DEFENSE: It's not responsive to the question. I don't know what else to do at this point. I would certainly think that if the state can't control the witness, that the court should instruct the witness.
>
> THE COURT: I intend to instruct the witness.
>
> DEFENSE: Outside the presence of the jury?
>
> THE COURT: Let me take care of it.

(R1118-22) Over Sireci's objection, the victim's widow and son were allowed to remain in the courtroom during the remainder of the proceedings. (R1151-52)

This Court recently addressed the constitutional problem created when the state unnecessarily presents the testimony of the victim's family members in Jones v. State, 15 FLW S604 (Fla. November 15, 1990), where this Court explained:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.
>
> Here, none of the relatives' testimony was necessary to establish the identity of the victims. It is apparent

> that such testimony was impermissibly designed to evoke the sympathy of the jury. We find that the trial court abused its discretion by denying Jones' objections to this testimony.

Jones, 15 FLW at S606. Similarly, the state's needless presentation of the cumulative testimony of Poteet's son and wife "merely to present [them] to the jury" was prejudicial.

Violation of Robinson v. State and Pope v. State:

During the direct examination of Barbara Perkins, the woman who accompanied Sireci during the Poteet murder and who thereafter used Poteet's credit cards, the following occurred:

> Q. (PROSECUTOR): Did [Sireci] ever show or did he every demonstrate any characteristic that made you think that he wasn't in his right mind?
>
> A. (Perkins): No.
>
> Q: Other than the fact that he had done these --
>
> A: No. That's -- (shakes head).
>
> Q: **Did he ever express to you during this trip how he felt about these two murders that had happened in Orlando?**
>
> A: **He --**
>
> DEFENSE: **Your Honor.**
>
> THE COURT: **I'm sorry?**
>
> DEFENSE: **Nothing. I am sorry.**
>
> THE COURT: **Alright. You may answer the question.**
>
> A: **He seemed -- after he read about them in the paper, he seemed sort of proud of it.**

(R1006-07). Defense counsel immediately objected and moved for a mistrial, arguing that the state was presenting testimony of a non-statutory aggravating factor with the sole purpose being to inflame the jury. (R1007-08) The trial court ruled that defense counsel waived the objection by not making it more timely and further indicated that there was nothing wrong with the testimony. (R1009)

However, Perkins' testimony was clearly irrelevant and prejudicial under the Eighth and Fourteenth Amendments. This Court has repeatedly held that lack of remorse is an improper consideration in the penalty phase of a capital case. Robinson v. State, 520 So.2d 1, 6, (Fla. 1988); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). Recently, in Jones, supra, this Court again urged the state "to refrain injecting an issue that this Court has unequivocally determined to be inapplicable, causing us to vacate sentences in the past." Jones, 15 FLW at 606.

The objection made here by defense counsel was **NOT** untimely. The question posed by the prosecutor, "Did he ever express to you during this trip how he felt about these two murders that had happened in Orlando?" called only for a yes or no answer, as did the preceding question which was responsively answered by the witness. As defense counsel pointed out, prior court rulings had been secured through motions in limine which forbade presentation of this type evidence, and the prosecutor had previously been cautioned about presenting such testimony.

It must be presumed that the prosecutor knows the answers to his questions and has instructed the state witnesses concerning prior court rulings. See Harris v. State, 15 FLW D2829, 30 (Fla. 3d DCA November 20, 1990)(The prosecutor has an affirmative duty to apprise all of the State's witnesses of the nature of pretrial evidentiary rulings so as to prevent violations of those rulings."). It was prejudicial error for the trial court to permit testimony concerning Sireci's lack of remorse. The timely objection should have been sustained and a curative instruction given.

In Riley v. Wainwright, 517 So.2d 656 (Fla.1988) this Court dealt with the defendant's entitlement to a valid jury recommendation and concluded that, due to the legal effect that the presence the recommendation has on the sentencing procedure, the defendant is entitled to a fair and impartial jury recommendation. The improper testimony, arguments, and influences presented here over timely objections render the instant jury recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 17 of the Florida Constitution. The death sentence imposed in reliance on an unreliable jury recommendation must be reversed and the matter remanded for a new penalty phase and/or resentencing.

