

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**

REPLY BRIEF OF APPELLANT

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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.

Appellee contends that this issue is procedurally barred either because it was or should have been raised on direct appeal. To the extent that trial counsel did not fully preserve this issue there was ineffective assistance of counsel. If in fact Florida's statute on aggravating circumstances is found to be facially vague and overbroad in violation of the eighth and fourteenth amendments of the United States Constitution, this would constitute fundamental error. In the interest of justice a court can correct a fundamental error which results in an illegal sentence at any time. Jean v. State, 627 So. 2d 593 (Fla. 2d DCA 1993).

It is fundamental error to impose two aggravating factors that are mutually exclusive. The court improperly found the existence of the aggravating factors that the murder was committed for financial gain and also finding the aggravating factor that the murder was committed to avoid arrest.

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.

Mr. Sireci is entitled to an evidentiary hearing on this issue because the claim was raised that trial counsel was ineffective for failing to fully set forth the basis of his argument and ask for a proper limiting instruction on the pecuniary gain aggravating factor. Trial 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). In denying Mr. Sireci, the trial court failed to cite to that part of the record where trial counsel asked for such a limiting instruction as he was entitled to by law.

As Appellee pointed out, “to support a 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.” Anderson v. State,

627 So.2d 1170, 1171 (Fla 1993) The trial court failed to address the specific claim that trial counsel failed to adequately present the argument that the aggravating factor of pecuniary gain only applies where pecuniary gain is the primary motive for the murder.

To the extent the trial court failed to constitutionally instruct this jury there was fundamental error in this proceeding which resulted in an illegal sentence that can be corrected at any time. Jean, 672 So. 2d at 593.

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.

The prior conviction used to support the finding of “prior conviction of a violent felony” did not exist at the time Sireci was initially sentenced to death in this case. It is a violation of due process and fundamental error for Mr. Sireci, after having been granted a new sentencing hearing, to be put in a worse position than he was prior to his successful appeal where he gained a new sentencing. Appellee

contends that this argument is without merit because Mr. Sireci did not suffer any additional punishment from the addition of an aggravating factor upon his resentencing.

If in fact Mr. Sireci had received an adequate penalty phase at his first trial and the aggravating factor of the prior conviction of an additional murder had not been presented to the jury, it is likely that he would have received a life recommendation. Penalty phase relief must.

ARGUMENT IV

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

Where, as was done here, a jury was not constitutionally instructed, the resulting sentencing was obtained pursuant to fundamental error. Where a jury instruction violates a constitutional amendment it is fundamental error. The court in Enberg v. Meyer, 820 P.2d 70 (Wyo. 1991), found an underlying felony used as both an element of first degree murder and as an aggravating circumstance to be violative of the Eighth Amendment. When taken in consideration with all of the other issues it is apparent that Mr. Sireci's sentence was the product of fundamental error which cannot be harmless in this case. 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.

When considered in combination with the other errors committed in this new penalty phase, the ex-post facto application of the aggravating circumstance of cold, calculating and premeditated rises to the level of fundamental error that may be corrected at any time.

ARGUMENT VI

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

There can be no more fundamental error than for the government to put to death an innocent man. Mr. Sireci is entitled to an evidentiary hearing to prove that there is newly discovered evidence which probably would produce and acquittal. Mr. Sireci was improperly denied an evidentiary hearing because the trial court failed to attach portions of the record that conclusively show that he 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).

An evidentiary hearing is needed for Mr. Sireci to establish that the property receipt from the Sheriff's Department of Orange County was newly discovered evidence.

Other evidence alleged in the 3.850 motion to be newly discovered were the towels and wash cloths 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 credibility of the state's key witness can be impeached, because she claimed to never have been in the abandoned motel room. If allowed to perform DNA testing on this item, the results would be newly discovered evidence which could exonerate Mr. Sireci. This could not have been discovered at the time of the original trial because DNA testing was not available in 1976.

An evidentiary hearing is needed to determine whether the new evidence that almost \$400.00, cigarettes and wine taken in the previous murder was not discovered because of ineffectiveness of counsel or by the failure of the state to release this information. The significance of this evidence is that it shows that Ms. Perkins' involvement was greater than she let the jury believe and that her testimony at trial was unreliable.

An evidentiary hearing is needed to determine if Mr. Woodall's liquor bill was paid for by the State Attorney. An evidentiary hearing is needed to establish that information leading to the discovery of the missing bill was newly discovered. The significance of this would be that defense counsel could impeach a key state witness and that this information, which tends to show that Mr. Woodall was given favors for his testimony, was not revealed to trial counsel.

Appellee contends that the trial court did not have to review the record in denying the motion for post conviction relief because it would only reveal additional evidence of his guilt. This argument is contrary to the due process protections that our Constitution provides its citizens. Rather than blindly accepting what the state puts forth as inculpatory evidence, the Constitution requires trials and appellate review to insure, to the greatest extent possible, that innocent citizens are not unjustly convicted and punished for crimes.

Barbara Perkins could not have been impeached with this evidence at the original trial because it is newly discovered. That is why it was not raised in previous 3850 motions. If Barbara Perkins credibility had been impeached, there is a reasonable probability that a different verdict would have resulted, especially in light of the fact that she was a key state witness. She also is a person most likely to fabricate information as she was arrested while in possession of the victim's credit

cards and Mr. Sireci's car. It is only natural that she would have to find someone as a scapegoat. Who better than the slow thinking Mr. Sireci whom she duped into getting caught for theft in Tennessee and then took his car.

The only physical evidence tying Mr. Sireci to the crime scene was a hair found on the sock of the victim that was similar to the hair of Mr. Sireci. Now DNA testing could be done to eliminate the hair as coming from Appellant. This should be allowed at this stage as it would be newly discovered evidence.

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.

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. The jury was allowed to hear information that the court had previously ruled was inadmissible in granting Mr. Sireci's motion in limine. To the extent that trial counsel failed to object to the jury learning Appellant was previously on death row and asking to poll the jury

regarding the impact of this information, Mr. Sireci received ineffective assistance of counsel. This issue is not procedurally barred since it is cognizable as a valid 3.850 claim.

Defense counsel failed to object to Mr. Sireci being made to appear in front of the jury in shackles, which further prejudiced his chances of receiving a fair sentencing trial. Counsel was further ineffective for not asking to voir dire the jury as to the impact of seeing Mr. Sireci in shackles on their sentencing recommendation. This is not an attempt to examine the thought processes of the jury but rather a process to determine the impact of illegal considerations on their sentencing recommendation.

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.

The issue that the jury considered non-statutory evidence is not barred because it was never considered in the context of a 3.850 motion. Appellee contends that Appellant is attempting to use this forum to criticize this Court's

decision on direct appeal. This is certainly not the case, considering that this Court found that it was error, albeit harmless, for the juror to have heard this non-statutory aggravation. This must now be viewed in context of a postconviction motion in light of all the claims raised in Mr. Sireci's amended 3.850 motion. Due to ineffective assistance of counsel and other errors at Mr. Sireci's resentencing, it can no longer be considered harmless that the jury took into consideration a non-statutory aggravating circumstance.

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.

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). An evidentiary hearing is needed to present important, necessary, and truthful information which was never presented to the jury. This evidence could properly be presented through a social worker utilizing a psychosocial assessment. Mr. Sireci received ineffective assistance of counsel and expert mental health assistance to the extent that a social worker was never recommended or hired to present Mr. Sireci's life history to the jury in lay terms that the jury could comprehend.

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.

Once again, DNA testing was not available at the time of the trial in this case.

The only way to establish the accuracy of forensic testing done at the Sanford laboratory is to now allow DNA testing. This would be newly discovered evidence that can conclusively show that the jury was presented with erroneous evidence, which unjustly resulted in a conviction in this case.

ARGUMENT XI

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 AMENDMENT TO THE UNITED STATES CONSTITUTION.

The specific instruction that improperly diminished the jury's responsibility in this case was as follows:

Ladies and gentlemen of the jury, it is your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However it is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and, if they do, whether they are sufficient to outweigh any mitigating circumstances you are reasonably convinced exist.

Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.

(V28, R2539) The jury's responsibility was diminished because they were never advised that their recommendation was to be accorded great deference. The jury was repeatedly told that this was an advisory sentence and they never learned the true significance that is attached to their sentencing recommendation under the laws of the State of Florida.

ARGUMENT XII

MR. SIRECI WAS 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.

The United States Supreme Court recently accepted review of the issue of whether judicial electrocution constitutes cruel and unusual punishment. Mr. Sireci should have been afforded an evidentiary hearing on this issue because the standards of decency are forever evolving and with each execution there is new evidence that electrocution is in fact a form of cruel and unusual punishment.

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.

Appellant relies on the argument set forth in his Initial Brief regarding this issue.

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.

To the extent it was fundamental error and a denial of due process for the trial court not to find the existence of statutory mitigating circumstances, in the interest of

justice, that error can now be corrected. Mr. Sireci presented 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. The trial court erred in not find that mitigating circumstances existed when competent evidence was presented.

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.

Because Mr. Sireci's resentencing was fraught with errors he was denied due process and the combination of errors rises to the level of fundamental error. Mr. Sireci's Constitutional rights can be honored by affording him a new sentencing which is fair and just and all of his mitigating evidence is properly presented to a jury for consideration.

CONCLUSION

On the basis of the argument presented in the Initial Brief and herein, and on the basis of what was submitted to the lower court, Appellant respectfully submits that he is entitled to relief from his unconstitutional death sentence, and to all other relief that this Court deems just and proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant, which was typed in Times New Roman 14 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 15, 1999.

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