IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

HENRY PERRY SIRECI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 76,087

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Fl. 32114
(904)252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

HENRY PERRY SIRECI, Appellant,	)	
vs.	)	CASE NO. 76,087
STATE OF FLORIDA, Appellee.	)	

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In pertinent part, Fla.R.App.P. 9.210(c) provides that "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." (emphasis added). The state's answer brief violates this rule, in that the brief contains eighteen pages of rambling generalizations based on limited, out of context testimony. (AB1-18)[1] The state does not disagree with any of the facts contained in the statement of the case and facts set forth in the Initial Brief of Appellant. Sireci disagrees with the accuracy and fairness of many of the state's representations, as will be specifically identified and addressed in the argument portion of this brief.

[1] (AB) refers to the state's answer brief.

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.

The state summarizes its position as follows:

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

(AB at 19).

The state and Sireci agree that it is discretionary for a trial judge to require a jury sentencing recommendation. The state, however, contends that a trial court can **never** abuse its discretion by requiring a jury recommendation over a defendant's voluntary and prudent waiver because the recommendation is "advisory" only. (AB at 25) The state mischaracterizes the underlying premise of Sireci's argument, erroneously stating that Sireci contends that the jury recommendation is "binding." AB at 27, 33. Sireci has never contended that the jury recommendation is binding. It is respectfully submitted, however, that the characterization "nearly binding" is fair where the jury recommendation must be accepted unless no reasonable person could agree with it. See Tedder v. State, 322 So.2d 908 (Fla. 1975); LeDuc v. State, 365 So.2d 140, 150-51 (Fla. 1978). Even if the consequences are that the trial judge must give "great weight" to

the recommendation, it cannot seriously be said that a defendant is not greatly prejudiced by a recommendation of death.

The state further urges that in some way Sireci could, if allowed to voluntarily waive the jury recommendation with the advice of counsel, effectively raise an issue concerning the voluntariness of such a waiver:

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

(AB at 25).

The state's argument is untenable. Though Sireci certainly has demonstrated that he suffers from organic brain damage, his competency to be sentenced has never been questioned. Indeed, in light of the prudence of waiving a jury recommendation under these circumstances, one would have good reason to question not only Sireci's competence if he did not waive the recommendation, but also his attorney's. There is no issue concerning Sireci's legal competence to make this type decision. See Goode v. State, 365 So.2d 381, 384 (Fla. 1978)(waiver of fundamental right valid where record shows literate and competent defendant understandingly makes voluntary waiver).

If, indeed, it is discretionary for a trial court to require a jury advisory recommendation as to the penalty in a death case, there must be some limit to that discretion. Where, as here, going into the sentencing phase it is clear to all that the recommendation will on its face be suspect because the jury will perceive that the defendant has been imprisoned on death row for the past ten years for the same offense and the defendant, with the advice of counsel, is adamant that he wants to waive the jury recommendation, it is an abuse of discretion to require the jury to render an unreliable recommendation. This recommendation is of absolutely no value. Requiring a jury recommendation under these circumstances not only caused the unnecessary expenditure of time, funds and labor of the citizens and the judiciary at a time when such finite resources could be better spent, it also unnecessarily opened up a legal morass of constitutional issues that otherwise would providently be waived.

For instance, aside from the sheer costs in time, money and labor of presenting the matter to twelve jurors and having that transcribed for review by appellate courts, use of a jury magnifies ten-fold the constitutional problems that necessarily inhere in imposition of the death penalty. Life/Death scrupled juror concerns arise. See Wainwright v. Witt, 469 U.S. 412 (1985) Juries, which are composed of lay-people, are more susceptible to improper emotional arguments than are trial judges. See Booth v. Maryland, 482 U.S. 496 (1987). Jury override, or lack thereof, issues occur. See Tedder v. State,

322 So.2d 908 (Fla. 1975). Issues concerning vague and/or erroneous jury instructions are created. See Maynard v. Cartwright, 486 U.S. 356 (1988). These and other concerns may, indeed, be an obligatory consequence of the death penalty when a constitutionally **reliable** recommendation can be attained from a jury but, when the end product will be tainted **and everyone knows that the end product will be tainted**, it is unreasonable to require the recommendation. The requirement arbitrarily placed form over substance.

An apt description of a judge's discretion is found in Cannakaris v. Cannakaris, 382 So.2d 1197 (Fla. 1980):

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own idea of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

Cannakaris, 382 So.2d at 1203, quoting B. Cardozo, The Nature of the Judicial Process, 141 (1921).

Simply said, it was an abuse of discretion for this judge to require, over Sireci's timely waiver made with advice of counsel, an advisory recommendation from the jury under the circumstances of this case. It is by far better to have no jury

recommendation at all than to require one that will necessarily be tainted and useless. Requiring this recommendation over the defendant's waiver was a violation of state and federal rights to due process and a fair trial.

Though not mentioned by the state, the Fourth District Court of Appeal has, in Williams v. State, 15 FLW 2914 (Fla. 4th DCA December 5, 1990), agreed with the Second District Court of Appeal in State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990). The state has also petitioned this Court to issue a Writ of Prohibition in State v. Honorable C. Vernon Mize, Jr., and Joseph Patrik Olsen, Supreme Court Case number 77,373, because Judge Mize allowed the defendant in a first-degree murder case to waive a jury recommendation over the state's objection after having pled guilty. Sireci respectfully maintains that the state has no authority to object to a defendant's voluntary waiver of a jury sentencing recommendation in a first-degree murder case and that the holdings of the district courts of appeal in Ferguson and Williams are erroneous.

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.

The state's suggestion (AB at 30) that Sireci's motion for mistrial, made immediately before another question could be asked and answered, was untimely does not merit discussion. The state's contention that Sireci was the first to inform the jury that Sireci was incarcerated on death row is incorrect. It is an example where the state's piecemeal generalization of the testimony is inaccurate and grossly misleading.

Specifically, the state contends the following:

> Dr. Lewis stated on direct examination that she conducted studies of inmates on Death Row with a team, including Dr. Pincus (R1482-83). Dr. Pincus also testified for the defense (R1988). Dr. Lewis said that people on Death Row often deny child abuse (R1504). She later said Sireci blocked out abuse (R1556). She said she first met Sireci during a study of eight to ten individuals incarcerated at Starke (R1519). It can hardly be said it was the prosecutor who brought forth testimony that Sireci was on death row when the defense witness on direct examination made Sireci's status quite apparent. Any information the staet (sic) provided was cumulative to Dr. Lewis to Death Row referring (sic) before and after the state's question.

(AB at 30) An appendix containing the state's foregoing record

citations is appended hereto as Appendix A. The undersigned does not believe that those citations support a good faith argument that defense counsel in any way informed the jury that Sireci was on death row. Instead, the evidence establishes the parameters of the research done by the mental health experts, that is, that the spectrum of people examined by the doctors included first-degree murderers on death row, but not necessarily, or even inferentially, Henry Sireci.

The affidavit of the defense investigator who spoke with one of the jurors at the time Sireci was sentenced establishes that the jury did not know of Sireci's prior death sentence until Dr. Lewis' testified. (R3408) Further, the affidavit reveals that the jury believed that a prior **jury** had sentenced Sireci to death, not the trial judge. The state's contention that the prosecutor's improper revelation was harmless beyond a reasonable doubt, (AB at 31), simply ignores the affidavit which avers that the information "made it easier for them to recommend the death penalty as well." (R3408)

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.

The state argues that Sireci has failed to provide any compelling reason for this Court to overrule the holding that application of a new statutory aggravating factor to a crime that occurred before the date of the legislation is not an ex post facto violation. (AB at 34) The most compelling reason the undersigned can advance is that the strained reasoning in Combs v. State, 403 So.2d 418 (Fla. 1981) and its progeny is clearly erroneous. Statutory aggravating factors which authorize imposition of the death penalty do not protect a defendant sentenced to death, but instead each factor provides additional weight to legally justify imposition of the death penalty. Especially in a weighing scenario, the very presence of that factor brings with it some additional weight in favor of the death penalty. The trial court's use of a statutory factor, created after the murder of the victim, to impose the death penalty constituted an ex post facto application of that statute and was error.

POINT IV

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

Sireci relies on the argument and authority presented in the Initial Brief of Appellant in reference to this point on appeal, except to point out that the mitigating evidence presented in this case has, in the past, been found to be sufficient to justify a life sentence. See Amazon v. State, 487 So.2d 1 (Fla. 1986). Had the judge assessed the testimony concerning the existence of mitigation initially without a jury recommendation, his findings and the sentence could well have been different. This follows, where this jury (apparently) rejected most of the mitigation that was presented, and the judge was required to defer to the recommendation unless no reasonable person could agree. See LeDuc v. State, 365 So.2d 140, 150-51 (Fla. 1978).

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 state argues that, "there was no intent on the state's part to elicit the complained-of answers, neither were the answers pure Booth material." (AB at 43) As noted by the trial judge, the state appeared to be presenting these witnesses solely to put them before the jury. (R1150-51) The focus is not just on what is said. The "fairness" inquiry also includes whether the juror's emotions are being inflamed by needless exposure to suffering family members.

The state also argues that Sireci "opened the door" for the state to present evidence concerning lack of remorse based on the following testimony presented during the defense case:

> Q. (defense attorney) I'm not really asking at this moment to reach a conclusion about the Short homicide, although I appreciate that you, that you can. I'm really asking that considering the Short homicide, does that change your opinions about his actions at the time of the Poteet homicide?
>
> A. (Dr. Lewis) No. Actually, when we did the first, that evaluation in '84 for the study, I was unaware of one of the two homicides. And, and I remember saying when I became aware of it, "Why didn't they tell me about this." You know, it makes so much more sense. When, because of the certain similarities in the events and the kind of uncontrollable behavior and the mindlessness of it. It would have

helped us for our research to have known it. Because it was so consistent with the other.

Q. Are you aware that he has made statements, post-event, that the reason he killed Mr. Poteet was to effectively, to eliminate him as a witness?

A. Right.

Q. Knowing that, does that change your conclusion about his, his state of mind at the time of the crime?

A. No.

Q. Why not?

A. Well, first of all, at least to my knowledge, from the people I've talked to and the things I've read, he has made several different kinds of descriptions of what he did or what he thinks he did or what he thinks he didn't do. To the best of my knowledge, one is no more or less incriminating than the other. But there has been no real coherence to this kind of thing. And he, he also, at times, is quite grandiose and quite macho and likes to think that he is a very tough or very important person so that if he did these kinds of things -- there was, as I recall, a boastful quality to them, but that didn't always jive. They were, one day it was one thing; one day it was another. I think that this is consistent. By the way, brain damaged people -- and you'll also find this was alcoholics who have had brain damage, will do something called confabulation. So that if they don't know why they did something, they will find a reason. And you know, even people, by the way, who have a seizure, they may say, every time I think of my mother, I have a seizure, whatever, and I understand kind of after the fact that they say these kind of things. But there has been a few times where he has said, I believe even to his mother, I

> don't know why I did it. I don't know why.

(R1590-91;AB at 48) Sireci respectfully submits that this testimony in no way opens the door for the state to affirmatively present, over timely and specific objection, testimony that once Sireci "seemed sort of proud" after reading about the two murders in the paper. (R1006-07) At most, the evidence was geared to explain the statements made by Sireci that Poteet was killed to eliminate a witness. A defendant should be able to offer an explanation for such statements without having the state turn the inquiry into whether the defendant is remorseful for the killing

These specific errors taint the jury recommendation under the Eighth Amendment. It was error to require a recommendation in the first place under these facts. Because the recommendation is otherwise unreliable here, the death penalty based thereon must be reversed and the matter remanded for resentencing.

POINT VI

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

Sireci relies on the argument contained in the Initial Brief of Appellant in reference to this point except to point out that, insofar as lack of prior notice to a defendant as to what statutory aggravating factors the state intends to rely on in imposing the death penalty, all laws are contained in Florida Statutes, yet separate notice is required despite the fact that a defendant may "know" he has violated a particular one.

CONCLUSION

Based on the foregoing cases, argument and authorities, and those in the initial brief, Appellant respectfully requests that the death sentence be vacated and the matter remanded for a new sentencing proceeding.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 353973
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

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 Perry Sireci, #056338, P.O. Box 747, Starke, Fla. 32091 on this 20th day of February, 1991.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER