IN THE SUPREME COURT OF FLORIDA

HENRY PERRY SIRECI,

Appellant,

vs. **CASE NO. 95,116**

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the case and facts set forth in appellant's brief but adds the following.

In 1976, Henry Perry Sireci was convicted for the first degree murder of Howard Poteet. The trial judge, the Honorable Maurice M. Paul, followed the jury's recommendation and imposed a sentence of death.

On direct appeal, the Florida Supreme Court affirmed Sireci's conviction and sentence. This Court set forth the following summary of the facts in Sireci v. State, 399 So. 2d 964 (Fla. 1981):

> The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.
>
> The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.
>
> The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in

> the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed him. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.
>
> Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.
>
> The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.
>
> The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.[1]

Sireci appealed his judgments of conviction and sentence of death on direct appeal to the Florida Supreme Court, raising twelve

[1] In addition, the trial court noted in its sentencing order dated May 4, 1990, that Poteet's body exhibited defensive wounds. (V. III at 347-349).

(12) issues.[2] On April 9, 1981 this Court affirmed Sireci's conviction and sentence. Sireci v. State, 399 So. 2d 964 (Fla. 1981). On May 17, 1982, the United States Supreme Court denied certiorari. Sireci v. Florida, 456 U. S. 984, 102 S. Ct. 2257, 72 L. Ed. 2d 862 (1982), rehearing denied, 458 U. S. 1116, 102 S. Ct. 3500, 72 L. Ed. 2d 1378 (1982). Sireci subsequently unsuccessfully sought post conviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850, and that decision was affirmed on appeal. Sireci v. State, 469 So. 2d 119 (Fla. 1985),

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[2] The claims raised on direct appeal included the following: 1) the trial court erred in allowing testimony concerning collateral offenses; 2) the refusal to grant a continuance when an additional witness list was filed on the first day of trial, to strike the testimony of Donald Holtzinger and/or grant a mistrial was error; 3) the trial court erred in limiting cross-examination of a key prosecution witness; 4) appellant was denied due process of law by direct testimony regarding appellant's exercise of his constitutional right to remain silent; 5) the circumstantial evidence is insufficient to prove either premeditation or felony murder; 6)(A) State failed to notify the defendant, prior to trial, of the aggravating circumstances it intended to prove; (B) the trial court had no jurisdiction to impose a death sentence; 7) the execution of appellant's death would subject him to cruel and unusual punishment; (A) the aggravating circumstances were not proven beyond a reasonable doubt and/or were improperly applied and the trial court improperly failed to consider certain mitigating factors; (B) the prosecution was allowed to present evidence of non-statutory aggravating factors; (C) appellant was improperly limited in his presentation of mitigating evidence; (D) the Florida capital sentencing statute is unconstitutional; (E) appellant was denied his right to a fair cross-section of the community by Florida's exemption, on request, of mothers with children, from service on juries; and (F) Florida's capital sentencing statute is unconstitutional.

cert. denied, 478 U. S. 1010, 106 S. Ct. 3308, 92 L. Ed. 2d 721 (1986). On September 19, 1986, the governor signed a death warrant for Henry Perry Sireci, prompting the filing of a second motion for post conviction relief. A limited evidentiary hearing on this post conviction motion was granted by the Ninth Judicial Circuit Court, and the State unsuccessfully appealed. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

The trial court held an evidentiary hearing on Sireci's second 3.850 motion and ultimately ordered a new sentencing hearing on grounds that two court-appointed psychiatrists conducted incompetent evaluations at the time of the original trial. At the conclusion of the evidentiary hearing, a new penalty phase was granted by this Court, and this decision was affirmed on appeal. State v. Sireci, 536 So. 2d 231 (Fla. 1988). Upon re-sentencing, the jury recommended the death penalty by a vote of eleven to one and the Ninth Judicial Circuit Court again imposed the death penalty.[3]

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[3] The trial court found five aggravating circumstances: 1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence (a prior murder and an earlier robbery); 2) the murder was committed during a robbery and for pecuniary gain; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest by eliminating a witness; 4) the murder was especially heinous, atrocious, or cruel; and 5) the murder was cold, calculated, and premeditated. The court found non-statutory mitigating circumstances but no statutory mitigating

Appellant pursued a direct appeal of the resentencing hearing. In this appeal, appellant raised the following issues: 1) the trial court erred in refusing to permit the defendant to waive the jury sentencing recommendation; 2) the trial court erred in denying a motion for mistrial made when the prosecutor revealed to the jury that the defendant was on death row and in refusing to allow the jury to be polled on the impact of this error; 3) 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; 4) the trial court erred in rejecting statutory mitigating factors that were established without contradiction at the penalty phase; 5) 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; 6) Section 921.141, Florida Statutes (1987) is unconstitutional on its face and as applied. (V. III at 260-343). This Court affirmed imposition of the death sentence on direct appeal. Sireci v. State, 587 So. 2d 450 (Fla. 1991). Thereafter, the United States Supreme Court denied certiorari review. Sireci v. State, 503 U. S.

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circumstances. (V. III at 345-353).

946, 112 S. Ct. 1500, 117 L. Ed. 2d 639 (1992).

On or about June 23, 1993, Sireci filed his first motion for post conviction relief on his new sentence of death. This motion, which is 66 pages in length, presented 29 claims for relief. Subsequently, on or about March 24, 1994, Sireci filed his second motion for post conviction relief which is also 66 pages in length and presents the same 29 claims for relief as those contained in the pleading it purports to amend. An Order Directing a Response from State was issued by the Ninth Judicial Circuit Court on January 10, 1995. A timely response to the 1994 version of Sireci's motion followed.

In April, 1997 the Ninth Judicial Circuit Court held a hearing on Sireci's public records requests. Subsequently, on May 6, 1997, said court entered an Order on Defendant's Public Records Requests. Sireci filed his fourth version of his motion for post conviction relief on August 21, 1997. This motion is 147 pages in length and presents 33 claims for relief. Pursuant to the Order on Defendant's Notice of Loss of Designated Counsel dated January 20, 1998, the State filed its timely response to Sireci's fourth version of his motion for post conviction relief. (V. III at 193-259).

On January 21, 1999, the Honorable Richard F. Conrad presided

over a Huff hearing. (V. I at 1-35). The court summarily denied appellant's motion for post-conviction relief on February 9, 1999. (V. IV at 415-446).

SUMMARY OF THE ARGUMENT

ISSUE I--Appellant's claims questioning the constitutionality of various aggravating factors in this case are procedurally barred from review. Such challenges either were or should have been raised on direct appeal. Appellant cannot use a motion for post-conviction relief as a second direct appeal.

ISSUE II--The trial court properly found that appellant's challenges to the financial gain and cold, calculated and premeditated aggravators are procedurally barred from review in this Rule 3.850 motion.

ISSUE III--Appellant's challenge to his prior murder and robbery convictions is procedurally barred from review because he failed to raise this claim on direct appeal. Moreover, simply because a separate challenge to a prior conviction is pending does not prohibit the State from using the prior conviction as an aggravating circumstance.

Appellant's claim that separate aggravators were improperly based upon a single fact is procedurally barred from review. This issue should have been raised, if at all, on direct appeal.

ISSUE IV--This Court has repeatedly rejected similar constitutional challenges to the commission during the course of an enumerated felony aggravator.

ISSUE V--This issue was raised and addressed by this Court on direct appeal. Consequently, the trial court properly found this issue procedurally barred from review in this motion for post-conviction relief.

ISSUE VI--The trial court properly denied this claim below because appellant failed to show due diligence in raising this post-conviction claim based upon newly discovered evidence. Further, the trial court recognized that there is no reasonable probability that this so-called "newly discovered" evidence would change the verdict in this case.

ISSUE VII--Appellant's claim that the trial court erred in refusing to accept a waiver of the jury recommendation was raised on direct appeal and rejected by this Court. Similarly, appellant raised the prosecutor's reference to his death row status on direct appeal. Consequently, appellant is procedurally barred from raising these issues again in a motion for post-conviction relief.

ISSUE VIII--Admission of evidence establishing appellant's lack of remorse was raised on direct appeal before this Court. The trial court's summary denial of this claim was appropriate because a motion for post-conviction relief is not the forum to criticize a prior opinion of this Court.

ISSUE IX--The trial court found that appellant received

comprehensive mental health examinations prior to the resentencing hearing. Appellant has not identified any significant deficiencies in the examinations conducted below.

ISSUE X--Appellant does not specifically identify the alleged deficiencies in the forensic testing conducted in this case. Moreover, this claim is time barred because appellant failed to show due diligence in raising it before the lower court.

ISSUE XI--The jury instructions did not improperly diminish the jury's role in the sentencing hearing. Further, this claim is procedurally barred from review as it should have been raised, if at all, at trial and on direct appeal.

ISSUE XII--This Court has repeatedly rejected the argument that death by electrocution constitutes cruel and unusual punishment under the Florida and United States Constitutions.

ISSUE XIII--This issue is procedurally barred because it should have been raised, if at all, in appellant's first motion for post-conviction relief. Moreover, counsel's choice of venue is clearly the kind of strategic decision that is largely immune from post-conviction attack.

ISSUE XIV--Appellant's claim that the trial court did not consider his mitigating evidence was raised on direct appeal and rejected by this Court. Consequently, he is precluded from raising

this issue again in a motion for post-conviction relief.

ISSUE XV--Appellant fails to allege sufficient facts to support his claim that his trial was fraught with error. Consequently, the trial court properly denied this claim without a hearing.

ARGUMENT

Preliminary Statement On Applicable Legal Standards

1) Standards of Review on the Summary Denial of Post-Conviction Relief

In Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834, 116 L.Ed.2d 83, 112 S.Ct. 114 (1994), this Court observed that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So.2d 7, 10 (Fla.), rehearing denied, 701 So.2d 10 (Fla. 1974)(quoting State v. Weeks, 166 So.2d 892 (Fla. 1960)).

2) Procedural Bar

Matters which either were raised or could have been raised on direct appeal or previous post-conviction proceedings are procedurally barred on collateral review. It is well settled that a Rule 3.850 motion is not a substitute for, nor does it constitute a second direct appeal. "[A] Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied." McCrae v. State, 437 So.2d 1388, 1390 (Fla.

1983)(string citations omitted). See generally Parker v. State, 718 So.2d 744 (Fla. 1998), cert. denied, 143 L.Ed.2d 675, 119 S.Ct. 1580 (1984)(claims procedurally barred on second 3.850 motion for failure to object at trial, for having raised issue on direct appeal, or for having raised issues in prior motions or petitions); Maharaj v. State, 684 So.2d 726 (Fla. 1996)(Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing); Engle v. Dugger, 576 So.2d 696, 702 (Fla. 1991)(claim that the trial court failed to provide a factual basis to support imposition of death sentence was "procedurally barred because it should have been raised on the appeal from resentencing."). Accord Cherry v. State, 659 So.2d 1069 (Fla. 1995); Medina v. State, 573 So.2d 293 (Fla. 1990); Clark v. State, 690 So.2d 1280 (Fla. 1997).

Any attempt by a defendant to avoid the application of a procedural bar by simply recasting a previously raised claim under the guise of ineffective assistance of counsel is not generally successful. See Sireci v. State, 469 So.2d 119, 120 (Fla. 1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.") "Procedural bars repeatedly have been upheld as valid

where properly applied to ensure the finality of cases in which issues were or could have been raised." Atkins v. State, 663 So.2d 624, 627 (Fla. 1995).

ISSUE I

WHETHER FLORIDA'S STATUTE ON THE AGGRAVATING CIRCUMSTANCES IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. WHETHER THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS TO CURE THE INVALIDITY OF THE STATUTE.

Appellant coalesces several of his separate claims below into his first issue on appeal before this Court. As appellant acknowledges in his brief, the issues raised closely resemble three claims made below before Judge Conrad.[4] However, appellant omits any argument as to how the trial court erred in finding these issues procedurally barred from review.

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[4] The propriety of compressing various claims raised below into one appellate issue is, in the State's view, somewhat questionable. Of course, if the issue as now presented or compressed has materially changed from that before the trial court, the issue as now presented is barred from review. See Archer v. State, 613 So.2d 446, 448 (Fla. 1993)(for an issue "to be preserved for appeal . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved for appellate review.'" (quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)).

Judge Conrad found appellant's claims that the statutory aggravating circumstances are unconstitutionally vague and over broad and that the jury did not receive an appropriate limiting instruction were procedurally barred. (V. IV at 418). Judge Conrad summarily disposed of this issue because it either was or should have been raised on direct appeal. In his order denying post-conviction relief, Judge Conrad stated:

> In fact, the Defendant states in his Motion that it was raised on direct appeal. Thus, it is procedurally barred and cannot be raised in a motion for post-conviction relief. *See Mikenas v. State*, 460 So.2d 359 (Fla. 1984).

(V. IV at 418)[5].

Similarly, Judge Conrad found appellant's constitutional attack upon the heinous, atrocious, and cruel instruction in this case was not properly raised in appellant's Rule 3.850 motion. Judge Conrad observed that this issue should have been raised on direct appeal and therefore "cannot be raised in a motion for post-conviction relief." (citation omitted). (V. IV at 418).

The State also notes that any attack upon the heinous,

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[5] See Appellant's Amended Motion for Post-Conviction Relief at Volume II pgs. 49-50. "On direct appeal, Mr. Sireci challenged the application of the facially vague and over broad Florida death penalty statute as to him since the jury was instructed on aggravating factors which were not applicable under the law and since the jury was without guidance so as to know that the inapplicable aggravators should not be weighed against the mitigation presented.[]" [footnote omitted].

atrocious, or cruel aggravator applied to the facts of this case is devoid of any merit.[6] In Davis v. State, 648 So.2d 107, 109 (Fla. 1994), cert. denied, 516 U.S. 827, 133 L.Ed.2d 50, 116 S.Ct. 94 (1994), this Court stated:

> Even if this issue was not barred, it is without merit. This Court has consistently upheld a finding of heinous, atrocious, or cruel where the victim was repeatedly stabbed. Derrick v. State, 641 So.2d 378 (Fla. 1994); Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

Appellate defense counsel summarily argues that to the extent "trial counsel did not properly preserve this claim, Mr. Sireci received ineffective assistance of counsel." (Appellant's Brief at 6). However, Judge Conrad noted below in denying this claim: "...Defendant concedes in his Motion that defense counsel duly objected to this aggravating circumstance and that the vagueness of section 921.141, Florida Statutes, was presented to both the trial court and the Florida Supreme Court." (V. IV at 419). See Sireci v. State, 587 So.2d 450, 454 (Fla. 1991)("Sireci's claim that section 921.141, Florida Statutes (1987), is unconstitutional on

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[6] The State noted below: "Although Sireci correctly asserted that defense counsel objected to the wording of this statutory aggravating circumstance, **Sireci neglected to inform this Court that defense counsel requested and received a special narrowed instruction**. (R 2542-43)." (V. III at 202).

its face and as applied is without merit."). Further, Judge Conrad noted:

> ...the record indicates that defense counsel strenuously argued this point and made corresponding argument that the jury instructions were vague. (R. 2335-2336, 2345-2347, 2438, 2440, 2542-2543, 2975-2989, and 3002-3006). More importantly, defense counsel requested a special jury instruction which expanded on the language contained in the standard jury instruction and the Court granted that request. The expanded instruction was given. (R. 2895). This instruction was more extensive than that approved in *Hall v. State*, 614 So.2d 473 (Fla.), *cert. denied*, 510 U.S. 834, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993).

Thus, Judge Conrad concluded that "defense counsel was not ineffective. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." Id.

Appellant finally contends under Issue One, that the Ninth Judicial Circuit Court erred in instructing the jury on the avoiding arrest aggravator and/or that the State failed to present sufficient evidence to establish this factor. (Appellant's Brief at 6). Judge Conrad also found this claim procedurally barred from review, noting that this claim "should have been raised on direct appeal..." (V. IV at 420).

Appellant complains that the Ninth Judicial Circuit Court should not have found the avoiding arrest aggravator to be present in this case. (Appellant's Brief at 8). Judge Conrad properly found that this issue was procedurally barred as it was raised on

direct appeal.[7] Appellant's brief on appeal appears to simply reargue the merits of claims found procedurally barred below. He does not attempt to show how the trial court's summary disposition on the basis of procedural bar was in any way improper. The trial court's ruling in this case is supported by the record and should be affirmed by this Court.

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[7] Appellant argues that the murder of Mr. Poteet was "only an after thought" and therefore his elimination as a witness was not a significant motive. However, the Ninth Judicial Circuit Court noted the following in its sentencing order:

> During the robbery of Eddie Nelson in 1970 the Defendant told Nelson he was going to have to kill him to keep him from identifying him. It is not clear if this was just a threat to scare the victim or if he was prevented from carrying out his threat by the arrival of another customer but it is clear that his subsequent arrest and conviction of the robbery was the result of the victims identifying him to the police.
>
> After the robbery of John Short he told Barbara Perkins he killed Short to keep him from identifying him and wished he knew the identity of a customer who saw him so he could kill him to keep him from being a witness.
>
> Subsequent to the murder of Howard Poteet the Defendant told David Wilson, Detective Arbisi and Harvey Woodall that Poteet was killed to keep him from being a witness. The defense contention that the statements suggest confabulation is not convincingly based upon the evidence. (V. III at 348).

ISSUE II

WHETHER APPELLANT'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF THE IMPROPER APPLICATION OF THE AGGRAVATING FACTORS OF FINANCIAL GAIN AND THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellant again combines several issues below into one assignment of error before this Court. Again, however, these issues concerning the application of aggravating circumstances either were or should have been raised on direct appeal from appellant's resentencing. Consequently, these issues are procedurally barred from consideration in this post-conviction appeal.

Appellant contends that the jury was not properly provided a "pecuniary gain" limiting instruction in this case. He maintains that use of this aggravator is improper unless it is the primary motive for the murder. Once again, Judge Conrad found that this issue should have been raised, if at all, on direct appeal. Failure to raise this issue on direct appeal, operated to bar this claim for post-conviction relief below.[8] (V. IV at 420).

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[8] Further, this issue lacks any merit. As the State pointed out below: "With respect to the proper application of the aggravating circumstance, the Supreme Court of Florida has clearly held that both the pecuniary gain and avoiding arrest factors may be applied in a given case and are not mutually inconsistent. Thompson v.

Judge Conrad correctly held that the challenge to the jury instruction on the "cold, calculated" aggravator was procedurally barred because it was raised on direct appeal.[9] (V. IV at 421). Again, a motion for post-conviction relief is a collateral attack upon a conviction and is not the proper forum to litigate direct appeal issues.

While appellant maintains that the criteria for this court's review of the issue has been met by an objection below and an appeal to this Court (Appellant's Brief at 11), appellant forgets that a post-conviction proceeding is not simply a second direct appeal. It is a collateral attack upon a conviction or sentence. Moreover, the objection raised on direct appeal from the resentencing was that application of this aggravator violated the

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State, 19 Fla. L. Weekly S632 (Fla. November 23, 1994) [648 So.2d 692, 695]." (V. III at 208).

[9] The State's Response in this case correctly noted the following:

> Similarly, Sireci's claim that the jury instruction on the cold, calculated and premeditated aggravating circumstance which was given in the instant case was inadequate is likewise procedurally barred. As recently stated by the Supreme Court of Florida in Jackson v. State, 19 Fla.L.Weekly S215, 217 (Fla. April 21, 1994)[648 So.2d 85, 89]: "claims that the instruction on the cold calculated and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. James v. State, 615 So.2d 668, 669 n.3 (Fla. 1993). (V. III at 210-211).

prohibition against *ex post facto* legislation, not that the instruction was unconstitutionally vague. (V. III at 318-19).

As for any claim that trial defense counsel or appellate counsel rendered ineffective assistance in failing to adequately raise or preserve issues below, Judge Conrad aptly noted the following:

> ...as indicated in Claim III above, defense counsel's actions concerning the 'heinous, atrocious, or cruel" instruction were more than adequate. The same is true for the "pecuniary gain" instruction discussed in Claim IV above. Likewise, defense counsel filed pre-trial motions arguing that the "cold, calculated" factor was vague and overbroad. (R. 2934-2956). Defense counsel strenuously objected to the application of said factor to this case. (R2440-2445). More importantly, defense counsel requested special jury instructions concerning this factor and presented argument for those instructions. (R 3143-3145, 2344-2345). The Court gave one of those special instructions. (R2543-2544). Defense counsel's performance, therefore, was not deficient. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> Defendant's claim regarding the ineffective assistance of appellate counsel is improperly raised in this forum. *See State v. District Court of Appeal, First District*, 569 So.2d 439 (Fla. 1990); Fla.R.App.P. 9.140(j)(1).

(V. IV at 422).

ISSUE III

WHETHER THE PRIOR CONVICTIONS USED TO SUPPORT THE FINDING OF "PRIOR CONVICTION OF A VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE WERE UNCONSTITUTIONALLY OBTAINED, INADMISSIBLE TO SUPPORT THIS AGGRAVATOR UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND WERE IMPROPERLY USED TO SUPPORT EVERY OTHER AGGRAVATOR.

Appellant next complains that the State impermissibly used his prior convictions for robbery and murder as an aggravator upon his resentencing for the murder of Henri Poteet. (Appellant's Brief at 12-14). Appellant's first challenge to use of this aggravator is in fact a collateral challenge to his guilty plea for the robbery and murder of John Short. Appellant claims that due to his mental condition he was unable to make a knowing and voluntary choice to plead guilty to the murder and robbery of Jonathan Short.

Judge Conrad rejected appellant's claim, first noting that "[t]he underlying contention concerning the use of prior convictions should have been raised on appeal. *See Mikenas v. State*, 460 So.2d 359 (Fla. 1984)." And, that "[i]t appears that Defendant is attempting to relitigate an aggravating factor that is procedurally barred." (V. IV at 423). The trial court found that appellant's attempt to avoid the procedural bar by claiming ineffective assistance of counsel was unavailing. The trial court noted that a defendant may not avoid a procedural bar by simply

recasting his claim in terms of ineffective assistance of counsel.[10] (V. IV at 423).

In any case, Judge Conrad observed that trial counsel did in fact attack the "voluntariness of Defendant's plea in the other murder case." (V. IV at 423). Judge Conrad noted that defense counsel "did attack the prior murder plea via a separate, contemporaneous rule 3.850 motion." "Also, defense counsel filed two motions in limine in the resentencing proceeding seeking to bar the State from introducing prior convictions based upon prior ineffective assistance of counsel. (R 3032-3036, 3129-3129-3131)."[11] Based upon this record, the trial court determined that appellant did not show that his counsel was deficient or that he suffered any prejudice from the alleged deficiency. (V. IV at 424). In disposing of this issue, the lower court stated:

> The trial court was fully aware of Defendant's mental limitations and yet expressly stated at the hearing on the motion in limine that, when it had granted a

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[10] Judge Conrad also stated that any attempt to attack the effectiveness of appellate counsel for failing to raise the issue on direct appeal is not properly raised in a motion for post-conviction relief. (V. IV at 424). See generally Robinson v. State, 707 So.2d 688, 700 (Fla. 1998)("the claim regarding leading questions is a substantive claim improperly recast in ineffective assistance language as a second appeal.").

[11] The State notes that the denial of appellant's motion to withdraw his guilty plea in the Short case was affirmed in Sireci v. State, 565 So.2d 1360 (Fla. 5th DCA 1990).

> resentencing proceeding in the subject case, "there was nothing that would affect the determination or the plea made in that *Short* case because we're not talking about an insanity defense or a psychological defense that would have made him incapable of rendering a plea." (R. 2593)

(V. IV at 424). Further, as the State observed in its response to this issue, simply because a challenge is made or even pending on a previous conviction does not prevent a court from considering the conviction as an aggravating factor. (V. III at 213); Bundy v. State, 538 So.2d 445, 447 (Fla. 1989)(fact that defendant is collaterally attacking prior convictions which have been final for several years does not entitle the capital defendant to any relief). See Eutzy v. State, 541 So.2d 1143, 1146 (Fla. 1989) (recognizing that defendant seeking collateral review of a conviction which served as the sole evidence of a prior violent felony conviction is not entitled to relief).

Citing North Carolina v. Pearce, 3965 U.S. 711 (1969), appellant argues that use of the prior convictions for robbery and murder was improper as these convictions were not used in the first sentencing hearing. (Appellant's Brief at 13). Appellant did not make this specific argument below in the final version of his motion for post-conviction relief. Failure to raise this issue below operates to bar this issue on appeal. See Section 924.051 (1)(b), Fla. Stat. (1996)("'Preserved' means that an issue, legal

argument, or objection to evidence was **timely raised before, and ruled on by, the trial court**, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) post conviction relief denied, 574 So.2d 1075 (Fla. 1991)("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."). In any case, appellant's argument is clearly without merit. Appellant did not suffer any additional **punishment** from the addition of an aggravating factor upon his resentencing. See generally Preston v. State, 607 So.2d 404, 407-408 (Fla. 1992), cert. denied, 123 L.Ed.2d 178, 113 S.Ct. 1619 (1993).

Appellant's claim that separate aggravators were based upon a single fact was found procedurally barred by the trial court below. (V. IV at 424-25). Judge Conrad noted that this claim was barred from review because "it should have been raised on direct appeal. *See Mikenas v. State*, 460 So.2d 359 (Fla. 1984)." Appellant does not even attempt to show how the trial court's resolution of this issue on the basis of a procedural bar was improper or erroneous. Judge Conrad's ruling should be affirmed by this Court.

ISSUE IV

WHETHER MR. SIRECI'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Judge Conrad addressed the merits of this claim and denied it below.[12] Judge Conrad's order provides the following analysis:

> The Florida Supreme Court has rejected this argument many times even after the *Espinosa* decision was rendered. *See Jones v. State*, 648 So.2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995); *Stewart v. State,* 588 So.2d 972 (Fla. 1991), *cert. denied*, 503 U.S. 976, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992).
>
> Defendant also argues that "trial and appellate counsel were ineffective for failing to object or present this claim on direct appeal." Counsel cannot be ineffective for failing to raise frivolous claims. Further, Defendant is unable to show prejudice. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Finally, Defendant's argument with respect to appellate counsel is improperly raised in this forum. *See State v. District Court of Appeal, First District,* 569 So.2d 439 (Fla. 1990); Fla.R.App.P.

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[12] While Judge Conrad addressed the merits of this issue below, the State correctly noted that it was procedurally barred. The State observed that "[t]his claim is procedurally barred because it could have been but was not raised at trial or on direct appeal. See Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1995)(complaints about instructions are procedurally barred unless a defendant objects and requests legally sufficient alternative instructions)..." (string cites omitted). (V. III at 217). The express finding by this Court of a procedural bar is important so that any federal courts asked to consider the appellant's claims in the future will be able to discern the parameters of their federal habeas review. See Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

9.140(j)(I).

Therefore, this claim is denied.

Judge Conrad was correct in observing that an appellate counsel cannot be faulted for failing to raise a "frivolous" claim. Similar challenges have been repeatedly rejected by this Court and federal courts. See e.g. Blanco v. State, 706 So.2d 7, 11 (Fla. 1997), cert. denied, 142 L.Ed.2d 76, 119 S.Ct. 96 (1997)(rejecting constitutional challenge to commission during the course of an enumerated felony aggravator);[13] Johnson v. Singletary, 991 F.2d 663, 669 (11th Cir. 1993)("Nothing in *Stringer* indicates that there is any constitutional infirmity in the Florida statute which permits a defendant to be death eligible based upon a felony murder conviction, and to be sentenced to death based upon an aggravating circumstance that duplicates an element of the underlying conviction.")(discussing Stringer v. Black, 503 U.S. 527, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983), cert. denied, 104 S.Ct. 1432 (1983) (rejecting argument that Florida has impermissibly made the death

[13] In Blanco, Justice Wells noted the value of stare decisis and the value of precedent: "If the doctrine of stare decisis has any efficacy under our law, death penalty jurisprudence cries out for its application. Destabilizing the law in these cases has overwhelming consequences and clearly should not be done in respect to law which has been as fundamental as this and which has been previously given repeatedly thoughtful consideration by this Court." 706 So.2d 11 (Wells, J., concurring).

penalty the “automatically preferred sentence” in any felony murder case because one of the statutory aggravating factors is the murder taking place during the course of a felony).

ISSUE V

WHETHER THE USE OF THE "COLD, CALCULATING" AGGRAVATING CIRCUMSTANCE IS A VIOLATION OF THE EX POST FACTO CLAUSES OF BOTH UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF FLORIDA.

Once again, appellant neglects to even address on appeal Judge Conrad's rejection of this issue below as procedurally barred. Judge Conrad held:

> Defendant argues that the enactment of section 921.141(5)(I), Florida Statutes, was retrospective and changed the punishment that he would receive. This issue is procedurally barred because it was raised on direct appeal. (citation omitted). Therefore, this claim is denied.

(V. IV at 426). In its decision on direct appeal from appellant's resentencing, this Court stated:

> Finally, we have previously rejected the argument that application of the cold, calculated, and premeditated factor to be a crime committed before the legislature enacted that aggravating factor violates the ex post factor clause. Ziegler v. State, 580 So.2d 127 (Fla. 1991); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

Sireci v. State, 587 So.2d 450, 455 (Fla. 1991). Appellant's attempt to relitigate an issue decided adversely to him on direct appeal is devoid of merit and procedurally barred from review.

ISSUE VI

WHETHER MR. SIRECI IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING CONTRARY TO THE SIXTH AND EIGHTH AMENDMENTS.

Appellant attempts to relitigate guilt phase issues in this post-conviction attack upon his resentencing hearing. As noted above, in the Statement of the Case, appellant already fully litigated a post-conviction motion on his guilt phase issues which was denied by the trial court and affirmed by this Court on appeal. Now, more than twenty years after his convictions for the murder and robbery of Howard Poteet, appellant claims he has new evidence which casts doubt upon his convictions. He claims Judge Conrad erred in denying his guilt phase issues without a hearing. The State disagrees.

Judge Conrad properly denied this claim because appellant failed to show that he exercised due diligence in bringing these claims below. (V. IV at 429-430). See Mills v. State, 684 So.2d 801, 804-805 (Fla. 1996)(noting that the defendant "must show in his motion for relief both that this evidence could not have been discovered with the exercise of reasonable diligence and that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit was based."). Appellant did not even attempt to show when this so-called newly discovered evidence

became known to the defense and why it could not have been discovered earlier for presentation in his first post-conviction motion attacking his convictions. See Atkins v. State, 663 So.2d 624, 626 (Fla. 1995)(finding an issue "procedurally barred because it should have been raised in prior collateral proceedings.").

In any case, the trial court observed that the so-called newly discovered evidence would not have had an impact upon the verdict in this case:

> Without reaching the issue of whether or not this information constitutes newly discovered evidence, it is clear that there is not a reasonable probability that this information would have produced an acquittal. *See e.g.* Robinson v. State, 707 So.2d 688 (Fla. 1988); Stano v. State, 708 So.2d 271 (Fla. 1998). In this case, it was not simply Defendant's denim jacket that tied him to the murder of Howard Poteet. The Florida Supreme Court summarized part of the evidence against defendant in its opinion on his direct appeal:
>
> "The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with a wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.
>
> Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

> The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.
>
> The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim."

(V. IV at 430)(quoting Sireci v. State, 399 So.2d 964, 967 (Fla. 1981)).

The denim jacket was not, as appellant contends, the "centerpiece" of the State's case below. The defendant's confession to the murder to several different individuals was far more damaging to the appellant.[14] While appellant complains that the trial court did not review the trial record before making its decision in this case, he does not deny or contest the summary of evidence presented in the trial court's order. In fact, the State submits that full review of the record would only reveal additional evidence of appellant's guilt.[15] Consequently, appellant has not

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[14] This Court also noted that the trial court properly allowed into evidence testimony from another former cell mate [Holtzinger] concerning an attempt by appellant to eliminate his former brother-in-law Wilson as a witness. "The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction." Sireci, 399 So.2d at 968.

[15] The State realizes that the record is limited to what was utilized by the trial court below in denying the motion for post-

shown that the trial court erred in summarily denying his untimely claim without reviewing the trial record in this case.

As for any attempt to show evidence that could be used to impeach appellant's former girlfriend, Barbara Perkins, Judge Conrad found this claim untimely and procedurally barred. Judge Conrad stated: "Defendant's conviction became final in 1981. Further, Defendant filed two post-conviction motions subsequent thereto and raised several claims of ineffective assistance of original trial counsel. Therefore, these claims are successive. *See Jones v. State*, 591 So.2d 911 (Fla. 1991)."

Appellant does not show how the trial court's rationale in denying this procedurally barred claim was in any way incorrect or unsound. Any claim surrounding trial counsel's failure to properly impeach the testimony of Barbara Perkins should have been raised long before his latest motion for post-conviction relief. See Demps v. Dugger, 714 So.2d 365, 367 (Fla. 1998)(agreeing with the

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conviction relief, but notes that this Court's summary of the evidence did not mention all of the compelling evidence presented by the State. For instance, appellant also confessed his involvement in the murder to his brother, Peter Sireci. Peter Sireci testified that appellant told him that Perkins had certain credit cards that he took from the man he killed. Appellant also told his brother that he was preparing to go to Canada because the police were looking for him. (Trial Transcript at 420-421). Since a review of the trial record would only reveal additional evidence of appellant's guilt, appellant has failed to establish any need for a remand so that Judge Conrad can review the trial record.

trial court's summary denial of a claim based upon newly discovered evidence where the defendant did not show why the claim was not raised in an earlier petition and did not show "due diligence" in raising the claim). Nor has appellant shown that any alleged inconsistency or possible impeachment of Barbara Perkins' testimony would change the result in this case. See generally Kilgore v. State, 631 So.2d 334, 335 (Fla. 3d DCA 1994)(facts tending to demonstrate mere inconsistencies "between a witness' trial and deposition testimony" are legally insufficient to require an evidentiary hearing).

As for any claim regarding State witness Woodall, Judge Conrad held:

> Defendant also claims that a state witness, Harvey Woodall, was given favors for his testimony, including payment of a large hotel liquor bill, which was not disclosed to Defendant. Defendant has been unable to tie this allegation to any specific evidence, other than the fact that there is not a record that the Board of County Commissioners paid this bill. Defendant alleges that if the State Attorney paid the bill Woodall's credibility as a witness would have been undermined. Defendant's allegations are conclusory. In addition, as stated above, this information does not substantially undermine confidence in the outcome of the prior proceedings, nor is it of such nature that it would probably produce an acquittal on retrial.
>
> Therefore, this claim is denied.

The trial court's ruling recognized that appellant's less than developed claim regarding a hotel liquor bill was an

inconsequential claim at best. See LeCroy v. Dugger, 727 So.2d 236, 240-241 (Fla. 1998)(upholding the trial court's summary denial of ineffective assistance claims where the trial court found "numerous other allegations of deficient conduct were noting more than conclusory claims that 'other' *unspecified* evidence should have been developed, or was available and should have been used.").

ISSUE VII

WHETHER THE FAILURE OF THE TRIAL COURT TO ALLOW MR. SIRECI TO WAIVE A JURY TRIAL ENSURED THAT MR. SIRECI WOULD BE SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND RULES PROHIBITING JUROR CONTACT HAVE PREVENTED APPELLANT FROM ESTABLISHING THE PREJUDICIAL IMPACT OF THIS RULING.

As for the trial court's refusal to allow appellant to waive a jury recommendation, this issue was raised on direct appeal. Consequently, the trial court properly found that this issue was procedurally barred from review in a motion for post-conviction relief. (V. IV at 435-436). See Sireci v. State, 587 So.2d 450, 452 (Fla. 1991).

Similarly, appellant's complaint about the prosecutor's comment revealing appellant's death row status is procedurally barred from review. Judge Conrad stated below:

> This issue was raised on direct appeal and is procedurally barred. *See Sireci v. State*, 587 So.2d 450, 452 (Fla. 1991), *Mikenas v. State*, 460 So.2d 359 (Fla. 1984). Defendant cannot avoid that bar by phrasing the claim in terms of ineffective assistance of counsel. Moreover, even if examined in terms of ineffective assistance of counsel, the supreme court expressly stated in its opinion that "[t]he prosecutor's reference to the prior death sentence did not prejudice the defendant..." *Sireci v. State*, 587 So.2d at 453. Hence, this claim does not meet the test set forth in *Strickland v. Washington*. Therefore, this claim is denied.

(V. IV at 436). See generally Romano v. Oklahoma, 512 U.S. 1, 10, 129 L.Ed.2d 1, 11, 114 S.Ct. 2004 (1994)("We do not believe that

the admission of evidence regarding petitioner's prior death sentence affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility.").

Appellant also claims that he was prejudiced by being shackled during trial. Once again, appellant raises an issue before this Court which is procedurally barred as it should have been raised, if at all, on direct appeal. (V. IV at 440). Judge Conrad properly found that appellant's attempt to raise this issue on the basis of ineffective assistance of counsel is without merit. Judge Conrad stated:

> Defendant also argues that, to the extent defense counsel did not object to his shackling, defense counsel was ineffective. Defendant, however, has failed to allege how he was prejudiced by defense counsel's failure and whether there is a reasonable probability that but for this failure, the outcome would have been different. Defendant does not allege that the jury viewed the shackles during the penalty phase. In fact, the Court took precautions to ensure that the jury did not view Defendant in shackles. (R. 116, 129, 850-51). Therefore, Defendant was not prejudiced and the second prong of *Strickland* is not satisfied. Thus, this claim is without merit and is denied.

(V. IV at 440-441).

Appellant finally complains that he was prevented from questioning the jury regarding the possible prejudice he suffered from the above allegations of error. Judge Conrad disposed of this

issue below, stating:

> Defendant also claims that he cannot fully plead this claim because rule 4-3.5(d)(4) of the Florida Rules of Professional Responsibility prevents him from contacting the jurors. Nevertheless, this does not change the result that this issue should have been raised on appeal and the procedural bar cannot be avoided by raising ineffective assistance of counsel claims.

(V. IV at 441).

Appellant's reliance upon Powell v. Allstate Ins. Co., 652 So.2d 354 (Fla. 1995), is misplaced. (Appellant's Brief at 31). In Powell, the Petitioner made a credible allegation of juror misconduct [overt racist statements] and was therefore entitled to interview the jury panel. *Sub judice*, appellant does not allege any overt act of juror misconduct.

In effect, appellant seeks permission for defendants in any case to question or poll the jurors as to what effect a claimed trial error had on their deliberations. The State is unsure how this would work, individual polling or a group focus session with defense counsel asking questions no doubt designed to obtain the desired responses. Fortunately, neither this Court nor the Florida Rules of Professional Responsibility allow defense attorneys such broad license to question jurors about allegations of trial error

after they have fulfilled their duty.[16] See Cave v. State, 476 So.2d 180, 187 (Fla. 1985)("This respect for jury deliberations is particularly appropriate where, as here, we are dealing with an advisory sentence which does not require a unanimous vote for a recommendation of death or a majority vote for a recommendation of life imprisonment. To examine the thought process of the individual members of a jury divided 7-5 on its recommendation would be a fruitless quagmire which would transfer the acknowledged differences of opinion among the individual jurors into open court. These differences do not have to be reconciled; they only have to be recorded in a vote.").

[16] In State v. Hamilton, 574 So.2d 124, 128 (Fla. 1991) this Court observed: "...Florida's Evidence Code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors. (citation omitted). Jurors may not even testify that they misunderstood the applicable law. This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. The rule also rests on a policy 'of preventing litigants or the public from invading the privacy of the jury room.' (Citations omitted).

ISSUE VIII

WHETHER THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT REGARDING NONSTATUTORY AGGRAVATING FACTORS RENDERED MR. SIRECI'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Again, the appellant improperly attempts to use this post-conviction proceeding as a second direct appeal. As Judge Conrad stated below: "This issue is procedurally barred because it should have been raised on appeal and, with respect to Defendant's lack of remorse, was raised on direct appeal. *See Sireci v. State*, 587 So.2d 450, 454 (Fla. 1991); *Mikenas v. State*, 460 So.2d 359 (Fla. 1984). Therefore this claim is denied." (V. IV at 438).

Appellant's argument that this Court erred in its harmless error analysis is procedurally barred. (V. IV at 438-439). Appellant's attempt to use this forum to criticize the prior decision of this Court on direct appeal is without merit. A motion for post-conviction relief is not the forum to criticize the Florida Supreme Court's disposition of issues addressed on direct appeal. See Eutzy v. State, 536 So.2d 1014, 1015 (Fla. 1988) (affirming trial court's summary denial of claims "which the court aptly characterized as 'matters that were addressed on direct appeal and are attacks and criticisms of the decision of the

Florida Supreme Court.'").

ISSUE IX

WHETHER MR. SIRECI WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION; BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE; AND BECAUSE THE STATE SUPPRESSED EXCULPATORY EVIDENCE. WHETHER MR. SIRECI'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.

Appellant's ambiguous claim that inadequate mental health examinations were conducted in this case was properly denied without a hearing. In addressing this issue, Judge Conrad stated:

> Defendant argues that defense counsel failed to provide him with competent psychiatric evaluations. Defendant claims that, although mitigating evidence was presented, the information was not presented to the jury in such a way as to explain to the lay jury the effects of this type of mitigation. However, Defendant does not state what mitigating evidence was not presented to the jury or how the evidence presented was inadequate.
>
> The record indicates that defense counsel obtained the assistance of several psychological and mental health experts. (R 2842 Dr. Pincus, 2877 Dr. Vallely, and 3218 Kevin Sullivan, L.C.S.W.). Dr. Dorothy Lewis, a psychiatrist, testified extensively at trial regarding Defendant's mental state, cognitive abilities, brain damage and evidence of abuse. (R 1476-1576; 1596-1740). Dr. Jonathan Pincus, a neurologist, testified about Defendant's brain damage and birth related trauma. (R 1988-2073, 2084-2195)
>
> ....

> ...Hence, Defendant received full, complete, and competent psychiatric evaluations which were utilized in the best manner possible. Therefore, defense counsel's performance was in no way deficient in this regard.

(V. IV at 439-440).

While appellant claims that the jury was not provided with "[i]mportant, necessary, and truthful information" with respect to his mental health evaluations (Appellant's Brief at 39), he fails to identify exactly what this "important" and "truthful" information is. Appellant's rather vague and conclusory claim was properly denied by the trial court below.

Appellant also contends that trial counsel and appellate counsel were ineffective in failing to raise or preserve issues surrounding appellant's examination by the State's mental health experts. However, Judge Conrad correctly observed the following in rejecting this claim:

> Defendant asserted that defense counsel did not object to the State's request to have its own experts examine Defendant. However, defense counsel did object and strongly argued against such a court order. (R. 2568). Accordingly, this claim is without merit.

(V. IV at 440). Moreover, defense counsel filed a demand for discovery in this case (V. XXIV at 2785) and was therefore subject to reciprocal discovery. The trial court's summary denial of this issue is supported by the record and should be affirmed by this Court.

Appellant's remaining claim, that incarceration records were not turned over, was addressed by Judge Conrad as follows:

> In addition to the above arguments, Defendant tacks on a claim in this section that there are a large number of files that have been discovered at the Florida State Prison. Defendant intimates that some of these documents deal with his incarceration. However, Defendant admits that this Court has previously denied this claim in connection with a public records request. Therefore, this claim is denied.

(V. IV at 440). Appellant's records claim did not allege sufficient supporting facts to show that favorable records existed much less how the absence of such records prejudiced him at the resentencing hearing below. Consequently, this claim was properly denied by Judge Conrad below.

ISSUE X

WHETHER NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. SIRECI'S CONVICTIONS AND SENTENCES ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant, without specifically identifying the newly discovered evidence and its significance, claims that newly discovered evidence from FDLE would probably result in an acquittal on retrial. (Appellant's Brief at 41). Judge Conrad summarily denied this claim below, stating:

> First, this Court found FDLE in compliance with all outstanding public records requests at the April 22, 1997 hearing. Second, Defendant's claim is insufficiently pled as the newly discovered evidence is not even identified. The two jackets referred to in Claim XIV do not constitute scientific or forensic evidence, neither does the extent of Defendant's girlfriend's involvement in the murder. Finally, this argument is time barred to the extent it takes issue with evidence presented at Defendant's trial during the guilt/innocence phase. Defendant is, in essence, making a general allegation and characterizing it as "newly discovered evidence." This does not satisfy the standard required for newly discovered evidence. Thus, this claim is denied.

(V. IV at 442).

The State also notes that appellant completely failed to show the exercise of due diligence in bringing this claim to the attention of the trial court. By definition, newly discovered evidence concerns facts that were "unknown by the trial court, by

the party, or by counsel at the time of trial" and which could not have been discovered by the defendant or counsel through the use of due diligence. Bolender v. State, 658 So.2d 82, 85 (Fla. 1995), cert. denied, 116 S.Ct. 12, 132 L.Ed.2d 896 (1996). Appellant did not even attempt to show due diligence in raising this claim. Consequently, this claim was was properly denied without a hearing.

ISSUE XI

WHETHER INACCURATE JURY INSTRUCTIONS GREATLY DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY AND INACCURATELY ADVISED ON WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES IN DECIDING WHETHER MR. SIRECI SHOULD LIVE OR DIE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant's motion below did not even identify the particular instruction that he claims inaccurately advised the jury. (V. II at 73). Nonetheless, he now claims that the trial court's instruction that "it is their duty to advise the court what punishment should be imposed upon the defendant for his crime of first degree murder" was improper. (Appellant's Brief at 42). He claims that the instruction somehow diminished the jurors sense of responsibility by advising them that the judge must make the final decision as to what punishment is imposed. Id.

Judge Conrad denied this claim below for failing to identify which instruction or prosecutorial comment his allegation of error referred to. (V. IV at 442). Further, in denying this claim below, the trial court stated:

> During the resentencing proceedings, defense counsel filed a pretrial motion, citing *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), in an attempt to prohibit the State from making any reference to the jury's advisory role, which motion was denied. (R 2957-2959). More importantly, "*Caldwell* does not control Florida law on capital sentencing." *Melendez v. State*, 612 So.2d 1366, 1369 (Fla. 1992), *cert. denied*,

> 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 3313 (1993), *see also Johnson v. State*, 660 So.2d 637 (Fla. 1995); *Turner v. Dugger,* 614 So.2d 1075, 1079 (Fla. 1992). Therefore, defense counsel's performance was not deficient.

In addition to lacking any merit, the State notes that this issue is procedurally barred because it should have been raised, if at all, on direct appeal. See Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990)(finding various jury instruction issues raised in a motion for post-conviction relief procedurally barred because they "either were raised or should have been raised on direct appeal."). Appellant's claim lacks any merit and was properly denied without an evidentiary hearing below.[17]

[17] In Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992), this Court stated: "In issue (9), Melendez asserts that the jurors were misled by instructions and arguments which diluted their sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This argument is without merit because Caldwell does not control Florida law on capital sentencing. We find that the instructions as given adequately advised the jury of its responsibility and that the prosecutor's comments were not improper. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Combs v. State, 525 So.2d 853 (Fla. 1988)."

ISSUE XII

WHETHER MR. SIRECI IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

Judge Conrad properly found that this issue is without merit. The trial court recognized that this Court has rejected similar claims regarding use of the electric chair in Florida. (V. IV at 444). This Court has repeatedly rejected similar challenges to use of the electric chair. See Provenzano v. Moore, No. 95,973 (Fla. September 24, 1999); Jones v. State, 701 So.2d 76, 80 (Fla. 1997), cert. denied, 140 L.Ed.2d 335, 118 S.Ct. 1297 (Fla. 1997)("We hold that electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment."). Remeta v. State, 710 So.2d 543 (Fla. 1998); Stano v. State, 708 So.2d 271 (Fla. 1998).

ISSUE XIII

WHETHER DEFENSE COUNSEL RENDERED INEFFECTIVE LEGAL ASSISTANCE BY FAILING TO PROCURE A CHANGE OF VENUE THUS RESULTING IN THE DENIAL OF A FAIR TRIAL IN VIOLATION OF MR. SIRECI'S RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. WHETHER, TO THE EXTENT APPELLATE COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE, MR. SIRECI RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Below, it was unclear to Judge Conrad whether or not appellant was complaining about the effectiveness of trial counsel or his appointed counsel on resentencing. To the extent that appellant was complaining about the effectiveness of trial counsel, Judge Conrad found the issue procedurally barred. Judge Conrad held: "To the extent that Defendant is alleging ineffective assistance of original trial counsel, such a claim is time barred and successive."[18] (V. IV at 444-445). Further, the State observes

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[18] The State's Response to this issue below aptly noted the following:

> Sireci's conviction became final with the denial of certiorari review by the United States Supreme Court in 1982. Sireci v. State, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). As a consequence, Sireci had until January 1, 1987, in which to collaterally challenge his conviction herein. See Ziegler v. State, 623 So.2d 48, 50 (Fla. 1993) recognizing January 1, 1987, as deadline for seeking post-conviction relief as to Ziegler's conviction, which had become final prior to January 1, 1985, even though Zeigler had been resentenced after 1987

that appellant provides no record cites to his description of various headlines alleged to have been printed in the Orlando area after the murder. Citation to extra record material not considered by the trial court below is improper on appeal from the denial of this motion for post-conviction relief.

As for any claim that resentencing counsel was ineffective for failing to move for a change of venue, Judge Conrad stated:

> Initially, the Court would note that the resentencing in Defendant's case took place in 1990, some fourteen years after the guilt phase was conducted in this matter. Prior to voir dire, defense counsel indicated a concern regarding publicity with respect to those jurors who resided in this area during 1975 and 1976. (R. 58). However, defense counsel also noted that there had been little media attention focused on the resentencing proceedings. During voir dire, defense counsel did question venire members individually, outside the presence of other venire members, about their awareness of the case and any pretrial publicity. (R 294-297, 371). Those potential jurors were not seated on Defendant's jury. Further, the trial court asked the same question of the full venire panel as a group and no one indicated any personal knowledge of the case, through the media or otherwise. (R 598-99). Therefore, defense counsel's performance cannot be said to have been deficient under *Strickland.* Further, Defendant cannot show prejudice.

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and was therefore entitled to collaterally challenged new sentence in a new post-conviction proceeding). Sireci did, in fact, so challenge his conviction. Sireci v. State, 469 So.2d 119 (Fla. 1985). Because this claim should have been raised, if at all, in Sireci's first motion for post-conviction relief filed in 1986, it must now be summarily denied. (V. III at 257).

(V. IV at 445).

This claim was properly denied without an evidentiary hearing. Both the state and federal courts have not hesitated in approving the summary denial of post-conviction relief where the pleadings and record demonstrate that a hearing is unnecessary. *See, e.g.*, Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Provenzano v. State, 616 So.2d 428 (Fla. 1993); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991); Kennedy v. State, 547 So.2d 912 (Fla. 1989); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991).

The seminal decision in this area, Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984), explained the deleterious cost to society in the automatic grant of post-conviction inquiry:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
>
> * * *
>
> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved

> unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.
>
> (80 L.Ed.2d at 694-95)
> (emphasis supplied)

In the recent decision of Provenzano v. Singletary, *supra*, the court rejected the defense argument that he should have been accorded an evidentiary hearing on the claims that the trial court improperly failed to grant a change of venue even though counsel tactically chose not to pursue the remedy; habeas counsel argued that an evidentiary hearing was needed to determine the reasonableness of the tactic, pointing to an affidavit submitted by another defense lawyer. The Court of Appeals explained its reasons for rejecting the argument:

> Even if the affidavit had said that its author would have insisted on a change of venue, it would establish only that two attorneys disagreed about trial strategy, which is hardly surprising. After all, "[t]here are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, 466 U.S.

668, 689, 104 S. Ct. 2052, 2065 (1984); accord, e.g., Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995) (en banc) ("Three different defense attorneys might have defended Waters three different ways, and all of them might have defended him differently from the way the members of this Court would have, but it does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance."). In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice. See, e.g., White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) (defendant must establish "that the approach taken by defense counsel would have been used by no professionally competent counsel"); Harich v. Dugger, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (same). Even if accepted as gospel, the affidavit does not do that.

There is another more fundamental reason why Provenzano is not entitled to an evidentiary hearing on the reasonableness of his counsel's decision to forego a change of venue, regardless of any affidavit he may have proffered. Our Jackson, Horton, and Bundy decisions establish that the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

Provenzano v. Singletary, 148 F.3d

1327 at 1331-1332 (11th Cir. 1998)

The Ninth Judicial Circuit Court was under no obligation to *sua sponte* order a change in venue for this trial. And, as Judge Conrad found below, this claim is procedurally barred from review in this post-conviction proceeding. And, even if not barred, as noted above, this issue lacks any merit and was properly denied without a hearing below.

ISSUE XIV

WHETHER MR. SIRECI WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF BOTH STATUTORY AND NONSTATUTORY MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Judge Conrad found this claim below procedurally barred from review. Judge Conrad held:

> Defendant argues that the trial court failed to find statutory mitigating circumstances even where such mitigating circumstances were proven by competent, substantial evidence. This argument is procedurally barred because it was raised on direct appeal. *See Sireci v. State*, 587 So.2d 450 (Fla. 1991)

(V. IV at 426). Appellant does not even attempt to show how Judge Conrad erred in finding this issue procedurally barred. Appellant's claim is without merit and was properly denied without an evidentiary hearing below.

ISSUE XV

WHETHER MR. SIRECI'S TRIAL PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court was unimpressed with this catch all claim below, stating that "[a]s indicated in all the other claims addressed above, no error has been committed." (V. IV at 446). This claim must also be rejected as appellant fails to provide sufficient facts to support his claim on appeal. Appellee continues to assert that appellant is procedurally barred from arguing claims that he either did raise or could have asserted earlier at trial and on appeal.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Julius J. Aulisio, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of October, 1999.

COUNSEL FOR STATE OF FLORIDA