POINT VI

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by defining the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of the separation of powers doctrine of the United States Constitution and Article II, Section 3 of the Florida Constitution. Specifically, the Florida Legislature is charged with the responsibility of passing substantive laws. Article III, Florida Constitution (1976).

Simply said, legislative power, the authority to make laws, is expressly vested in the Florida Legislature. In an exercise of that power, the Florida Legislature passed Section 921.141, Fla. Stat. (1975) which purportedly established the substantive criteria required for authorization of imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, however, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla. 1973) where this Court provided the working definitions of the statutory aggravating factors ostensibly promulgated by the Florida Legislature. This Court can enact laws, either directly or indirectly.

Recently, in rejecting a claim that Florida's especially heinous, atrocious and cruel statutory aggravating factor was unconstitutionally vague based on Maynard, supra, this Court in dicta stated:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989). Other instances where the definitions of statutory aggravating factors have been provided by this Court demonstrate that the violation of the separation of powers doctrine is unacceptably pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla.1980)(parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981) (more than three people required to constitute a great risk of death or injury to many persons)[4]; Banda v. State 536 So.2d 221,

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[4] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360

225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). The passage of such broad legislation for it to be refined, defined and given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977). It is respectfully submitted, however, that these "factors" are but

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(Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

open windows through which virtually unlimited facts may be put before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding of Furman v. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the juror sentencer an informed basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois v. State, 407 So.2d 885 (Fla. 1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla. 1989)(improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the jury/ sentencer under the general heading of a statutory aggravating factor, permits consideration of non-statutory aggravating factors to impose the death penalty. Though the non-statutory reasons offered under this category may be constitutional in the broad sense of the word, others (such as sympathy for victims of other unrelated crimes, as occurred here by reference to the Short murder) are unconstitutional.

The same rationale applies to other statutory aggravating factors, which are in essence but categories through

which unfairly prejudicial evidence is put before the jury/sentencer. Because the statutory aggravating factors fail to adequately channel the sentencer's discretion in imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2) and (3), Florida Statutes (1989). In fact, the statute places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). This Court has recognized that the burden must be on the State to prove that the aggravating factors outweigh the mitigating factors. See Arrango v. State, 411 So.2d 172, 174 (Fla. 1982); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.") As written, the statute places the burden of proof on the defendant in violation of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur,

421 U.S. 684 (1975).

Even when the statute is changed by judicial fiat to place the burden on the state to show that the statutory aggravating factors "outweigh" the mitigation, a violation of due process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise the jury/sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted. As worded, the standard instructions dilute the requirement that the state prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. The standard instruction requires only that the state show that the death penalty is warranted by a mere preponderance of the evidence, thereby resulting in a violation of due process. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). Imposition of the death penalty based on a preponderance of the evidence is unconstitutional. In re: Winship, 397 U.S. 358 (1970). By showing that the aggravation "outweighs" the mitigation the state achieves death penalty recommendations and/or sentences by a mere preponderance standard in violation of the aforesaid cases and the constitutional requirements to due process.

For the aforesaid reasons, the death penalty in Florida is unconstitutional both on its face and as applied. It must accordingly be declared unconstitutional and the death penalty must be reversed.

CONCLUSION

Based on the argument and authorities cited herein, this Court is respectfully requested to vacate the death sentence and remand for imposition of a life sentence or for a new sentencing phase.

Respectfully submitted,

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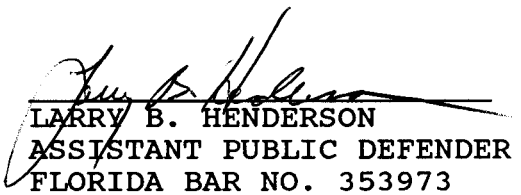
SEVENTH JUDICIAL CIRCUIT



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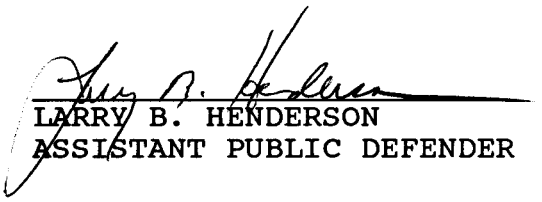
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Henry P. Sireci, #056338, P.O. Box 747, Starke, Fla. 32091 on this 17th day of December, 1990.



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