

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,116

HENRY P. SIRECI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Sireci's Fla. R. Crim. P. 3.850 motion for post-conviction relief. This proceeding challenges both Mr. Sireci's conviction and his death sentence. References in this brief are as follows:

"V.__, R. ____." The record on the initial direct appeal to this Court.

"V.__, RR.____." The record on the appeal from the re-sentencing to this Court.

"V.__, PCR. ____." The post-conviction record on appeal.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Sireci lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is be appropriate in this case, given the seriousness of the case and the claims involved. Mr. Sireci accordingly requests that this Court permit oral argument.

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STATEMENT OF THE CASE

On February 27, 1976, the grand jury of Orange County, Florida, returned an indictment charging Mr. Sireci with first degree murder in the death of Howard Poteet (V.1, R.2) An arrest warrant arising out of the same circumstances was consolidated with the indictment (V.1, R.4) Mr. Sireci entered a plea of not guilty (V. 1, R. 12)

Mr. Sireci's case proceeded to jury trial on October 18, 1976 (V. 1, R. 169). The jury returned a verdict of guilty of first degree murder (V. 1, R. 196). The jury recommended death for the murder and the trial court imposed a death sentence (V. 2, R. 299) This sentence of death was ultimately vacated by the trial court and upheld by the Florida Supreme Court. Sireci v. State, 536 So. 2d 231 (Fla. 1988).

A new sentencing trial was held before a jury on April 9-20, 1990 and the jury recommended death by a vote of 11 to 1 (V. 26, RR. 3271). On May 4, 1990 the trial court sentenced Mr. Sireci to death (V. 24, RR. 2657). On direct appeal, the Florida Supreme Court affirmed Mr. Sireci's conviction and sentence. Sireci v. State, 587 So. 2d 450 (Fla. 1991). The United States Supreme Court denied certiorari. Sireci v. Florida, 112 S. Ct. 1500 (1992).

Mr. Sireci filed his initial Rule 3.850 motion challenging his resentencing on June 21, 1993. Mr. Sireci filed amended Rule 3.850 motions on March 23, 1994, April 18, 1995, and August 21, 1997 (V. 2, PC-R. 147). This is Mr. Sireci's first post-

conviction action stemming from his resentencing.

The state filed its answer to the motion to vacate judgments of convictions and sentences on February 2, 1998 (V. 3, PC-R. 193-259).

On January 21, 1999, Judge Richard F. Conrad presided over a Huff hearing held on the 3.850 postconviction motion (V. 1, PC-R. 1-35). Judge Conrad, without granting an evidentiary hearing, summarily denied Mr. Sireci's Rule 3.850 postconviction motion on February 9, 1999 (V. 4, PC-R. 415-446). Mr. Sireci timely filed his notice of appeal on March 10, 1999 (V. 4, PC-R. 448-449).

SUMMARY OF ARGUMENT

1. Florida's sentencing scheme denied Mr. Sireci his right to due process of law and constitutes cruel and unusual punishment. The language "especially heinous atrocious and cruel" is unconstitutionally vague. The jury was not instructed that there must be intent on the part of the defendant. The trial court erred in finding the aggravating factor of avoiding arrest because avoiding arrest was not the dominant motive for the killing.

2. The trial court erred in denying relief where the jury was not instructed that in order to find the aggravating factor pecuniary gain, pecuniary gain had to be the primary motive. It was error to find the existence of cold, calculated and premeditated where the jury was not instructed on the requirement of heightened premeditation.

3. The prior convictions used to support this aggravator were unconstitutionally obtained because Mr. Sireci did not have the ability to make a knowing and intelligent waiver of his constitutional rights. It was error to use the prior felony conviction to support every other aggravating circumstance.

4. Use of the felony murder aggravator of the crime being committed during the course of a robbery failed to narrow the class of persons eligible for the death penalty, and resulted in an unconstitutional sentence.

5. The aggravating factor of cold calculated and premeditated came into effect well after the commission of this offense and is a violation of the ex post facto clause of the Florida and United States Constitutions.

6. There is newly discovered evidence which points to Appellant's innocence. Appellant is entitled to an evidentiary hearing because the trial judge did not even review the trial record. There was no way for the trial court to know if the record conclusively refuted these claims.

7. The trial court erred in denying relief on the claim that the jury should have been waived for resentencing. The jury was inherently prejudiced because they learned that Mr. Sireci was previously on death row. To make matters worse, Mr. Sireci was made to appear in court in leg shackles. There is no way of knowing the impact of these errors on the jury because the Florida Bar Code of Ethics prevents Appellant's lawyers from contacting the jurors.

8. The trial court should have granted a new sentencing because of the error of jurors considering non-statutory aggravating factors. This error is not harmless when considered with the cumulative impact of the other errors presented to the trial court.

9. The trial court erred in denying Appellant and evidentiary hearing to establish that he did not receive effective mental health expert assistance. Although mental health professionals evaluated Mr. Sireci, they did not explain to the jury, in terms which lay persons could understand, how Appellant's mental health problems impacted the crime. Trial counsel was ineffective for failing to provide the experts with necessary background information on Mr. Sireci to support their findings and present this mitigation to the jury.

10. Because questions were raised regarding the procedures followed by the forensic laboratory, all forensic evidence should be retested under now available DNA procedures which are much more accurate and reliable.

11. The instructions to the jury improperly diminished their sense of responsibility in rendering a verdict. Mr. Sireci did not receive effective assistance of counsel when no objection was posed to this jury instruction.

12. Execution by electrocution as mandated by Florida Statute is cruel and unusual punishment under the Florida and United States Constitutions.

13. Mr. Sireci was denied a fair trial because of the

pervasive and prejudicial publicity surrounding his original trial. Relief should be granted at this time because it was fundamental error for the court not to change venue in this case. At the very least , Mr. Sireci should be afforded an evidentiary hearing and access to the jurors to establish that relief is proper.

14. Although each of the aforementioned errors considered individually may be harmless, the cumulative effect of all of the errors, when weighed together, establish harmful error which at the very least establishes the need for an evidentiary hearing.

ARGUMENTS

ARGUMENT I

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

This argument encompasses issues raised in claims II, III, V and VII of the motion to vacate. Florida's capital sentencing scheme denied Mr. Sireci his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty and narrow the application of the death penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976).

The capital sentencing statute in Florida fails to provide any standard of proof for insuring that aggravating circumstances

"outweigh" the mitigating factors, and does not define "sufficient aggravating circumstances." Mullaney v. Wilbur, 421 U.S. 684 (1975) Further, the statute does not sufficiently define for consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S. Ct. 528 (1992).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926 (1992). To the extent trial counsel did not properly preserve this claim, Mr. Sireci received ineffective assistance of counsel.

There is no serious argument that the language "especially heinous, atrocious, cruel or depraved" is not facially vague. Richmond v. Lewis 506 U. S. 40, 47 (1992) Florida's statutory language "especially heinous, atrocious or cruel" is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. Espinosa v. Florida, 505 U.S. 1079 (1992). Florida 's statute has only been able to pass constitutional muster where a narrowing construction has been established as in State v. Dixon 283 So. 2d 1, (Fla. 1973). However, simply adopting a narrowing construction is not enough. Where the statute is on its face vague and overbroad, as in this case, the narrowing construction

must be applied by the sentencer in order to cure the facial defect. Richmond v. Lewis, 506 U.S. at 48.

The Florida Supreme Court requires that the jury be instructed that the defendant must intend to inflict a high degree of pain or to torture. Failure to instruct the jury that it must find intent results in an unconstitutional sentence under the Eighth Amendment. Stein v. State, 632 So. 2d 1361 (Fla. 1994). In Stein, this Court struck the heinous, atrocious and cruel aggravator where no evidence was presented to demonstrate Steins' intent to inflict a high degree of pain or to otherwise torture the victims. The factor of heinous, atrocious and cruel is proper only in torturous murders, where evidence of extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)

The trial court's order acknowledged that the defense claimed that multiple stab wounds suggest an uncontrolled frenzy which was a product of brain damage. Defense experts testified that such frenzy could result once the defendant began stabbing the victim (V. 13, RR. 1589). There certainly was not proof beyond a reasonable doubt that the defendant had a desire to inflict a high degree of pain and a tortuous death which would more likely occur from fewer knife wounds resulting in a slow painful bleeding to death. More likely, the multiple stab wounds were the product of a psychotic frenzy.

This Court has held that in order to prevent "mechanical application" of aggravating factors, the "avoiding arrest" aggravating factor applies only where it is clearly shown that the dominant or sole motive for the murder was the elimination of a witness.

Menendez v. State 368 So. 2d 1278, 1282 (Fla. 1979). The trial court found the aggravating factor of avoiding arrest to be present in this case. Under the state's theory of the case, the murder was committed for financial gain. The evidence presented showed that Appellant went to the car lot to steal a car, or in a light favorable to the state, to take money from the victim. At most, it was only an afterthought to kill the victim to avoid arrest. Thus, avoiding arrest could not have been the sole or dominant motive for the killing.

ARGUMENT II

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.

This argument encompasses issues raised in claims IV, VI, and VII of the motion to vacate. The jury in Mr. Sireci's case was instructed that they could find as an aggravating factor that the murder was committed for the purposes of financial gain. Trial counsel did argue that the statute which allows this aggravator is unconstitutional because it fails to narrow the

class of persons eligible for the death penalty. However counsel failed to point out the argument set forth in the motion to vacate judgment and sentence that this Court has held that the "pecuniary gain" aggravating factor applies only where pecuniary gain is shown to be the primary motive for the murder. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Without this limitation, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad because it fails to adequately inform the sentencer what must be found for the aggravator to be present.

No such limiting instruction was provided to the jury in this case. The instruction provided in this case violates Espinosa v. Florida, 505 U.S. 1079 (1992); Stringer v. Black, 503 U.S. 1079 (1992); Sochor v. Florida, 504 U.S. 527 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution. The "financial gain" aggravating instruction is not only vague under the Eighth and Fourteenth Amendment to the United States Constitution, and the State did not prove that the primary motive for the crime with which Mr. Sireci was accused was pecuniary gain. The jury must be given adequate and constitutional instructions since it is part of the sentencing calculus. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Here, this Court requires that the finding of "pecuniary gain" as an aggravating circumstance must be limited to those crimes where financial gain was the primary motive. The instructions given to the jury did not include this

language. As a result, the jury found two mutually exclusive aggravating factors, avoiding arrest and financial gain. In order for these factors to exist, they must be the sole or dominant or primary reason for the killing. Thus the particular reason must be at least 51 % or greater basis for the killing. If avoiding arrest was greater than 51 % of the reason for the killing, then financial gain cannot also be greater than 51 % of the reason for the killing and vice versa. Therefore if one of these aggravators is found to exist the other one is automatically excluded.

The trial court failed to instruct the jury in Mr. Sireci's case as to the limitations of the "cold, calculated" aggravator required by the Florida Supreme Court. Not only did the trial court fail to give the adequate narrowing instruction, but the state failed to prove the existence of this aggravator beyond a reasonable doubt. There was insufficient evidence to support the finding of this aggravating circumstance.

The Florida Supreme Court in recognizing the vagueness of the "cold, calculated and premeditated" aggravator has required that it must be narrowed by adopting a "heightened premeditation" standard to distinguish this aggravator from the first degree murder element of premeditation. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). The jury was never told that "heightened premeditation" must exist before this aggravator can be found. The trial court did not apply this "heightened premeditation" standard when it found this aggravator. Such instruction violates Espinosa v. Florida, 505 U.S. 1079 (1992); Stringer v.

Black, 503 U.S. 222 (1992); Sochor v. Florida, 504 U.S. 527 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

This issue was objected to by counsel at trial. At the jury instruction conference Mr. West raised an objection to the instruction:

MR. WEST: YOU ARE -- RATHER THAN ARTICULATING OBJECTIONS TO THE COURT'S RULINGS, MAY I HAVE A STANDING OBJECTION TO THOSE INSTRUCTIONS THAT ARE DENIED THAT BY FAILING TO PROPERLY INSTRUCT THE JURY, IT RENDERS THEIR SENTENCING PROCESS UNRELIABLE AND VIOLATES THE 5TH, 6TH 8TH AND 14TH AMENDMENTS?

THE COURT: YOU MAY HAVE SUCH A STANDING OBJECTION.

(V. 16, RR. 2328). An alternative instruction was proposed by Mr. Sireci and rejected by the circuit court (V. 26, RR. 3143-44).

This instruction was objected to at trial and raised on direct appeal to the Florida Supreme Court. The criteria to allow this Court's consideration as set out in Jackson v. State, 684 So. 2d 85 (Fla. 1994) have been met. The jury as a co-sentencer, must be instructed with constitutional instructions. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jackson, 684 So. 2d 85 (Fla 1994) . The failure of the trial court to properly and constitutionally instruct this jury requires relief.

The jury relied upon improper jury instructions regarding aggravating factors in arriving at the recommendation of death.

The error is not harmless. The failure of trial and appellate counsel to raise this issue is ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. See Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). The trial court erred in denying Appellant relief in the form of a new sentencing hearing.

ARGUMENT III

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.

This argument encompasses issues raised in claims VIII and IX of the motion to vacate. The prior convictions introduced to support the "prior conviction of a violent felony" were obtained in violation of the United States Constitution and were used to support this aggravating circumstance in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Testimony of Dr. Lewis and Dr. Pincus was introduced at the resentencing plainly showed that Mr. Sireci did not have the ability to make any knowing and intelligent waiver of any constitutional right. Any plea of guilty to any offense made by Mr. Sireci is unconstitutional because he could not make the necessary waiver of his constitutional rights. Boyd v. Dutton, 405 U.S. 1 (1972); Boykin v. Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938).

The plea of guilty by Mr. Sireci in the John Leonard Short

offense is unconstitutional. Mr. Sireci's mental condition prevented him from making a knowing and intelligent plea of guilty on the homicide of John Short. The unconstitutional prior conviction cannot be used to support the sentence of death in this matter. Johnson v. Mississippi, 486 U.S. 578 (1988). It was also improper to use this conviction in the Short case because the plea was not entered until after Mr. Sireci was sentenced on the Poteet case. This conviction was not used at the original sentencing because it did not exist at the time. Mr. Sireci was successful in obtaining a new sentencing. To use this conviction, which occurred after the original sentencing but was based on actions of Mr. Sireci prior to the Poteet murder, would violate the tenants of North Carolina v. Pearce, 395 U.S. 711 (1969), that a defendant should not be placed in a worse position after remand from a successful appeal.

The use of the unconstitutional prior conviction is even more egregious since the trial court used it when he found every other aggravating circumstance, including the "prior conviction of a violent felony" aggravator. This error can never be deemed harmless because the entire sentence of death rests on this prior conviction. The trial court used the prior convictions to support his findings on each of the aggravating circumstance. The failure of trial counsel to present this issue, based on Mr. Sireci's mental state, violated his right to effective assistance of counsel. The use of the prior conviction to support Mr. Sireci's sentence of death is a violation of the Eighth and

Fourteenth Amendments to the United States Constitution. The 3.850 motion must be granted.

Two separate aggravating factors cannot be supported or based upon a single fact. Provence v. State, 337 So. 2d 783 (Fla. 1976). The evidence concerning these prior crimes was admitted by the state only to prove the existence of the "prior conviction of a violent felony." This evidence was admitted for no other purpose. It was certainly not admitted to prove each and every other aggravating circumstance.

The use of these crimes to support aggravators other than the "prior conviction of a violent felony" violates Williams v. State, 110 So. 2d 654 (Fla. 1959). This is also a violation of Fla. Stat. §90.404. Each aggravating circumstance found by the trial court was based upon the same set of facts -- the robbery of Eddie Nelson and the murder of John Short. This multiple counting of the same facts also violates the Eighth and Fourteenth Amendments to the United States Constitution. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). Relief is warranted.

ARGUMENT IV

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

This argument encompasses issues raised in claim X of the motion to vacate. Mr. Sireci was convicted of one count of first degree murder, with robbery being the underlying felony. The jury was instructed on the "felony murder" aggravating

circumstance. The trial court subsequently found the existence of the "felony murder" aggravating factor as well as the "pecuniary gain" aggravator (R. 3300).

The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 504 U.S. 527 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 503 U.S. 527 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Sireci thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not be automatically eligible for the death penalty..

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Aggravating factors must channel and narrow the sentencer's discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The use of this automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the sentencing process was rendered unconstitutionally unreliable. *Id.* "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for

sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

The Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.

When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at least one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:

"Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." (emphasis added).

As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90. See also United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); Davis v. Executive Director of Department of Corrections, 100 F.3d 750 (10th Cir. 1996).

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black, 503 U.S. 527 (1992). The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

[W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P. 2d at 92. This error cannot be harmless in this case:

[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 504 U.S. at 534.

The use of a doubling instruction does not make the instructions received by Mr. Sireci's jury constitutional. The role of aggravators and instructions are to guide the sentencer's discretion or, in other words, to narrow the class of persons that are eligible for the death penalty. Sochor v. Florida, 504 U.S. 527 (1992). To that end, the jury, as a co-sentencer, must be constitutionally instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Mr. Sireci's jury was not properly instructed.

The trial court erred in denying relief on this claim because Espinosa is a change in law holding that juries must be treated as sentencers. The trial court indicated that the Florida Supreme Court has rejected this argument many times even after the Espinosa decision was rendered. In support of its proposition, the court erroneously cites to was 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), which was actually decided before Espinosa. The court also erroneously cited to 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) which rejected the

automatic application of the aggravator argument because it was not raised below. The argument in this case was properly in front of the trial court as an ineffective assistance of counsel claim. Moreover, the decision of Johnson is new since the Florida Supreme Court considered this matter on direct appeal. Therefore, this Court must revisit this claim. Mr. Sireci was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. His jury was told to consider an illusory aggravating circumstance. Relief is proper at this time.

ARGUMENT V

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.

This argument encompasses issues raised in claim XI of the motion to vacate. The offense date of the murder for which Mr. Sireci was convicted was on December, 1975. Section 921.141 (5)(i) of the Florida Statutes became effective July 1, 1979, four years after Mr. Sireci was accused of committing this crime. The use of this vague "cold, calculated" aggravating circumstance changed the punishment that Mr. Sireci would receive. This enactment was retrospective and disadvantaged Mr. Sireci. Thus it is a violation of the ex post facto clause of both the federal and state constitutions. Miller v. Florida, 482 U.S. 423 (1987). The trial court erred in denying relief under the 3.850

and a new sentencing must be granted.

ARGUMENT VI

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

This argument encompasses issues raised in claims XIII, XIV, XVI, XVII, and XVIII. Appellant's claim that he is innocent of this crime was erroneously denied without an evidentiary hearing. Mr. Sireci made a claim in his motion to vacate judgment and sentence that there is newly discovered evidence which shows his innocence, and that it was therefore proper to raise such a claim in his motion. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. See Fla. R. Crim. P. 3.850(d); Rivera v. State, 717 So. 2d 477 (Fla. 1998); Roberts v. State 568 So. 2d 1255, 1256 (Fla. 1990). The trial court must conduct an evidentiary hearing on this matter since the record before the court does not conclusively prove that Mr. Sireci is not entitled to relief. The trial court failed to cite to or attach portions of the record that refute this claim.

The centerpiece of the State's case against Mr. Sireci was that he owned two identical denim jackets and that one of these jackets was found in an abandoned motel near the scene of this crime. The State's argument followed that because this jacket was Mr. Sireci's and because it had blood on it that was similar to the victim's, then Mr. Sireci must have been guilty.

On February 4, 1976, Detective Nazarchuk¹ interviewed Peter Sireci. In that interview Peter and Detective Nazarchuk discussed the jacket:

NAZARCHUK: Are you able to describe the jacket {sic} to me or did he tell you what kind of jacket it was.

PETER: He said it was like a levi's jacket fur line and he's got one similar like it right now.

A property receipt from the Sheriff's Department of Orange County shows that property transferred from the Las Vegas Police Department included "One Blue Denim Jacket brown collar, stripped lining." This receipt was dated February 12, 1976. This jacket was seized or impounded from Barbara Perkins, Mr. Sireci's companion who fled to Las Vegas. Among her possessions was the other denim jacket belonging to Mr. Sireci. According to these documents both of Mr. Sireci's jackets were accounted for and neither one of them was found in the abandoned hotel room.

Other evidence that undermines any confidence in Mr. Sireci's conviction and shows a lack of adversarial testing is evidence concerning Barbara Perkins' involvement in this crime. The State maintained that Barbara Perkins, Mr. Sireci's accomplice, did nothing but leave Mr. Sireci off at a street corner prior to the crime and pick him up later, after the crime. Ms. Perkins, as well as the State, has said that she had no other involvement and was not at the scene of the crime or at the

¹Detective Nazarchuk's case notes should be in the OCSO CID file, which Mr. Sireci has yet to receive.

abandoned motel where a jacket was found. Found at that motel were a variety of towels and washcloths that were subjected to hair and fiber analysis. This analysis showed that hair similar to Ms. Perkins was found on not one, but two towels. With advancements in science since the time of this crime, it is likely that the hairs on the towels could be matched to Ms. Perkins through DNA testing. Thus the state's key witness' credibility can be impeached, because she claimed to never have been in the abandoned motel room.

Ms. Perkins testified at the resentencing that Mr. Sireci had robbed a convenience store two days before the Poteet crime. She said that in that robbery only about thirty dollars was taken. However evidence indicates that almost \$400.00, cigarettes and wine were taken. This evidence, not previously heard by the jury, whether through the ineffectiveness of counsel or by the failure of the state to release this information, shows that her involvement was greater than she let the jury believe and that Ms. Perkins' testimony at trial was unreliable.

Harvey Woodall, a jail house snitch, testified on behalf of the State, relaying information that Mr. Sireci is alleged to have told him. In the statement given to police on April 7, 1976, Mr. Woodall related the information that Mr. Sireci is supposed to have told him. In this statement Mr. Woodall said that Mr. Sireci told him that he wore a green sweatshirt with a hood. This information is contrary to the theory presented to the jury by the State, that Mr. Sireci wore a denim jacket. This

information undermines Mr. Woodall's testimony at trial.

It appears that Mr. Woodall was given favors for his testimony that were not revealed to trial counsel. This information would have been useful to impeach Mr. Woodall's credibility. The out of state witnesses in this matter stayed at the Kahler Plaza Inn. On October 27, 1976 a message was left for "Jim." This message indicated that Mr. Woodall had charged a large amount of liquor on the hotel bill. No indication is found whether Mr. Woodall's bill at the Kahler Plaza was paid by the Board of County Commissioners as were all other out of state witnesses. No request or order has been found in the record that the Board paid this bill. If the State Attorney paid this bill for Mr. Woodall, this information would have undermined his credibility as a witness. Giglio v. United States, 405 U.S. 150 (1972). Since portions of the record were not attached to refute these allegations, an evidentiary hearing should have been conducted. The evidence pled in this claim, or any part of it, if presented to a jury on retrial would probably result in Mr. Sireci's acquittal of this crime. The probability standard set out in Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) and Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) is applicable here. Under the probability standard a new trial must be granted if the new evidence is of such a nature that it would probably produce an acquittal at retrial.

The trial court summarily denied this claim without an evidentiary hearing stating that: "it is clear that there is not

a reasonable probability that this information would have produced an acquittal." (V. 4, PC-R. 430). However, the trial court failed to attach portions of the record to support his conclusion, but relied only on a four paragraph excerpt from the Florida Supreme Court opinion. Circuit Judge Richard Conrad did not even preside over the original trial so he cannot know the totality of evidence presented which would be absolutely necessary to make the ruling of no reasonable probability. Even more egregious, Judge Conrad did not even familiarize himself with the evidence presented at trial as evidenced by footnote three of his order where he indicates that the original trial and penalty phase transcripts were not available to him (V. 4, PC-R. 430). It is a clear violation of due process, as provided in the Florida and United States Constitutions, for a trial judge to make a ruling that this new evidence would not probably result in an acquittal when the trial judge does not even know what evidence was presented at trial.

The excerpts the trial court used to deny this claim mainly rely on the testimony of Barbara Perkins and Harvey Woodall. If Mr. Sireci was provided an evidentiary hearing, and successfully proved his claims, the credibility of Perkins and Woodall would be impeached. If Perkins testimony is undermined, that would also diminish the testimony of Mr. Bonnie Arnold who was intimate with Perkins. The only physical evidence tying Appellant to the crime was a hair found on the sock of the victim that was similar to the hair of Mr. Sireci. At this point, DNA testing could be done

to eliminate the hair as coming from Appellant, The states case is based on witnesses, most of whom were biased, testifying about what they claim Appellant told them. It was established in the new penalty phase that Appellant suffers from brain damage and has rambling and illogical thought processes. This undermines the accuracy of any statements he provided to other witnesses. With this new evidence, the state's case becomes much weaker and Appellant probably would be acquitted on retrial.

Mr. Sireci is not only innocent of this crime but he was also denied an adversarial testing of this matter before the court and jury. In other words, the violation of Strickland v. Washington, 466 U.S. 668 (1984), and the withholding of evidence by the State in violation of Brady v. Maryland, 373 U.S. 83 (1963), have denied Mr. Sireci the full panoply of protections afforded a criminal defendant by the United States Constitution. Schlup v. Delo, 513 U.S. 298 (1995). The trial court erred by not conducting an evidentiary hearing and thereafter relief.

ARGUMENT VII

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.

This argument encompasses issues raised in claims XIX, XX, XXVI and XXX of the motion to vacate. Mr. Sireci filed a waiver of his right to a trial by jury prior to trial. The trial court refused to accept the waiver of the jury trial. Since the trial court is required to give great weight to the jury's recommendation; it was clear that the trial court recognized that it would be improper to allow the jury know that Mr. Sireci had previously been sentenced to death. The court had previously granted a motion in limine concerning this issue. The trial court was also aware that "any halfway intelligent juror under the facts of this case would figure out that Sireci had previously been sentenced to death and was on death row for this offense" (V. 23, RR. 2687-88). Even though the trial court had granted a motion in limine, it was obvious to him that it would have no effect. He was aware that the jury would likely become biased. Woodson v. North Carolina, 428 U.S. 280 (1976). As anticipated, the jury did learn about Mr. Sireci having been on death row.

During his cross examination of one of Mr. Sireci's mental health witnesses the State asked:

Q. (prosecution) Maybe it's not a

paranoid ideation, is that correct?

A. (Dr. Lewis) Maybe it's not, but I would put my reputation on the fact that it is. It is -- I mean it's demonstrated. It's one of the research criteria.

Q. It's what you expected to find of this man on death row, isn't that correct?

A. No, it is not. I had no idea. I beg your pardon, sir. What did you just say?

The trial court overruled the objection and denied a mistrial.
(V. 13, RR. 1673)

Only moments before making this statement to the jury, the state attorney had been warned by the Court that he was coming "perilously close to commenting on Mr. Sireci's previous death sentence" (V.13, RR. 1640) The Court's previous admonishment in the presence of the jury gave rise to a presumption that the jurors were unable to fairly consider the issue of Mr. Sireci's sentence. Weber v. State, 501 So. 2d 1379, 1383 (Fla. 3d DCA 1987).

Espinosa v. Florida, 505 U.S. 1079 (1992) and Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993) recognize that the jury is a co-sentencer, and therefore, the jury must be constitutionally instructed. Telling the jury that Mr. Sireci was previously on death row undermines the jury's sense of responsibility in deciding whether Mr. Sireci lives or dies.

To make matters worse, Mr. Sireci was made to appear in front of the jury in shackles which may have further prejudiced his chances of receiving a fair sentencing trial. Mr. Sireci was shackled throughout the resentencing. Shackling a defendant

before a jury is strictly forbidden by the United States Constitution. Shackling a defendant is inherently prejudicial and has been condemned by the United States Supreme Court. Holbrook v. Flynn, 475 U.S. 560 (1986). When shackling occurs, it must be subjected to "close judicial scrutiny," Estelle v. Williams, 425 U.S. 501 (1976).

To the extent Mr. Sireci's attorney failed to object or appeal, Mr. Sireci received ineffective assistance of counsel. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). The trial court's use of, and failure to prohibit, this "inherently prejudicial practice" without any showing of necessity or any hearing entitles Mr. Sireci to a new sentencing proceeding before an unbiased jury. Mr. Sireci's due process rights were violated because he was shackled without any inquiry or hearing on the necessity of shackling. In fact, the court gave no reason to shackle Mr. Sireci. The shackling of Mr. Sireci throughout the resentencing without any hearing or showing of necessity stripped Mr. Sireci's resentencing of any fairness. Mr. Sireci's penalty phase was prejudiced, and the trial court erred in denying Mr. Sireci a new sentencing.

There is no way of knowing the impact of these errors on the jury because of the unconstitutional provision in the Florida Bar Code of Ethics which prohibits counsel from contacting the jurors. Mr. Sireci was denied an impartial jury and due process of the law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Florida Rules of Professional Responsibility, Rule 4-3.5(d)(4) prevented Mr. Sireci prevented from communicating with the jurors. Not only does this rule chill Mr. Sireci's ability to investigate his case in violation the Eighth and Fourteenth Amendments, but it is even more egregious when Mr. Sireci requested that he be allowed to contact jurors after trial to discuss the possibility of misconduct. This request was denied. This Court must declare this rule to be unconstitutional or permit interviews with each juror.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights. Mr. Sireci should have the ability to interview the jurors in this case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting the jurors. The failure to allow Mr. Sireci the ability to interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

Mr. Sireci is incarcerated on death row and is unable to conduct such interviews. He has been provided counsel who are members of the Florida Bar. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, precludes counsel from contacting jurors and conducting an investigation into constitutional claims that would

be discovered through interviews.

The role of juries in capital sentencing proceedings must conform to the doctrines applying the Eighth Amendment's prohibition on cruel and unusual punishment to regulate imposition of the death penalty. See Furman v. Georgia, 408 U.S. 238 (1972); Espinosa v. Florida, 505 U.S. 1079 (1992); Thomas v. State, 403 So. 2d 371 (Fla. 1981). States may not impose a sentence of death where the process by which the defendant was determined to be eligible for the death penalty is so indeterminate that it fails to guide the jury in narrowing the class of persons eligible for death. *Id.*; Zant v. Stephens, 402 U.S. 862, 878 (1983). Florida's capital sentencing scheme attempts to guide juror decision making by permitting jurors to consider only certain enumerated aggravating factors. See Barclay v. Florida, 463 U.S. 939, 965-66 (1976); § 921.141, Fla. Stat. (1983).

The jury acts as co-sentencer in Florida's capital sentencing scheme. Espinosa v. Florida, 505 U.S. 1079 (1992); Kennedy v. Singletary, 602 So. 2d 1285, 1286 (Fla. 1992) (Kogan, J., concurring). The process by which a jury renders a death sentence is also subject to the scrutiny demanded by the Due Process Clause of the Fourteenth Amendment. Gardner v. Florida, 430 U.S. 349, 358 (1977). Due process requires not only formalistic procedural fairness, but vindication of the defendant's "legitimate interest in the character of the procedure which leads to the imposition of sentence." *Id.*,

citing Witherspoon v. Illinois, 391 U.S. 510, 521-523 (1968).

The strictures of due process govern post-conviction challenges to a capital conviction or sentence. Huff v. State, 622 So. 2d 982 (Fla. 1993). The essence of due process is the opportunity to be heard. Ford v. Wainwright, 477 U.S. 399 (1986). The opportunity to have one's claims to post-conviction relief considered fully by a fair and impartial tribunal is also the essence of a prisoner's right of access to the courts. See Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640 (1941). Mr. Sireci should have been allowed to to conduct interviews with jurors to determine whether or to what extent the extralegal influences may have prejudiced his penalty proceedings.

In light of evidence that the deliberations of Florida capital juries frequently and to a shocking degree consider factors extrinsic to the verdict and engage in overt prejudicial acts, Mr. Sireci must be permitted to interview the jurors who contributed to his death sentence in order to assess the extent to which Mr. Sireci may have been prejudiced. See Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995). Certainly, juror misconduct during the guilt phase of Mr. Sireci's trial would warrant a new trial. Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991).

While juror misconduct during the guilt phase raises serious Sixth Amendment problems, misconduct during penalty phase proceedings comes under greater scrutiny due to the Eighth and Fourteenth Amendment restrictions on capital sentencing. See

Gardner v. Florida, 430 U.S. at 357-358. The expression of community conscience must be guided and channeled by objective standards, Godfrey v. Georgia, 446 U.S. 420, 428 (1980), and must be individualized in accordance with lawful instructions on aggravating and mitigating factors for the sentence to meet the test for validity under the Eighth Amendment. See Mills v. Maryland, 486 U.S. 367, 375 (1988). "Because of the importance of the jury's role in sentencing in capital cases, jurors should be as fully informed as possible about their duties and responsibilities." Jones v. State, 652 So. 2d 346, 354 (Fla. 1995) (Anstead, J., concurring). Jurors must not only be informed of their responsibilities under the sentencing statute but must act according to their duty and oath. Morgan v. Illinois, 504 U.S. 719, 735 (1992). Where jurors consider evidence in a manner other than "the manner prescribed by law" those considerations must be considered extrinsic to the verdict. See Russ v. State, 95 So. 2d 594, 600 (Fla. 1957). What Florida's rule prohibiting counsel from interviewing jurors does in this context is curtail Mr. Sireci's ability to pursue these recognized claims for collateral relief. Mr. Sireci can show a risk that overt acts and improper considerations intruded upon the verdict sufficient to undermine the verdict's reliability.

Juror misconduct and inadequate sentencing-phase instructions are also recognized as grounds for federal habeas corpus relief in capital cases. Jeffries v. Blodgett, 5 F.3d 1180, 1190, 1195 (9th Cir. 1993). The court in Jeffries found

sufficient "potential for prejudice" to warrant relief where jurors received extrinsic information that the defendant previously committed an act similar to the one of which he was being accused. Jeffries, 5 F.3d at 1190-1191. The Ninth Circuit relied on Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988), which presented similar facts. There is ample reason to believe that "overt acts" such as the open consideration of extralegal aggravators "'might have prejudicially affected the jury in reaching their own verdict.'" Powell, 652 So. 2d at 356, quoting, Hamilton v. State, 574 So. 2d 124, 128 (Fla. 1991) (internal citation omitted).

Mr. Sireci will be denied due process of law and access to the courts if counsel are not permitted to interview jurors in preparation for postconviction proceedings. Because "[d]eath is a different kind of punishment from any other that may be imposed," Gardner v. Florida, 430 U.S. 349, 357, 97 S. Ct. 1197, 1205 (1977), the Supreme Court's due process jurisprudence demands that more reliable procedures be used in capital cases. Beck v. Alabama, 408 U.S. 238, 367-368, 100 S. Ct. 2382, 2387-2388 (1980). Florida "jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings." Swafford v. State, 679 So. 2d 736, 740 (Harding (citing California v. Ramos, 463 U.S. 992, 998-999 (1983) (other citation omitted)).

To ensure a fair proceeding the trial court should have allowed Mr. Sireci to waive his right to a jury. The

mechanistic application of these rules in this sentencing trial violated Mr. Sireci's rights under the Eighth and Fourteenth Amendment to the United States Constitution. As a result, Mr. Sireci's jury became biased and recommended death. The trial court, under Florida case law, was required to give "great weight" to this biased recommendation. The trial court denied this claim because this issue was raised on appeal. The trial court failed to recognize a change in the caselaw from the United State Supreme Court in the case of Espinosa v. Florida, 505 U.S. 1079 (1992). If the jury relied on invalid aggravators to make its recommendation of death, then the judge indirectly weighed these invalid aggravators. This kind of indirect weighing is not allowed because it creates the same potential for arbitrariness as a direct weighing of an invalid aggravating factor. Espinosa at 1082. As was done in Espinosa, the trial court should have presumed that the jury found and invalid aggravating circumstance that was presented to them and granted relief in the form of a new sentencing trial. The trial court erred by not granting relief on this issue.

ARGUMENT VIII

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.

This argument encompasses issues raised in claims XXIII and XXIV of the motion to vacate. The judge and jury which sentenced

Mr. Sireci were presented with and considered nonstatutory aggravating circumstances such as Mr. Sireci's purported lack of remorse. This was testified to by Barbara Perkins when she testified that after Mr. Sireci read about the murder in the newspaper, "he seemed rather proud of it." The trial court denied this claim because it was raised on direct appeal.

What the trial court did not recognize is that this comment was found to be error, albeit harmless. Thus the trial court was required to consider this error in conjunction with all of the other claims raised in the motion to vacate judgment and sentence to make a determination if the jury probably would have recommended a life sentence. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). In combination with other errors presented herein, this error no longer can be considered harmless.

The Florida Supreme Court determined that testimony concerning Mr. Sireci's lack of remorse had been improperly presented to the jury in violation of Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988). This Court then determined that this comment was harmless error. Thus, an extra thumb was placed on the death side of the scale. Stringer v. Black, 503 U.S. 222 (1992). This "thumb" joined those of the already vague and inadequate aggravating factor instructions.

Moreover, the Florida Supreme Court's analysis fails under Richmond v. Lewis, 506 U.S. 40 (1992). There, the United States Supreme Court indicated that the harmless beyond a reasonable doubt standard for a sentencer's consideration of an invalid

aggravator requires consideration of the sentencer's weighing process. Here, the Florida Supreme Court failed to address the impact of this error on a sentencing jury. The proper standard for harmless error review on direct appeal review is found in Chapman v. California, 386 U.S. 18 (1967). The Court failed to conduct the proper review of this constitutional error. It is critical that the state courts conduct harmless error under the proper standard. Brecht v. Abrahamson, 507 U.S. 619 (1993). The trial court erred in denying relief because new case law warrants revisiting this issue.

The sentencer's consideration of improper and unconstitutional nonstatutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. Maynard v. Cartwright, 486 U.S. 356, 358 (1988). As a result, this impermissible aggravating factor evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Sireci's constitutional rights. Penry v. Lynaugh, 492 U.S. 302 (1989).

ARGUMENT IX

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. MR. SIRECI'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.

This argument encompasses issues raised in claim XXV of the motion to vacate. A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Mason v. State, 489 So. 2d 734 (Fla. 1986).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails

to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, at 80 (citation omitted).

In Mr. Sireci's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 470 U.S. at 81, dealing with the long term results of a severely abusive and tortuous childhood. The judge and jury are deprived of the facts

concerning this disorder which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Sireci's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 470 U.S. at 81.

Even though mitigating evidence was presented to the jury charged with the responsibility of whether Mr. Sireci would live or die, the information was never presented to the jury in such a way as to explain to the lay jury the effects of this type of mitigation. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Sireci's constitutional rights. See Penry v. Lynaugh, 492 U.S. 302 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). In discussing the statutory mental health mitigating factors, the Florida Supreme Court recognized that:

A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983).

Because of counsel's lack of preparation and failure to provide information to the experts concerning Mr. Sireci's background, the judge and jury were deprived of critical evidence regarding statutory and nonstatutory factors relating to whether Mr. Sireci should live or die. On September 5, 1989 the state

requested the trial court to order Mr. Sireci to submit to mental health evaluation by the state's own experts. The Court granted the state's motion for evaluation. Additionally the court ordered that defense mental health experts be required to reveal to the state reports and other work product. These orders violated Mr. Sireci's right to remain silent and his right to counsel. Estelle v. Smith, 451 U.S. 454 (1981). To the extent that trial counsel failed to object or appellate counsel failed to raise this issue, Mr. Sireci's right to effective assistance of counsel was denied.

It was discovered that a large number of files were kept at Florida State Prison, where Mr. Sireci was housed from the time of his sentence in 1976 to 1993, that had not been released to Mr. Sireci's counsel in compliance with an earlier request. The Department of Corrections has not turned over the documents and has not inspected them in accordance with Chapter 119 of the Florida Statutes.²

Information concerning a person's incarceration is relevant mitigating evidence and should have been disclosed to counsel, and thus, to the mental health experts in this matter. Skipper v. South Carolina, 476 U.S. 1 (1986). This information would be particularly important in this matter given the large amount of testimony concerning Mr. Sireci's mental health issues. The prejudice to Mr. Sireci resulting from the failure to present

²This Court has denied Mr. Sireci's claim in this regard, finding adequate DOC's affidavit that inmate records are not kept in the records storage room at FSP.

mitigating evidence to the judge and jury is clear. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. The trial court erred in failing to conduct an evidentiary hearing.

ARGUMENT X

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.

This argument encompasses issues raised in claim XXVII of the motion to vacate. Defense counsel learned of information indicating that at the time of Mr. Sireci's arrest and trial the Sanford laboratory of the Florida Department of Law Enforcement and the Orange County Sheriff's Department were not following proper scientific procedures for recovering and testing forensic evidence. With the advent of new technology such as DNA testing any laboratory errors can now be corrected. It is intolerable that a possible innocent person could be executed in this country when the means are available to insure accurate testing of evidence. The trial court should have afforded Mr. Sireci an evidentiary hearing to establish the need to retesting items that given the results anticipated would probably result in an acquittal at retrial.

ARGUMENT XI

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

This argument encompasses issues raised in claim XXVIII of the motion to vacate. The trial court misled the jury concerning the significance that is attached to its sentencing verdict under the laws of the State of Florida. In Florida's trifurcated capital sentencing scheme, a jury's sentencing recommendation is to be accorded great deference. Mann v. Dugger, 844 F.2d 1446, 1453 (11th Cir. 1988); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). During Mr. Sireci's sentencing procedure the instructions to the jury improperly minimized the jury's "sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment to the United States Constitution. Caldwell v. Mississippi, 472 U.S. at 320 (1985); Mann, supra at 1456 (R. 152, 892, 916, 2539).

The trial court advised the jury only that it is their duty to advise the court what punishment should be imposed upon the defendant for his crime of first degree murder. The court did not inform the jury that in essence they are co-sentencers and that the judge must follow their verdict in all but the rarest of situations. Instead the judge diminished the jurors responsibility by advising them that the judge must make the final decision as to what punishment should be imposed.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the Eighth Amendment in the identical way in which the comments and instructions here violated Mr. Sireci's Eighth Amendment rights. Henry Sireci is entitled to relief under Mann, since there is no discernible difference between the two cases. A contrary holding would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment.

For some time the State of Florida has maintained that its judge/jury sentencing procedure insulates it from the dictates of the Eighth Amendment to the United States Constitution as set forth in Caldwell v. Mississippi. See, Mann v. Dugger, 844 F.2d 1446, 1454, n. 10 (11th Cir. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988). The Florida Supreme Court has maintained that since the jury does not actually sentence the accused and only renders an advisory verdict, there can never be a violation of Caldwell when instructing or arguing to the jury. This theory is contrary to Florida law as discussed at length in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). In Mann the Eleventh Circuit determined "that the sentencing jury plays a significant role in the Florida capital sentencing scheme..." Mann at 844 F. 2d at 1450. The en banc opinion rested on long standing Florida case law which has held that the trial court in making a sentencing

decision must give great weight to the jury's verdict. Mann v. Dugger, 844 F.2d at 1450; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

The United States Supreme Court has also concluded that the Florida jury is an integral part of the Florida sentencing scheme. In Espinosa v. Florida, 505 U.S. 1079 (1992), the question before the Court was the impact of an invalid aggravating circumstance, but the Court said:

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation... (citations omitted).

Espinosa, 505 U.S. at 1082.

In other words, the trial court in a Florida death penalty case is the sentencer in combination with the jury and not in lieu of the jury. The standards for sentencing and sentencing discretion found in the Eighth Amendment apply to a Florida capital jury. In Caldwell, the Supreme Court held, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. at 328-29.

It can no longer be doubted that Caldwell error can happen in Florida and did happen in Mr. Sireci's case. Under the clear and unambiguous language of Mann v. Dugger, Mr. Sireci's right to a fair and impartial sentencing under the Eighth Amendment to the United States Constitution was violated by the State of

Florida when the trial court made comments diminishing the jury's role and responsibility in deciding whether Mr. Sireci should live or die.

Espinosa v. Florida, 505 U.S. 1079 (1992), and Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993), recognize that the jury is a co-sentencer and therefore it must be constitutionally instructed. Comments that diminish the jury's sense of responsibility, such as telling it that its duty is merely advisory in nature is an inaccurate statement of the law. The jury was not accurately instructed, and comments made to the jury undermined its sense of responsibility in deciding whether Mr. Sireci should live or die. Trial counsel's failure to object at trial is ineffective assistance of counsel under the Sixth, Eighth and Fourteenth Amendment to the United States Constitution. The trial court erred in denying relief under 3.850.

ARGUMENT XII

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.

This argument encompasses issues raised in claims XXXI of the motion to vacate. Execution by judicial electrocution is mandated by Florida Statute § 922.10. Hence, the sentence imposed by this Court is unconstitutional since it entails Mr. Sireci being subjected to judicial electrocution which

constitutes cruel and unusual punishment. The Constitution of the United States prohibits punishment that is cruel and unusual. U.S. Const. Amend VIII. The Florida Constitution bars any punishment that is either cruel or unusual. Fl. Const. Art.I, § 17. Mr. Sireci can demonstrate that judicial electrocution violates both the state and federal standards. Mr. Sireci's motion to intervene in the challenge to the electric chair before the Florida Supreme Court was denied.

Information to substantiate the claim that the use of the electric chair constitutes cruel and unusual punishment was clearly set forth in Appellants motion to vacate judgment and sentence. The trial court denied Appellant an evidentiary hearing because this issue had been decided in Jones v. State, 701 So. 2d 76, cert. denied, 118 S.Ct. 1297 (1998). The Florida Supreme Court has recently decided to revisit this issue in Provenzano v. State, Case Number 95,959.

The trial court erred in denying an evidentiary hearing because with each new execution there is more and more evidence to support the notion that use of the electric chair is a cruel and unusual form of punishment. The evolving standards of decency throughout the world are suggesting that the death penalty in general and the electric chair in particular are forms of cruel and unusual punishment. Recently, even Russia, a country not noted for their human rights, has commuted the death sentences of all of its condemned inmates to life in prison. This is a

poignant example of the evolving standard of decency which exemplifies that the death penalty and use of the electric chair are cruel and unusual punishment. With each passing year the use of the electric chair becomes more unusual as its exclusive use has been discontinued in all but four states in this country. The trial court erred in denying Appellant an evidentiary hearing on this matter.

ARGUMENT XIII

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 HIS RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TO THE EXTENT APPELLATE COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE, MR. SIRECI RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

This argument encompasses issues raised in claim XXXII of the motion to vacate. The constitutions of the United States and the State of Florida guarantee an accused the right to due process of law before being deprived of life or liberty and to a speedy and public trial by an impartial jury under the Fifth and Sixth Amendments of the United States Constitution. Mr. Sireci was denied his constitutional rights at his original trial in 1976. The trial court rejected this claim as being successive. Nonetheless, the trial court erred in not considering the claim on its merits because it constitutes fundamental error.

At least nine jurors, out of the seventeen questioned,

acknowledge being familiar with media reports about the case. At least six of those jurors were seated as members of Mr. Sireci's jury. Media bylines reported, "Psychotic Killer Loose, Sheriff Says"; "Sheriff Says Psychotic Killer Stalking County"; "Slain Store Clerk Told Mother About Threats"; "Transient Questioned in Hunt for Slasher"; "Slasher Slaying Suspect Arrested"; "Orlando Slash-Killer Suspect Under Arrest"; "Slasher Suspect Sireci Booked At Orlando Jail"; "Illinois Roofer Indicted in 'Slasher Murder'"; "Brother Says Sireci Told of Stabbing"; and "Death of Slasher Urged". The newspaper articles described how the victims were found "in pools of blood" and "money was taken from both victims". The articles also contained photos of the victim's tearful family captioned, "Howard Poteet Comforted by Wife...After he found his father's body at car lot" and included quotes from the victims such as Poteet's son stating, "It was my father's dream to own his own dealership and after working as a car salesman for 35 years, he finally realized that dream. I only wish he could have lived to enjoy it."

Although defense counsel recognized the vast amount of publicity generated by this case, he inexplicably failed to move for a change of venue. The facts discussed above demonstrate fundamental error in that Mr. Sireci was denied his right to a fair and impartial jury and to a jury selected according to the requirements of due process and equal protection. In Irvin v. Dowd, 366 U.S. 717 (1961), the Supreme Court explained:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due process [citations]. "A fair trial in fair tribunal is a basic requirement of due process."

Irvin, 366 U.S. at 721. It simply cannot be said that Mr. Sireci's trial comported with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Sireci's jury was "impartial" is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

In Mr. Sireci's case, the jurors' knowledge of the case and the inflamed community atmosphere deprived Mr. Sireci of a fair trial under both an inherent prejudice and an actual prejudice analysis. See Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991). Inherent prejudice occurs when pretrial publicity "is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." Coleman, 778 F.2d at 1490. Actual prejudice occurs when "the prejudice actually enters the jury box and affects the jurors." Heath, 941 F.2d at 1134. In determining whether a jury was fair and impartial, the reviewing court "must examine the totality of the circumstances surrounding the petitioner's trial." Coleman, 778 F.2d at 1538. "[N]o single fact is dispositive." Id.

An inherent prejudice analysis requires examining whether

pretrial publicity was inflammatory and whether that publicity saturated the community. Heath, 941 F.2d at 1134. The facts discussed above demonstrate that Mr. Sireci has met both of those requirements. The inflammatory nature of the pretrial publicity which saturated the community up to and including the time of Mr. Sireci's trial clearly warranted a change of venue. Presumed prejudice has been established. Due to the extensive nature of the prejudicial pretrial publicity the judge could have and should have moved for a change of venue *sua sponte* but failed to. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Defense counsel's failure to procure a change of venue, constitutes deficient performance. This deficient performance prejudiced Mr. Sireci. Strickland v. Washington, 466 U.S. 668 (1984). The failure of the court to sua sponte change venue is fundamental error for which this Court may grant relief at any time.

Mr. Sireci's trial was infected from the very beginning. He was convicted and sentenced to death in a proceeding so fundamentally and irreparably tainted by the all-pervasive pretrial media coverage as to deny him the fair trial and sentencing proceeding guaranteed by the Sixth, Eighth, and Fourteenth Amendments. His conviction and sentence must therefore fail. The trial court erred in denying an evidentiary hearing and and granting Rule 3.850 relief.

ARGUMENT XIV

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.

This argument encompasses issues raised in claims XII and XXI of the motion to vacate.

At sentencing, the Court found that Mr. Sireci's unrefuted and unimpeached evidence of his physically and sexually abusive childhood, borderline intelligence, vulnerability to manipulation, head trauma, and organic brain damage at the time of the offense did not support the finding of any of the statutory mitigating circumstances. The trial court must find that mitigating circumstances has been proved when competent evidence is presented. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Each of these constitutes a mitigating factor, Cheshire v. State, 568 So. 2d 908 (Fla. 1990) as well as supporting the finding of statutory mitigating circumstances. The jury and judge were required to weigh and give effect to all of Mr. Sireci's mitigation against the aggravating factors. According to his sentencing order the judge did not weigh this mitigation. Mr. Sireci was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution and is entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma,

455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Relief is warranted.

ARGUMENT XV

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.

This argument encompasses issues raised in claim XXXIII of the motion to vacate. Appellant did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments to the United States Constitution. See Ray v. State, 403 So. 2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It is Mr. Sireci's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his original trial and new penalty phase proceedings, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." *Id.* at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Seaboard Air Line R.R. Co. v. Ford, 92 So. 2d 160, 165 (Fla. 1956) (on rehearing); see also, e.g., Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, _____ U.S. _____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991).

The sheer number of errors which occurred during Mr. Sireci's original trial and new penalty phase trial render the outcome unreliable. The cumulative impact of these errors that are fully set forth in the preceding issues cannot be harmless.

Not only did the trial judge commit a number of procedural errors in the course of the trial but he unnecessarily pushed the defense counsel, destroying his ability to effectively represent Mr. Sireci. In the penalty phase proceeding, defense counsel's first penalty phase proceeding before a jury, he was required to endure long days with the jury and afterwards many more hours were spent preparing for the next day of trial (V. 17, RR. 2506) The defense counsel states in his closing statement that the trial has been exhausting. The effort to hurry this trial along

denied Mr. Sireci the effective assistance of counsel under the Sixth Amendment and the due process of law under the Fourteenth Amendment.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." *Id.* at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The flaws in the system which sentenced Mr. Sireci to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Sireci's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death

sentence -- safeguards which are required by the United States Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court at both the original trial and resentencing significantly tainted the process. At the very minimum, Mr. Sireci is entitled to an evidentiary hearing.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to relief from his unconstitutional death sentences, to an evidentiary hearing, and to all other relief that the Court deems just and proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant, which was typed in Courier 12 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 17, 1999.

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