IN THE SUPREME COURT OF FLORIDA

HENRY P. SIRECI,

Appellant,

vs.

CASE NO. SC03-1554
Lower Court No. CR76-532

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The present record on appeal from the denial of Sireci's third amended motion for DNA testing will be referred to as "V" followed by the appropriate volume and page numbers. Reference to the original trial transcript will be referred to as "TR" followed by the appropriate page number.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

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

A. General Factual And Procedural History

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

> The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.
>
> The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab and incisive wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.
>
> The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.
>
> Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit

> the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.
>
> The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.
>
> The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

Sireci appealed his judgments of conviction and sentence of death on direct appeal. On April 9, 1981, this Court affirmed Sireci's conviction and sentence. Sireci v. State, 399 So. 2d 964 (Fla. 1981) [Sireci I]. On May 17, 1982, the United States Supreme Court denied certiorari. Sireci v. Florida, 456 U.S. 984 (1982), rehearing denied, 458 U.S. 1116 (1982).

Sireci subsequently unsuccessfully sought postconviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850, and that decision was affirmed on appeal. Sireci v. State, 469 So. 2d 119 (Fla. 1985) [Sireci II], cert. denied, 478 U.S. 1010 (1986).

On September 19, 1986, the Governor signed a death warrant for Henry Sireci, prompting the filing of a second motion for postconviction relief. A limited evidentiary hearing on this

postconviction motion was granted by the Ninth Judicial Circuit Court, and the State unsuccessfully appealed. State v. Sireci, 502 So. 2d 1221 (Fla. 1987) [Sireci III].

The trial court held an evidentiary hearing on Sireci's second 3.850 motion and ultimately ordered a new sentencing hearing on grounds that two court-appointed psychiatrists conducted incompetent evaluations at the time of the original trial. At the conclusion of the evidentiary hearing, a new penalty phase was granted, and this decision was affirmed on appeal. State v. Sireci, 536 So. 2d 231 (Fla. 1988) [Sireci IV]. Upon resentencing, the jury recommended the death penalty by a vote of eleven to one and the Ninth Judicial Circuit Court again imposed the death penalty.[1]

Sireci pursued a direct appeal of the resentencing hearing. The Florida Supreme Court affirmed imposition of the death sentence on direct appeal. Sireci v. State, 587 So. 2d 450 (Fla. 1991) [Sireci V]. The United States Supreme Court denied

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

certiorari review on March 23, 1992. Sireci v. Florida, 503 U.S. 946 (1992). On or about June 23, 1993, Sireci filed his first motion for postconviction relief on his new sentence of death. On March 24, 1994, Sireci filed his second motion for postconviction relief which was 66 pages in length and presented 29 claims for relief. An Order Directing a Response from State was issued by the Ninth Judicial Circuit Court on January 10, 1995. A timely response to the 1994 version of Sireci's motion followed. Sireci filed his third version of his motion for postconviction relief on August 21, 1997. This motion was 147 pages in length and presented 33 claims for relief.

On February 9, 1999, the Honorable Richard F. Conrad summarily denied appellant's motion for postconviction relief. Petitioner appealed the denial of his motion to this Court. On September 7, 2000, this Court affirmed the lower court's denial of postconviction relief in Sireci v. State, 773 So. 2d 34 (Fla. 2000) [Sireci VI]. In its opinion, this Court rejected Sireci's claim that he was entitled to DNA testing on hairs found at the motel room Sireci stayed in after the murder, finding that the issue was time barred for failing to raise it earlier. Moreover, the court stated the following:

> However, even assuming that this claim were not time-barred, and assuming further that the DNA results would indicate that the hairs in the towels in the abandoned motel room belonged to Perkins, we cannot

> determine that this evidence would "probably produce an acquittal on retrial." *Jones*, 709 So. 2d at 521. At trial, Perkins admitted to having picked up Sireci at the abandoned motel; thus, it is not difficult to imagine that she might have actually gone inside the room. This evidence, however, in no way exculpates Sireci. Thus, we cannot agree that it would probably produce an acquittal on retrial.

Sireci VI, 773 So.2d at 44.

Sireci filed a state habeas petition on June 22, 2001. This Court determined that Sireci's habeas petition did not present any grounds for relief in an opinion issued on February 28, 2002. Sireci v. Moore, 825 So. 2d 882 (Fla. 2002) [Sireci VII]. Sireci's motion for rehearing was denied on April 15, 2002.

Sireci filed a successive motion for postconviction relief on October 1, 2002. In this motion, Sireci generally alleged that his convictions and resulting death sentence are unconstitutional and must be vacated in light of the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). The circuit court summarily denied Sireci's claim on January 13, 2003.

B. Litigation Of Various Motions For DNA Testing

In addition to the motion for DNA testing mentioned above and rejected by this Court in Sireci's motion for postconviction relief [Sireci VI], Sireci embarked on a series of motions seeking release of various items of evidence for DNA testing. By motion dated December 1, 2000, Sireci requested the court to

release a hair from the victim's sock for the purpose of DNA testing. (V-3, 43). The State opposed the motion, noting that the results of the DNA test would not, under the facts of this case, change the outcome of this case. (V-3, 56-57). The State noted that Sireci confessed to a number of individuals, including a detective, and, attached a monitored phone conversation from jail in which Sireci admitted that he committed the murder to his mother. (V-3, 73-74). Sireci filed an amended motion to release physical evidence for DNA testing on February 20, 2001. (V-3, 169). On February 26, 2001, the Court conducted a hearing and stated that it would take the matter under "advisement." (V-4, 282). Sireci filed an amended motion for DNA testing alleging that the hair found on the victim's sock could be tested by Mitochondrial methods, of which counsel only learned of just months prior to oral argument on his latest Rule 3.850 motion. (V-4, 283-84). The State filed a supplemental reference to the 1976 guilt phase transcript on February 26, 1991, said transcripts referencing the fact that Sireci admitted he had been to victim Poteet's used car business several times. (V-4, 286). Both the State and Sireci filed legal memoranda addressing the propriety of DNA testing. (V-4, 324, 327). On October 2, 2001, the trial court denied Sireci's DNA motions because they were insufficiently pled and time

barred. (V-4, 329-332). The record does not reveal an appeal from the trial court's denial of DNA testing.

On September 25, 2002, Sireci filed yet another "amended" motion for DNA testing, specifically requesting testing of the hair found on the victim's sock and any hairs found in the abandoned hotel room linked to Sireci. (V-4, 333-342). The State filed a response to the "[second] amended" motion on October 30, 2002. (V-4, 371-382). The court dismissed the motion because it was not under oath as required by Rule 3.853 of the Rules of Criminal Procedure. (V-6, 702).

Thereafter, Sireci filed his third amended motion for DNA testing, this time under oath. (V-6, 704). Sireci's motion discussed testing on the hair found on the victim's sock and other hairs found in the abandoned hotel room. (V-6, 705, 708). Sireci asserted that "[d]ue to the location of the evidence DNA testing will tend to show that Barbara Perkins or her accomplices battered and fatally stabbed the victim, that her hair or blood was present at the crime scene, that her hair was present at the motel she testified she had not visited, or that there was other forensic evidence." (V-6, 708). The motion then described a number of items of evidence, but did not articulate what the evidence had to do with the crime or why

testing on such evidence might prove relevant to some issue in the case.[2] (V-6, 707).

The State filed its response to the third amended motion on March 28, 2003. (V-6, 714-725). The State's response argued in part that hair on the victim's sock would not tend to exonerate Sireci, stating in part: "Mr. Poteet's body was found on a shag carpet in a used car sales office open to the public. As pointed out in the 2000 response, Defendant admitted to serval persons that he had in fact been in the office to see Mr. Poteet." (V-6, 721-22). As for the hairs located in the hotel room, the State argued in part:

> 19. Defendant suggests in paragraph 3 of the "Facts in Support of Motion" section of his motion that "Barbara Perkins' presence in the abandoned hotel room would also diminish the argument relied upon by the state that the denim jacket located within the hotel room was tied only to Henri Sireci." This statement is refuted by the facts of the case. The argument that the denim jacket belonged to Sireci would <u>not</u> logically be shaken by the presence of Perkins' hair on the jacket. Per her trial testimony, <u>she lived with Sireci</u>. Certainly there was ample opportunity for Perkins' hair to be deposited on the jacket through casual household contact. It is also quite possible that some of her hair might have fallen on Sireci's jacket in the car <u>before</u> Perkins dropped him off to rob Poteet. (See page 154, 1976 trial transcript, testimony of Barbara Perkins attached as Exhibit CC).

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[2]Indeed, the exhibits listed mention photographs, not listing what item was photographed or more importantly what relevance such photographs might have for the purpose of DNA testing. (V-6, 707).

(V-6, 722-23).

The State's response also addressed the hairs found in the hotel room. The State noted that the Florida Supreme Court decision in 2000 rejected the proposition that DNA testing from hairs found on the towels in the hotel constituted newly discovered evidence. (V-6, 723) (citing Sireci, 773 So. 2d at 44). As for any additional items listed in the motion, the State asserted that the mention of such items "is so vague that framing an intelligent response regarding those additional items is not possible." (V-6, 723-24).

The court held a hearing on the motion in which collateral counsel argued that testing on the hairs, those located in the hotel room and on Mr. Poteet's sock, might show that Barbara Perkins played a more important role in the murder and perhaps, could be viewed as an equally culpable co-defendant. Consequently, collateral counsel argued that the DNA testing could show that Sireci's death sentence, in light of the disparate treatment, was not appropriate. (V-2, 9-11). Counsel did not argue that the results of such testing would exonerate Sireci.

On July 15, 2003, the court denied Sireci's third amended motion for DNA testing, noting that Sireci failed to show a "reasonable probability" of acquittal or that he would receive

a “lesser sentence” on retrial. (V-7, 997). This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I–-Sireci's motion did not meet the requirements set forth under Florida Rule of Criminal Procedure 3.853. The motion did not clearly set forth the evidentiary value of the requested DNA testing and failed to demonstrate how that testing would exonerate Sireci or lead to a lesser sentence. The order denying release of evidence for DNA testing is supported by competent, substantial evidence, and should be affirmed on appeal.

ISSUE II–-The trial court's order clearly states its rationale for denying the requested DNA testing under Rule 3.853. Nothing more is required. Even a cursory review of the record reveals that the requested testing would not tend to exonerate Sireci or lead to a lesser sentence.

ISSUE III–-Sireci's argument below was not based upon assertion of a constitutional right to DNA testing. Nor did Sireci claim below that he was seeking habeas corpus relief. Consequently, this issue has been waived on appeal.

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN DENYING SIRECI'S MOTION FOR DNA TESTING UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.853 AND SECTION 925.11 OF THE FLORIDA STATUTES? (STATED BY APPELLEE)

Sireci argues the trial court erred in denying his third amended motion for DNA testing. Sireci asserts his pleading met the requirements of Rule of Criminal Procedure 3.853 which provides for such testing in criminal cases. The State disagrees.[3]

The denial of Sireci's motion is supported by competent and substantial evidence, and should not be disturbed on appeal. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997); Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998). The circuit court, having familiarized itself with the record in this case, found that Sireci failed to show a reasonable probability of acquittal on retrial or that he would receive a lesser sentence. Even a cursory review of the record in this case supports the trial

[3]Although Sireci has requested oral argument in this case, the State believes the matter can be decided based upon the available record. Oral argument on appeal from the denial of DNA testing would only serve to waste this Court's valuable judicial resources and result in needless delay.

court’s decision. Moreover, the issue of DNA testing has already been largely litigated before this Court.

A. Discussion Of The Evidence Sought To Be Tested

1) Hair From The Hotel Room

The issue of testing hairs which may have been located in the hotel room (towels) has been considered and rejected by this Court. Aside from finding a prior request for DNA testing of hairs using Mitochondrial testing untimely and procedurally barred, this Court found that such evidence would not probably produce an acquittal on retrial. This Court stated:

> However, even assuming that this claim were not time barred, and assuming further that the DNA results would indicate that the hairs in the towels in the abandoned hotel room belonged to Perkins, we cannot determine that this evidence would "probably produce an acquittal on retrial." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). At trial, Perkins admitted to having picked up Sireci at the abandoned motel; thus, it is not difficult to imagine that she might have actually gone inside the room. This evidence, however, in no way exculpates Sireci. Thus we cannot agree that it would probably produce an acquittal on retrial.

Sireci VI, 773 So.2d at 44.

Sireci's argument is no more persuasive now than when this Court rejected it in Sireci's motion for postconviction relief as an allegation of newly discovered evidence. In fact, the State questions the propriety of relitigating this issue when it was considered and rejected by this Court in a prior appeal. The issue should be barred by the law of the case doctrine. See Owen v. State, ___ So. 2d ___, 28 Fla. L. Weekly S790 (Fla

October 23, 2003)(“Generally, under the doctrine of the law of the case, ‘all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts.’”)(quoting Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984)). While the rule is not an absolute mandate, it is a “self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case.” Id. This court should decline to review this claim because it has already been considered and rejected on the same set of facts.

Regardless of any bar to review of his claim, the State notes that the evidence linking Sireci to the crimes was overwhelming, and based upon Sireci’s numerous confessions. While Sireci attempts to discredit some of the confessions, the sheer number of confessions and admissions militates against finding any doubt Sireci was responsible for the victim’s murder. The sources of these confessions are not simply a jail house snitch or a possible co-defendant, they include friends, relatives of Sireci, and, at least one detective. Moreover, as this Court has already found, finding Ms. Perkins’ hair in the

hotel room would in no way exonerate Sireci. Consequently, his claim must be denied.

2) The Jacket

Petitioner claims now that the blood on the jacket found in the abandoned hotel room should be subject to DNA testing. However, Sireci's motion clearly referenced the hairs found in the hotel where the blood stained jacket was located. (V-6, 705-706). The motion itself made no assertion that the testing on the blood found on the jacket might somehow exonerate Sireci. Consequently, to the extent Sireci is now making a different argument on appeal, his argument is not preserved for appeal. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993)("For an issue to be preserved for appeal, however, it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'" (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). In fact, during oral argument on the motion, counsel conceded that blood on the jacket was that of the victim, stating, in part: "...The blood that was found on that jacket was, in fact, determined to be Mr. Poteet's."[4] (V-2,

[4]The laboratory analyst testified at trial that the blood on the jacket was consistent with the murder victim in the ABO, MN, and RH systems. (TR. 372-73). The blood matched Mr. Poteet's blood and antigen grouping. Only 2.4 percent of the population has the same blood and antigen grouping. (TR. 412)

6). The focus of counsel's argument was clearly on hairs which might have linked Ms. Perkins to the abandoned hotel room where the jacket was found, not the blood on the jacket.

In any case, Sireci's argument strains credulity to suggest that testing on the jacket might somehow produce a different result at trial. Even if the victim's blood was not the jacket, the victim was nonetheless stabbed to death, and, Sireci repeatedly confessed to murdering him. Moreover, even if the blood belonged to Sireci's first murder victim, or, to another unidentified victim, this factor would not tend to exonerate Sireci for the murder of Howard Poteet.

3) Hair On The Murder Victim's Sock

The hair found on the victim's sock was not significant evidence of Sireci's guilt. The hair resembled Sireci's, but, Sireci admitted being in the office prior to the murder. Moreover, whether DNA testing would confirm the hair was Sireci's or not, this fact would not tend to exonerate Sireci. The hair might have been left by Sireci or some unknown third party who came into Mr. Poteet's public place of business. Sireci has not even alleged that the hair resembled a hair which might have come from Ms. Perkins.[5] In contrast to Sireci, Ms.

[5]Indeed, the crime analyst compared the hair on the sock and found it was consistent with the known sample from Sireci, but not consistent with any of the other known samples, which

Perkins has not confessed to the murder of Mr. Poteet, much less repeatedly confessed to several different people as Sireci has. Moreover, in none of these confessions did Sireci assert that Ms. Perkins stabbed the victim. Sireci simply has not articulated any credible scenario where DNA testing might show Ms. Perkins was either responsible for the victim's murder or that she was an equally culpable co-defendant. Nor has Sireci shown how such DNA testing would undermine his numerous confessions (direct evidence) to the brutal murder of Mr. Poteet.

4) Remaining Items

As the State noted in its response below, any remaining items are not sufficiently identified or linked to any aspect of the victim's murder to allow for an intelligent response. Consequently, his vague assertion may be summarily dismissed on appeal. Sireci has in no way articulated any reasonable basis to conclude that testing on the items mentioned in his motion might result in admissible evidence, much less exonerate him. (V-6, 707).

B. Discussion Of The Law

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included a hair sample from Barbara Perkins. (TR. 383-84; 406-07).

This Court recently affirmed the denial of postconviction DNA testing under similar circumstances in Hitchcock v. State, ___ So. 2d ___, 29 Fla. L. Weekly S13 (Fla January 15, 2004). Hitchcock sought DNA testing pursuant to Florida Rule of Criminal Procedure 3.853. Pursuant to the rule, Hitchcock asserted that the requested DNA testing would establish his innocense. 29 Fla. L. Weekly at S13. Hitchcock admitted to having sex with his 13 year-old niece [corroborated by DNA testing], but asserted the true murderer was his brother, a position that he took at trial when he testified. Hitchcock requested DNA analysis which he asserted would show that hair analysis conducted at trial improperly included him as the source of the hair, and, improperly excluded his brother, Richard. Hitchcock also asserted that DNA testing on the hair "may" show that Hitchcock's brother strangled the victim and that his hair or blood was at the scene of the murder. Hitchcock then went on to list 24 items that he sought to be tested by an independent lab for DNA. Id.

The trial court denied the motion, stating the allegation that DNA testing may exonerate the defendant was too "speculative" to grant postconviction DNA testing. The court noted that the defendant confessed to having sexual intercourse with the victim and that he failed to establish a reasonable

probability that DNA testing would exonerate him of the victim's subsequent murder. The court noted that the presence of physical evidence linked to his brother Richard (who lived in the house with the victim), would "not establish that Defendant was not at the scene or that he did not commit the murder." Id. at S14.

This Court affirmed the trial court's denial of DNA testing under Rule 3.853, noting the defendant has the burden of meeting the requirements of the rule:

> The clear requirement of these provisions is that a movant, in pleading the requirements of *rule 3.853*, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Hitchcock, at S14. This Court noted that Rule 3.853 does not authorize a speculative "fishing expedition" stating that "[i]t was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, 'how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or . . . will mitigate the sentence received by the movant for that crime.'" Id. at S14 (quoting Rule 3.853)(emphasis in original).

In this case, Sireci has clearly failed to meet his burden of showing that the DNA testing would somehow exonerate him or lead to a lesser sentence. Sireci has simply embarked upon a "fishing expedition" of the type this Court condemned in Hitchcock. Moreover, as in Hitchcock, Sireci has failed to give any credible explanation of how a few of Ms. Perkins' hairs, found in an abandoned hotel room, or, the one hair found on the victim's sock, would exonerate Sireci or mitigate his sentence. That is, even if the highly speculative assertions regarding Ms. Perkins' hair are proved true by DNA testing, nothing has changed. Sireci's repeated confessions are not impeached or in any way cast in doubt.

Sireci's reliance upon Riley v. State, 851 So. 2d 811 (Fla. 2d DCA 2003) and Knighten v. State, 829 So. 2d 249 (Fla. 2d DCA 2002), is misplaced. In neither of these cases did the defendant confess to the crimes and identification of the defendant as the perpetrator was genuinely disputed at trial. In this case, Sireci was positively identified by his confessions, not a questionable eyewitness identification.

Identity is simply not an issue in this case. As this Court noted in affirming the denial of Sireci's motion for postconviction relief: "An independent review of the record indicates that, in total, seven different people testified that

appellant confessed to them that he had murdered Howard Poteet." Sireci, 773 So. 2d at 42-43. "Specifically, the following people testified that Sireci admitted killing Mr. Poteet: (1) Barbara Perkins--girlfriend; (2) Donald Holtzinger--cell mate; (3) Peter Sireci--brother; (4) Harvey Woodall--cell mate; (5) Bonnie Lee Arnold--friend; (6) David Wilson--brother in law[6]; (7) Gary Arbisi--detective." Id. at 43 n. 16. "Those confessions were all consistent, detailed accounts of the murder." Id. at 43. Indeed, even at trial the identity of Sireci as the person who killed Mr. Poteet was not in dispute. Defense counsel argued the State had not proved first-degree murder, but conceded that Sireci was guilty of third degree murder. (TR. 702-12).

DNA testing of the type requested in this case does not create a reasonable probability of a different result at trial. Accordingly, the trial court's order denying such testing must be affirmed.

II.

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

WHETHER THE TRIAL COURT'S ORDER FAILS TO SUFFICIENTLY STATE ITS RATIONALE OR RENDER FACTUAL FINDINGS WHICH VIOLATES SIRECI'S DUE PROCESS RIGHT TO A FAIR APPEAL? (STATED BY APPELLEE)

Appellant complains that the trial court's order failed to state the court's rationale or render factual findings. The State disagrees.

The State realizes that the record is limited to what was utilized by the trial court below in denying the motion for DNA testing. Nonetheless, the trial court did state it reviewed some 12 volumes of record including the motion and State's response with its attached record. (V-2, 11). Contrary to Sireci's assertion that the trial court failed to "state its factual findings and rationale[,]" (Sireci's Brief at 28) the trial court's rationale was clearly stated in the written order. The trial court found that Sireci failed to show a "reasonable probability" of acquittal or that he would receive a "lesser sentence" on retrial. (V-7, 997). This order sufficiently states the court's rationale for appeal.

In Sireci VI this Court rejected a similar contention regarding the trial court's summary denial of a claim for postconviction relief. This Court stated:

> Appellant argues that the trial court failed to cite to or attach the portions of the record that refute this claim, and that, in relation, the trial judge did

> not review the transcripts from the original guilt phase. Appellant is correct. However, in *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993), this Court noted that in order to "support summary denial without a hearing, a trial court must either state its rationale in its decision *or* attach those specific parts of the record that refute each claim presented in the motion." (Emphasis supplied). In the instant case, while the trial court did not attach portions of the record, it did state its rationale.

773 So. 2d at 41 n. 15. The trial court's order sufficiently states its rationale and the available record provides ample support for the court's decision.

This Court's summary of the overwhelming evidence[7] available against appellant on denying his motion for postconviction relief in Sireci VI, does much to refute collateral counsel's assertion that the confessions were somehow inconsistent or that the source of the confessions were somehow unreliable. Sireci did not simply confess to his cell mate or Ms. Perkins. Sireci confessed his involvement in the murder to his brother and mother, among others. Peter Sireci testified that appellant told him that Perkins had certain credit cards that he took from the man he killed. Sireci

also told his brother that he was preparing to go to Canada because the police were looking for him. (TR. 420-421). The State's Response to Sireci's motion for DNA testing attached a

[7]This Court discussed the evidence in rejecting Sireci's claim that the State withheld potential impeachment evidence.

transcript of the taped conversation from the jail between Sireci and his mother. In this transcript, Sireci confessed to killing the victim, admitting that he slit the victim's throat. (V-6, 747).

Since a review of the available record would only reveal additional evidence of Sireci's guilt, Sireci has failed to establish any need for a remand so that the trial court can further elaborate on its reasons for denying the motion below, i.e., elaborate on why the court believed that there was no "reasonable probability" of acquittal or of a "lesser sentence" on retrial. The trial court made sufficient findings under Rule 3.853 (c)(5)(C).

III.

WHETHER DENIAL OF SIRECI'S MOTION FOR DNA TESTING VIOLATED HIS RIGHT TO HABEAS CORPUS IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS? (STATED BY APPELLEE)

Sireci clearly pursued his claim for DNA testing below under Florida Statute and criminal procedure rules. Sireci's argument was not based upon an assertion that he has a constitutional right to DNA testing in this case. Nor did Sireci claim below that he was seeking habeas corpus relief.[8] Consequently, this issue has not been preserved for review on appeal. See Section 924.051 (1)(b), Fla. Stat. (1996)("'Preserved' means that an issue, legal argument, or objection to evidence was **timely raised before, and ruled on by, the trial court**, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.").

Under the same circumstances in Hitchcock, this Court declined to discuss assertions that the circuit court's

[8]This claim was not made in written motion or in oral argument on the motion below. (V-2, 3-9).

rejection of DNA testing violated the constitution or Hitchcock's right to habeas relief. This Court stated: "Additionally, Hitchcock raised before this Court a constitutional argument that the circuit court's denial of his motion violated his right to habeas corpus relief. We conclude, as the State correctly noted, that this argument was not preserved because Hitchcock did not claim a constitutional right to DNA testing before the circuit court below." Hitchcock, at S14 n. 3. This Court should similarly find that the issue is not preserved for appeal here.[9]

[9]Assuming that a court could read into the state or federal constitutions a right to some form of DNA testing, nothing would prohibit the State from promulgating reasonable rules, such as those contained in Rule 3.853, to regulate that right. The State, however, does not concede that such a constitutional right exists. See Harvey v. Horan, 285 F.3d 298, 303 (4th Cir. 2002)(Wilkinson, C.J., concurring in denial of rehearing and rehearing *en banc)*.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that this Honorable Court affirm the order of the trial court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Marie-Louise Samuels Parmer, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of January, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLEE