IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-1554

HENRY SIRECI,

Appellant,

v.

STATE OF FLORIDA,

Appellee

INITIAL BRIEF OF APPELLANT

MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
Assistant Capital Collateral Counsel
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
Suite 210
TAMPA, FL 33619-1136
(813) 740-3544
(813) 740-3554 (Facsimile)
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

PRELIMINARY STATEMENT

This is an appeal from the Circuit Court of Orange County's denial of Henry P. Sireci's Amended Motion for Postconviction DNA Testing Pursuant To Florida Rule of Criminal Procedure 3.853 and Section 925.11 Florida Statutes. The record on appeal is comprised of eight volumes successively paginated beginning with page one. References to the record include a page number and are of the form, e.g., (Vol. 123 R. 123). References to the 1976 trial and record on appeal are of the form (1976 Vol. 123 R. 123) and (1976 ROA Vol. 123 R. 123) respectively. References to the 1990 trial and sentencing proceedings and are of the form (1990 Vol. 123 R.123).

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action may determine whether Mr. Sireci lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Sireci, through counsel, respectfully requests that this Court permit oral argument.

STATEMENT OF THE CASE

Mr. Sireci was tried, convicted and sentenced to death in 1976. Sireci v. State, 399 So.2d 964 (Fla. 1981); cert denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 863(1982). Mr. Sireci sought post-conviction relief under Florida Rule of Criminal Procedure 3.850. The circuit court denied relief and this Court affirmed the lower court's ruling. Sireci v. State, 469 So.2d 119 (Fla. 1985); cert denied 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721(1986). While under warrant, a successor 3.850 motion was filed and an evidentiary hearing was granted by the circuit court. The state unsuccessfully appealed. State v. Sireci, 502 So.2d 1221 (Fla. 1987). Following the evidentiary hearing a new penalty phase was granted and this Court affirmed that ruling on appeal. State v. Sireci, 536 So.2d 231 (Fla. 1988). Following the second penalty phase proceeding the jury returned their advisory verdict of 11 to 1 in favor of death and the judge sentenced Mr. Sireci to death. This Court affirmed. Sireci v. State, 587 So. 2d 450 (Fla. 1991); cert. denied 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). In June 1993, Mr. Sireci filed a motion for post-conviction relief under rule 3.850 and subsequently filed three amended motions, including a claim requesting DNA testing. In January 1999, the trial judge conducted a *Huff* hearing and summarily denied all of the claims in Mr. Sireci's motions. This Court affirmed the trial court's

ruling in Sireci v. State, 773 So.2d 34 (Fla. 2000).[1] Mr. Sireci then filed a petition for writ of habeas corpus which this Court denied. Sireci v. Moore, 825 So.2d 882 (Fla. 2002).

On September 25, 2002, Mr. Sireci filed an Amended Motion for Post Conviction DNA Testing pursuant to Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes. (V. 4, R. 333).[2] On February 28, 2003, the court dismissed the motion without prejudice. (Vol. VI, R. 702).[3] On March 18, 2003, Mr. Sireci filed an Amended Motion For Post-Conviction DNA Testing Pursuant to Florida Rule of Criminal Procedure 3.853 and Section 925.11 Florida Statutes.(Vol. VI, R.704). The State filed it's Response on March 31, 2003. (Vol. VI, R. 714). The circuit court held a hearing July 14, 2003, heard argument from counsel and entered its Order denying Mr. Sireci's claim on July 15, 2003. (Vol. VII, R. 996). Mr. Sireci

---

[1] In its ruling, this Court, *inter alia,* affirmed the circuit court's denial of Mr. Sireci's 3.850 claim on newly discovered evidence as it relates to DNA testing as time-barred and further stated that the particular items , i.e. "...[t]he hairs in the towels in the abandoned motel room..." were not of such a nature that they could be expected to "'probably produce an acquittal on retrial'" because Barbara Perkins admitted to picking up Mr. Sireci at the abandoned motel and it would not be a stretch to "imagine that she might have actually gone inside the room" . Id. at 44.

[2] This Motion, received by the clerk and date stamped October 1, 2002, was facially insufficient for failure to include a sworn affidavit.

[3] In its Order, the circuit court stated it was denying Mr. Sireci's motion filed on "February 26, 2003" but this appears to be a clerical error.

timely filed his Notice of Appeal on August 13, 2003.(Vol. VII, R. 998). This appeal follows.

STATEMENT OF THE FACTS

Mr. Sireci has maintained, from the time of his trial, that he is innocent of the crime for which he has been twice sentenced to death and for which he is incarcerated on death row. Mr. Sireci seeks to right the injustice that began with his trial and conviction for a crime he did not commit.

Mr. Sireci did not testify during the guilt phase of his 1976 trial. The State presented testimony from seven witnesses who recounted various statements by Mr. Sireci about his involvement in the murder of Mr. Poteet. Sireci v. State, 399 So.2d 964 (Fla. 1981); cert denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 863(1982). These people included Barbara Perkins, a girlfriend; Donald Holtzinger, a jail inmate; Peter Sireci, brother; Harvey Woodall, a cellmate; Bonnie Lee Arnold, friend; David Wilson, brother-in-law; and detective Gary Arbisi. Sireci v. State, 773 So.2d 34, 43 (Fla. 2000).[4]

---

[4] This Court noted that the statements were consistent and detailed. Sireci v. State, 773 So.2d 34, 42-43 (Fla. 2000). However, some of these statements were inconsistent with each other and inconsistent with the forensic evidence. By way of example, Harvey Woodall, a convicted felon who had been sentenced to the penitentiary six times, testified that Mr. Sireci told him he picked up the wrench on the premises. (1976 Vol.III R. 437). Bonnie Arnold, who had sex with Mr. Sireci's alleged girlfriend Barbara Perkins, said Mr. Sireci told him that he brought the wrench with him and hit him on the head in the office and that he fought the victim

The state also presented testimony from crime laboratory analyst William Monroe who purportedly performed valid scientific testing on evidence which placed Mr. Sireci at the murder scene. (1976 Vol. II R. 368). Mr. Monroe, a crime scene analyst from the Sanford Crime Lab, opined that, based on his scientific analyses, the hair found on the victim's sock at the crime scene was "consistent with" Mr. Sireci's hair. Monroe further testified "consistent with means that of all the characteristics of the hairs I examined, I found no significant differences, *that in all probability, this hair came from that individual*." (1976 Vol. III R. 406-407)(emphasis added). Mr. Monroe also opined that the blood on the denim jacket found in the abandoned motel room "exactly matched" the blood-type groups of Mr. Poteet and excluded Bonnie

---

when he got out of the car, (1976 Vol. III, R.455- 456); and, that Mr. Sireci never took anything from Mr. Poteet. (1976 Vol. IV, R. 473). Detective Arbisi testified that Mr. Sireci told him that he got $11 from Mr. Poteet, (1976 Vol. III, R. 598); that Mr. Poteet didn't offer much resistance, (1976 Vol. IV, R. 605);and, that Barbara Perkins had "prior knowledge of the homicide" and was present and took part in the homicide. (1976 Vol. IV, R. 608). Barbara Perkins, a convicted thief who later received a three-year deal for charges related to this case and denied being present during the murder, testified that Mr. Sireci told her he took the wrench with him on the way to the used car lot (1976 Vol. I, R. 179) and that he couldn't find any money so he took Mr. Poteet's wallet which contained credit cards. (1976 Vol. I, R. 195). At the 1990 penalty phase, the defense mental health experts testified Mr. Sireci's statements were inconsistent and suggest confabulation, a characteristic consistent with Mr. Sireci's brain damage. Even though the judge rejected that assertion, he found "credible" the defense expert testimony which "convincingly establishes [that Mr. Sireci] suffers from organic brain damage ... and he may be described as functionally retarded." (1990 Vol. XXVI, R. 2676- 2677).

Arnold and Henry Sireci. (1976 Vol. II, R. 387-390).

The State Attorney argued in closing that "one of those clothing items became very important later on and that was Mr. Poteet's socks. ... The socks became relevant because on the socks was a hair. ... [and the blood on the jacket] became significant because the blood on that jacket matched the blood of Mr. Howard Poteet." (1976 Vol. IV, R. 679-680.) Mr. Sireci's attorney argued that the crime amounted to only third-degree murder. (1976 Vol. IV, R. 702-712.)

The 1976 trial court prohibited Mr. Sireci from testifying to his innocence during the penalty phase of the proceedings. See Sireci v. State, 399 So.2d 964, 972 (Fla. 1981). During the guilt phase of the proceedings, Mr. Sireci's attorney spoke to two men who had been transported to the Orange County Jail and who had written a letter which had been sent to various people including the attorneys and the trial judge . The letter implicated a man named James Capotorto aka "Big Jim" in the murder. (1976 ROA Vol. I R. 193 and 1976 Vol. IV R. 648).[5] Following the guilty verdict and the rendering of the jury's advisory sentence recommending death, Mr. Sireci wrote a letter to the trial court wherein he claimed he had wanted to discharge his lawyer prior to the verdict because the two men who wrote the letter about "Big Jim" had not been

[5] Mr. Sireci's attorney questioned Mr. Sireci under oath on the record as to his agreement with the decision not to call the witnesses and Mr. Sireci initially gave his "tacid (sic) approval or acquiescence". However, the reasons behind the decision were never placed on the record. (1976 Vol. IV R. 650-55).

called to testify and asked the court to declare a mistrial. (1976 ROA Vol. II R. 292-293 and 1976 Vol. Transcript of Sentencing R. 4). The Court denied the motion for mistrial. Id. Nevertheless, Mr. Sireci has continued to maintain his innocence.

In 2003, Mr. Sireci filed his DNA motion under Rule 3.853 and Section 925.11, Florida Statutes which is at issue in this appeal. The DNA motion began by offering facts in support of the lower court granting DNA testing. The motion stated that:

> 1. Henry Sireci was charged with the murder of Howard Poteet. Howard Poteet owned a used car lot in Orlando, Florida. At the time of the offense Henry Sireci was living with and supporting Barbara Perkins, a woman he had met not long before Mr. Poteet's murder. Henry Sireci was accused and convicted of beating and fatally stabbing Howard Poteet at the used car lot.
>
> 2. Barbara Perkins was also originally accused of murder and robbery of Howard Poteet. At the time of Ms. Perkins' arrest she was found to be in possession of the defendant's automobile and Howard Poteet's credentials and credit cards which she admitted using to forge receipts for gasoline and other expense after leaving Florida. Barbara Perkins eventually became the state's primary witness in their case against Henry Sireci. Although Barbara Perkins denied receiving any benefit in return for her testimony, her charges were eventually reduced to a simple robbery charge for which she pled guilty.
>
> 3. At trial the State argued that unidentified hairs found on Howard Poteet's sock were likely those of Henry Sireci because of physical similarities between the hair and known samples taken from Mr. Sireci. This argument represented the only physical evidence potentially placing Mr. Sireci at the crime scene. Conversely, Barbara Perkins who testified that she had never been present within the

hotel room identified by the State as the site where Mr. Sireci cleaned up following the homicide was impeached through the presence of her hair on towels taken from the room. 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 Henry Sireci. In as much as the evidence connecting the jacket which was stained with blood consistent with the victim's was heavily dependent upon Barbara Perkins' testimony; evidence which tend to impeach Perkins' testimony also tends to exculpate Henry Sireci.

4. Thorough and modern testing of the available blood and hair samples collected at the used carlot office is now a viable and legislatively recognized tool for establishing unbiased, unimpeachable direct or circumstantial evidence of an individual's presence or absence from a crime scene. Mitochondrial testing of the hair found on Mr. Poteet's sock would eliminate all physical evidence of Mr. Sireci's presence at the carlot. Since the hair was not Mr. Poteet's hair, the elimination of Mr. Sireci as the donor increases, albeit circumstantially, the likelihood of another perpetrator of this crime. Furthermore, should the hair be determined to belong to Ms. Perkins, her self-serving testimony concerning her innocent involvement in Mr. Poteet's death would be greatly undermined. In addition, should the hairs on the towels at the abandoned motel prove to be Ms. Perkins or eliminate Henry Sireci, her testimony that she had never been present at this locale which was alleged to contain physical evidence from the person of Mr. Poteet would again be undermined and point inescapably to the likelihood that Ms. Perkins was either directly or indirectly involved in Mr. Poteet's homicide. Identical logic applied to the issue of the denim jacket results on the same conclusion, Henry Sireci is innocent of the first degree murder of Howard Poteet and the death penalty. Inculpatory evidence of Ms. Perkins presence at the crime scene would also undermine her often times

> incredible and self-serving account of just exactly how she came to be in possession of Mr. Poteet's belongings and Mr. Sireci's automobile thousands of miles away from the scene of the crime. Proof of Ms. Perkins' involvement establishes Mr. Sireci's innocence of the murder of Howard Poteet and innocence of the death penalty.

The DNA motion, tracking the statute and rule, stated specifically the whereabouts of the relevant evidence in this case in a section of the motion entitled LOCATION OF EVIDENCE TO BE TESTED. (Vol. 6 R. 707-708).

In sum, the evidence that Mr. Sireci sought testing of was either in the possession of the Orange County Sheriff's Office or, if admitted into evidence, in the possession of the Orange County Criminal Clerk. (Vol. 6 R. 707-708). A summary of the evidence in the possession of the Orange County Sheriff's Office and the Orange County Clerk's Office was pled in this section.

In a section of the motion entitled PRIOR SCIENTIFIC TESTING ON THE EVIDENCE OF THIS CASE, pursuant to Florida Rule of Criminal Procedure 3.853(b)(2), Mr. Sireci stated that there had been no prior DNA testing that was known to Mr. Sireci or undersigned counsel. [6] (Vol. 6 R. 707-709).

---

[6] Prior scientific testing performed on the evidence in this case by the Sanford Crime Lab consisted of hair comparison analyses of the hair found on the victim's sock with hairs obtained from others including Ms. Perkins, Mr. Arnold and Mr. Poteet. The lab also performed blood typing comparison on the blood-stained jacket purported to belong to Mr. Sireci.

Pursuant to Florida Rule of Criminal Procedure 3.853(b)(3), Mr. Sireci stated that he was actually and legally innocent of the murder for which he was sentenced to death and that he was innocent of the death penalty. (Vol. 6. R. 709).

Mr. Sireci stated that he "maintains that the true murderer of the victim was either Barbara Perkins or her accomplice(s). Specifically, Mr. Sireci maintains that it was Barbara Perkins or her accomplices who stabbed and robbed Mr. Poteet." (Vol. 6 R. 709).

Mr. Sireci further pled that his "1976 trial was not an adversarial testing.[7] Mr. Sireci's attorney failed to effectively hold the State to its burden of proving beyond the exclusion of every reasonable doubt that Mr. Sireci was guilty and failed to adequately put forth a defense that would have shown that Barbara Perkins or her accomplices were the true perpetrators of the crime. Accordingly any determination of guilt is invalid, suspect and unconstitutional." (Vol. 6 R. 709).

Mr. Sireci followed Florida Rule of Criminal Procedure 3.853(b)(3) and (b)(4) and detailed the relevance of DNA testing in a section of the motion entitled RELEVANCE OF DNA TESTING. (Vol. 6. R. 709-710). Mr. Sireci began this

---

[7] It is of note that of the seven people who testified that Mr. Sireci admitted to killing Mr. Poteet, at least one was not cross-examined at all, and most were subject to a cursory, unfocused cross-examination. Barbara Perkins and Bonnie Arnold were the only witnesses who were subject to cross-examination of any length and even that examination was inadequate.

section of the motion by stating "that the identity of the true murderer of the victim is as genuinely disputed now as it was during the trial."(Vol. 6. R. 710).

Pursuant to this rule, Mr. Sireci "state[d] that DNA testing, blood and hair analysis requested in this motion will exonerate Henry Sireci. Due to the location of the evidence DNA testing may 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." (Vol. 6. R. 710-711).

Mr. Sireci further pled that "[t]he DNA and micro analysis would also tend to exonerate Henry Sireci and show that the state's initial unreliable analysis improperly excluded Barbara Perkins and improperly inculpated Henry Sireci." (Vol. 6. R. 711).

Completing this section of the motion, Mr. Sireci pled that: "Lastly, the evidence would also show that Henry Sireci was innocent of the death penalty by showing that even if he was involved in the death of the victim Henry Sireci was a minor participant. See Section 921.141(6)(d), Florida Statutes. Had Barbara Perkins or her accomplices committed this offense this would mitigate his death sentence." (Vol. 6. R. 711).

Because of the unique issues raised in Mr. Sireci's case, Mr. Sireci requested an independent laboratory for any potential DNA testing in a section of the motion entitled "REQUEST FOR AN INDEPENDENT LAB AND GOOD CAUSE FOR THE SAME." (Vol. 6. R. 711-712). This request was pursuant to Florida Rule of

Criminal Procedure 3.853(c)(7).

Under this section of the motion Mr. Sireci stated that:

> 1. FDLE is a state funded agency primarily acting in the scope of law enforcement investigation and not limited to pure "scientific" testing of materials. FDLE works in tandem with all other law enforcement agencies sited within the Florida jurisdiction and as such frequently acts as a confidential source for law enforcement agencies including Sheriff's departments, Municipal police departments and Offices of the States Attorney.
>
> 2. FDLE has a conflict of interest in undertaking the analysis of the evidence in this case: If FDLE finds that the evidence incorrectly implicated Henry Sireci and exculpated Barbara Perkins, this would be proof of the State's nonfeasance, misfeasance or malfeasance. Such a finding would damage the reputation of FDLE and could subject FDLE to legislative, judicial and public scrutiny. Accordingly, it is apparent that FDLE has an interest in avoiding any evidence of mistakes made by the Sanford Crime Lab.
>
> 3. As part of the "state" that seeks to execute Henry Sireci FDLE lacks the scientific neutrality of an independent lab. FDLE would have access to law enforcement information on this case and law enforcement would have access to FDLE.
>
> 4. A significant length of time that has passed from the collection of evidence and the methods used to collect evidence in this case. To perform the relevant tests a lab must have both the scientific ability to conduct the most advanced tests and the willingness to search for and analyze trace evidence that the Sanford Crime Lab did not originally test.
>
> 5. Ordering an independent lab avoids the suspicion

> that the original evidence testing in this case consisted of law enforcement solely focusing on that individual suspected as the perpetrator and then conducting only enough analysis to inculpate that suspect.(Vol. 6. R. 712).

Mr. Sireci concluded the motion by requesting certain procedures for the testing in a section entitled REQUESTED PROCEDURE FOR TESTING IN THIS CASE. (Vol. 6. R. 711-712). The motion stated that CCRC-M would pay the costs of such testing and detailed what exactly would be tested if the circuit court granted Mr. Sireci DNA testing. Moreover, this section of the motion proposed an exact procedure for the testing. (Vol. 6 R. 711-712).

The State filed a response with its arguments contained therein. (Vol. 6. R. 714-800). The State's response included a number of objections, including that the motion filed was insufficient to allow for DNA testing as Mr. Sireci had failed to show a reasonable probability that the DNA evidence would produce an acquittal on retrial. The State's response also addressed the relevance of individual items that Mr. Sireci sought to be tested. In particular, as to the hair on the victim's sock at the murder scene, the State claimed that the "only evidentiary value of the hair match was to suggest that the person who produced it had been in Poteet's office at some point." (Vol. 6. R. 722). The motion was set for hearing on July 14, 2003. At the hearing, Mr. Sireci's counsel stated, in part, as follows:

> "The language of [Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes] provides for not only

exculpatory evidence, but evidence that would tend to show that the individual would receive a lesser sentence as a result of the demonstration of DNA evidence that would be favorable to the defendant in this case, Mr. Sireci.

In this case the state argued that certain evidence that was found at the crime scene could be attributed to Mr. Sireci. They did this at trial. There was a hair that was found on the sock of Mr. Poteet, the victim in this case, and the testimony that was presented to the jury and the argument that was made to the jury, that the hair was consistent with a hair of Mr. Sireci.

In addition, there was testimony regarding a blood-stained Levi jacket that was found at a motel room that Barbara Perkins had testified had been used by Mr. Sireci to clean up after the homicide had occurred. The blood that was found on that jacket was, in fact, determined to be Mr. Poteet's. There were items that were located, or that were found, particularly, particularly hairs that were found on tiles and elsewhere inside that hotel room that were attributed to Mr. Sireci. But also hairs that was [sic] found to be consistent with or similar to the hairs of Barbara Perkins. In fact, Barbara Perkins was the primary witness against Mr. Sireci in this matter.

Barbara Perkins could very well have been treated as a co-conspirator or principle to the felony murder that Mr. Sireci was ultimately convicted of. She was with Mr. Sireci before the incident. She was with Mr. Sireci after the incident. She was found in possession of items that were stolen from Mr. Poteet, and was known to be the only individual who utilized the credit cards stolen from Mr. Poteet, and yet Barbara Perkins testified that she had no knowledge that, in fact, a homicide was about to occur. She was not treated as a principal in this matter, and had she been treated as a principal in this matter, it's very possible that a jury could have weighed the relative culpability of Barbara Perkins and Henry Sireci, determined that Barbara

> Perkins was, in fact, equally culpable, if not more so, for the homicide of Howard Poteet. Of course, Barbara Perkins was allowed to enter a plea to a lesser count. She was sent to prison. I believe at this time she's already been released from prison.
>
> It's our contention that the items that were testified to [as having] been consistent with Henry Sireci located at the crime scene as well as the motel, the items that were found in Illinois attributed to Mr. Sireci, that being a cap that was used for disguise and the like were argued by the State to have been circumstantial evidence of his presence and ultimately his responsibility or guilt, culpability in this matter. Had the jury realized that, in fact, Barbara Perkins' testimony that was so critical to the State in this case was flawed to the extent that she was equal or equally culpable for Mr. Poteet's demise, that they may very well have perceived the treatment or perceived the sentence Henry Sireci [received] to be inconsistent with the term of years that Barbara Perkins received. As such, we believe that under the new terminology and new language of the statute and the rule, that DNA testing in this matter, which would necessarily demonstrate not only Barbara Perkins' lack of credibility and candor, but also her immediate involvement at the scene or the motel and so on afterwards, and then her ultimate plea to a term of years would necessarily lead to the likely result that Henry Sireci would receive a lesser sentence, a likely sentence of life." (Vol. 2. R. 33-37).

The lower court denied the motion by written order dated July 15, 2003. (Vol. 6 R. 996-997). The court's order stated that the "defendant has not shown a reasonable probability that he would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." (Vol. 6. R. 997.) The entirety of the lower court's order, which contains no factual findings and no rationale

for its decision, is contained in the record, volume 7, on pages 996-997.

This appeal follows.

SUMMARY OF ARGUMENT

Argument I

Mr. Sireci, through his motion and argument of counsel, analyzed in conjunction with the transcripts of the 1976 and 1990 trials, made a sufficient showing under Florida Rule of Criminal Procedure 3.853 (b)(3)and(b)(4) that he should be allowed to conduct DNA testing on the evidence. Mr. Sireci asserted that he is innocent of the murder of Howard Poteet and innocent of the death penalty; that there exists a reasonable probability that DNA testing would exonerate Mr. Sireci or mitigate his death sentence; and, that his identification as the murderer is in dispute and there there is a reasonable probability DNA testing would mitigate his death sentence. Every requirement of the rule was met.

Argument II

The circuit court denied Mr. Sireci's Due Process rights to appellate review when it failed to set forth factual findings and the rationale behind its ruling.

Argument III

Mr. Sireci is entitled to DNA testing as part of his right to habeas corpus which is specifically guaranteed by both the United States and Florida Constitution.

ARGUMENT I

MR. SIRECI MADE A SUFFICIENT SHOWING FOR POST CONVICTION DNA TESTING UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.853(b)(3) and(b)(4) AND SECTION 925.11, FLORIDA STATUES THEREFORE THE LOWER COURT ERRED IN DENYING MR. SIRECI'S MOTION

A. STANDARD OF REVIEW

Because this issue involves questions of law, this Court should apply a standard of de novo review. [8]

B. THE CIRCUIT COURT'S RULING

The circuit court's order denying the motion stated the "defendant failed to make the requisite showing necessary to satisfy the requirements of subsections (b)(3) and (b)(4) under Rule 3.853 Fla.R.Crim.P." The court further ruled that "the defendant has not shown a reasonable probability that he would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at

[8] If the circuit court had made findings of fact this would be a mixed question of law and fact and this Court would give deference to the circuit court's factual findings.

trial." (Vol. 6. R. 996-997).

1. SUFFICIENCY OF PLEADINGS

Mr. Sireci made a sufficient showing under Florida Rule of Criminal Procedure 3.853(b)(3)and (b)(4) and Section 925.11 to obtain postconviction DNA testing. Fla. R. Crim. P. Rule 3.853 Motion for Postconviction DNA Testing states in relevant part:

> "(b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime.
>
> (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received."

In the section entitled "STATEMENT OF INNOCENCE" Mr. Sireci stated that he is "actually and legally innocent of the murder" and also that he is "innocent of the death penalty."(Vol. 6. R. 710). He further noted that the 1976 trial was "not an adversarial testing" and that Mr. Sireci's attorney at the 1976 trial failed to hold the state to its burden of proving beyond a reasonable doubt that Mr. Sireci was guilty of

murdering Mr. Poteet and also failed to adequately put forth a defense that would have shown that Barbara Perkins was the true perpetrator of the crime. Id. He further stated under the section entitled "RELEVANCE OF DNA TESTING" that the DNA evidence found at the crime scene and abandoned motel room will tend to show that Barbara Perkins or her accomplices were present at the crime scene. Id.

Under the section entitled "FACTS IN SUPPORT OF THIS MOTION," Mr. Sireci demonstrated the relevance of the requested DNA testing and thereby met the requirement of how the evidence would either exonerate him or mitigate his sentence. Specifically, Mr. Sireci noted Barbara Perkins was the primary witness against Mr. Sireci.[9] Ms. Perkins was the sole witness who placed Mr. Sireci at the crime scene at the time of the murder; the sole witness who placed him in the abandoned motel room after the murder; and, Ms. Perkins was the sole witness who identified the blood-stained jacket found in the abandoned motel room as belonging to Mr. Sireci. Ms. Perkins also denied receiving any benefit for her testimony but later plead to a reduced charge of simple robbery. (Vol. 6. R. 705-707.) Further, Mr. Sireci pled that the state presented expert testimony to the jury that the hair found on Mr. Poteet's socks at the crime scene belonged to Mr. Sireci and that this was the only physical evidence which placed Mr. Sireci at the crime scene. (Vol. 6. R. 707.) Mr. Sireci further stated that the

[9] Ms. Perkins was not an eyewitness, however. No eyewitnesses to the crime testified at trial.

state also presented expert testimony that the denim jacket found in the abandoned motel room, identified by Barbara Perkins as belonging to Mr. Sireci, had blood on it which matched the blood-type of the victim.(Vol. 6. R. 707.)Mr. Sireci also asserted that DNA testing of the hairs found on the towels in the abandoned motel room would reveal they were from Barbara Perkins.

Mr. Sireci further linked this testimony and established its relevance to exonerating him or mitigating his sentence by noting, during argument at the hearing and in his motion, that Ms. Perkins could have been charged as a principal in the murder. In light of her role in the murder and her plea deal, Ms. Perkins' credibility and culpability are relevant areas of consideration for a jury when recommending whether to sentence Mr. Sireci to life or death. In other words, evidence which tends to impeach Ms. Perkins tends to exculpate Mr. Sireci and thereby mitigate his sentence. (Vol. 6. R. 707.) Mr. Sireci further argued that testing of the hair found on Mr. Poteet's sock would eliminate all objective, physical evidence that placed Mr. Sireci at the crime scene.(Vol. 6. R. 707.) Further, if DNA testing revealed the hair was Perkins' and not Mr. Sireci's nor Mr. Poteet's, it would undermine her testimony and establish that she was directly involved in the murder (Vol. 6. R. 707-708). In addition, if the blood on the denim jacket did not belong to Mr. Poteet, another crucial piece of evidence linking Mr. Sireci to the crime would be eliminated proving that Barbara Perkins is not credible and that she was in fact involved in the murder herself, either

alone or with accomplices. In addition, if Mr. Sireci's DNA was not found on the denim jacket Ms. Perkins' testimony that the jacket belonged to Mr. Sireci would be undermined. Mr. Sireci further argued that DNA testing would prove the hairs from the towels in the motel room were Barbara Perkins' and would further diminish her credibility.

Mr. Sireci has met all the pleading requirements of Florida Rule of Criminal Procedure 3.853(b)(3)and (b)(4) and Section 925.11 and therefor should be allowed to obtain postconviction DNA testing. The circuit court erred in holding otherwise.

2. REASONABLE PROBABILITY OF ACQUITTAL

The trial court erred in its finding because Mr. Sireci did in fact make a sufficient showing that there was a "reasonable probability" that he would have been acquitted or received a lesser sentence had the DNA evidence been admitted at trial.

Florida Rule of Criminal Procedure 3.853 states in relevant part:

> "(5) The court shall make the following findings when ruling on the motion:
>
> > (C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial."

A claim is facially sufficient with regard to the exoneration issue if the facts as alleged demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial. Riley v. State, 851 So. 2d

811 (Fla. 2d DCA 2003); Knighten v. State, 829 So. 2d 249 (Fla. 2d DCA 2002).

In a different context, regarding the Sixth and Fourteenth Amendment rights to the effective assistance of counsel, the United States Supreme Court has defined the "reasonable probability standard" as one which places a relatively small burden on the appellant:

> "We believe that [appellant] **need not show that counsel's conduct more likely than not altered the** outcome in the case **... The result of a proceeding can be** rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, ... and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. **A reasonable probability is a probability sufficient to undermine confidence in the outcome.**" Strickland v. Washington, 466 U.S. 688 at 693-694, 104 S.Ct. 2052 at 2607-68, 80 L.Ed.2d 668 at 673-674 (1984)(citations omitted)(emphasis added).

This Court adopted that definition of "reasonable probability" in Stephens v. State, 748 So. 2d 1028, at 1033-1034 (Fla. 1999).

In reversing and remanding for further proceedings a denial of post-conviction DNA testing, the Second District Court of Appeal ruled that allegations about alternate sources of blood on pieces of relevant evidence can be sufficient to create a

reasonable probability of an acquittal at trial. Riley v. State,851 So. 2d 811 (Fla. 2d DCA 2003). Riley was accused and convicted in his 1976 trial of first-degree murder. Id. According to Riley's motion, the State introduced into evidence certain items found at the victims' apartment, which was the scene of the crime, and evidence from Riley's apartment. Id. In particular, Riley alleged that a bloodstained tank-top shirt found in his apartment was introduced at trial. The blood was identified as belonging to the victims. Id. The State refuted the allegations that it introduced the evidence as Riley claimed and argued there was ample incriminating evidence against Riley. Id. The circuit court denied the motion, stating that the DNA testing would not exonerate Riley and that there was an abundance of other evidence against him. Id at 812. The Second District Court of Appeal stated: "[T]he essence of his claim was that if DNA testing shows that the blood on the shirt does not belong to the victims, then the shirt would not be a piece of evidence linking him to the crime." Id. Further, if the blood did not belong to Riley or the victims it would suggest that a third party was involved in the crime. Id. In reversing and remanding for further proceedings, the Second District Court of Appeal, held that if "DNA testing confirms Riley's allegations, the results would create a reasonable probability that Riley would be acquitted," adding that there were inconsistencies in the eyewitness testimony. Id. at 812.

Mr. Sireci has also alleged that the blood-stained jacket does not contain the blood of Mr. Poteet, nor will it contain Mr. Sireci's DNA. The state introduced the

jacket at trial and argued it belonged to Mr. Sireci and contained Mr. Poteet's blood. Mr. Sireci's arguments as to the blood-stained clothing and testing of the hair on the victim's sock are identical to Mr. Riley's arguments. In addition, as in Riley, there is a conflict as to the presentation of the evidence at trial. The State suggested in its written response to Mr. Sireci's motion for DNA testing that the hair on the victim's sock is not relevant. The State claimed in its motion, that the "only evidentiary value of the hair match was to suggest that the person who produced it had been in Poteet's office at some point." (Vol. 6. R. 722). However, a careful reading of the 1976 transcript shows that was not the State's argument at trial as it related to the physical evidence against Mr. Sireci. In 1976 the prosecutor told the jury that "we didn't bring in each item, we brought in those that were relevant. The socks became relevant because on the socks was a hair.... We have the jacket in evidence ... and that became significant because the blood on that jacket matched the blood of Mr. Howard Poteet." (1976 Vol. IV R. 679-680). In addition, outside of the presence of the jury when persuading the 1976 trial court that the jacket was admissible, the state argued: " the circumstantial evidence of that jacket being in the room containing the blood of the victim is a significant fact which the jury should be allowed to consider." (1976 Vol. III R. 549). In essence, Mr. Sireci has alleged that DNA testing of the pieces of evidence introduced at trial linking him to the murder would prove there is no such link. Mr. Sireci's arguments as to the blood-stained clothing are indistinguishable from

Mr. Riley's arguments.

In Knighten v. State, 829 So. 2d 249 (Fla. 2d DCA 2002), the Second District Court of Appeal reversed another 3.853 denial with facts materially indistinguishable from those in Mr. Sireci's case. Knighten, who was convicted of burglary and sexual battery, sought DNA testing of a pubic hair found at the crime scene that had been identified through microscopic hair analyses as belonging to him and placing him at the scene. Knighten v. State, 829 So. 2d 249, 250 (Fla. 2d DCA 2002). In closing, the State argued that the hair identification evidence was objective evidence that supported the eyewitness testimony. Id. In reversing the trial court's denial of Knighten's motion for post-conviction DNA testing, the Second District Court of Appeal found that based on the problems with the witness' testimony and the state's heavy reliance on the hair evidence, there is a "reasonable probability that Knighten would have been acquitted at trial." Id. The state, as noted supra, also argued to the jury in Mr. Sireci's case the importance and relevance of the hair found on the victim's sock at the crime scene.

Mr. Sireci has made a sufficient showing that should the DNA testing of the hair and jacket show that the evidence is not what was argued by the state at trial there is a reasonable probability that he would be acquitted. Further, if the DNA testing of the hair and jacket show that another person was involved in the murder, either Ms. Perkins or her associates, there is also a reasonable probability that he would be

acquitted.

3. REASONABLE PROBABILITY OF MITIGATION OF SENTENCE

Mr. Sireci faces a death sentence. Therefor, he is also entitled to DNA testing if he can show that the DNA evidence would be of such a nature that there is a "reasonable probability" it would acquit him of the death penalty or "mitigate his sentence." Fla. R. Crim. Pro. 3.853. The purpose of Florida Rule of Criminal Procedure 3.853 and Florida Statute Section 925.11 is to provide a means to challenge convictions when there is a "credible concern that an injustice may have occurred and DNA testing may resolve the issue." In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 636 (Fla. 2001) (Anstead,J., concurring in part and dissenting in part). In Mr. Sireci's case, there is a credible concern that an injustice may have occurred as to his death sentence and DNA testing will show that the primary witness against him was involved in the murders but received only a slap on the wrist.

The 1990 trial judge found that Mr. Sireci has organic brain damage, which one expert testified was equivalent to a frontal lobotomy, and that he may be described as functionally retarded. At his second penalty phase proceeding, his lawyers presented extensive mitigation, including severe physical abuse and sexual abuse at the hands of his mother. The state presented testimony from Barbara Perkins to once again link him

to the scene and establish premeditation. Based on the State's theory of the case, Ms. Perkins was not present and not involved in the murder of Mr. Poteet. If in fact, Ms. Perkins' hair was on the victim at the crime scene, Ms. Perkins' testimony and her role in the murders becomes suspect. Had a jury heard that there existed objective, scientific evidence that Ms. Perkins, who received a three-year prison sentence for her part in the robbery of Mr. Poteet, was actually in the office where the murder occurred and was aware of and took part in the murder, it is reasonable to assume that there is a probability they would have acquitted Mr. Sireci of the death penalty. Further, if there was objective evidence that the blood on the jacket did not come from Howard Poteet and/or Mr. Sireci's DNA was not on the jacket or that the blood on the jacket belonged to Ms. Perkins, there exists a reasonable probability the jury would have acquitted Mr. Sireci of the death penalty.

Accordingly, the circuit court erred in denying the motion and this Court should reverse and remand the case to the circuit court for DNA testing.

ARGUMENT II

THE LOWER COURT'S ORDER DEPRIVED MR. SIRECI OF HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE DECLARATION OF RIGHTS TO THE FLORIDA CONSTITUTION AND DENIED HIM A FAIR APPEAL WHEN IT FAILED TO MAKE FACTUAL FINDINGS AND

STATE ITS RATIONALE WITH SUFFICIENT PARTICULARITY TO ENABLE MEANINGFUL REVIEW

A. STANDARD OF REVIEW

Because this issue involves questions of law, this Court should apply a standard of de novo review.

B. FAILURE TO MAKE FINDINGS AND STATE RATIONALE

The circuit court's written order fails to state its factual findings and rationale in denying Mr. Sireci's motion. Nor did the circuit court orally pronounce its rationale for denying Mr. Sireci's motion. These failures deprive meaningful review and diminish Mr. Sireci's appellate rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Declaration of Rights of the Florida Constitution.

Florida Rule of Criminal Procedure 3.853 states in relevant part:

> "(c)Procedure.
>
> (1) On receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.
>
> (2) The court shall review the motion and deny it if it is insufficient. If the motion is sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.
>
> (3) On receipt of the response of the

> prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing...
> (5) The court shall make the following findings when ruling on the motion: ...
> (C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial."

In its written order denying Mr. Sireci's motion, the circuit court wrote: "The defendant has not shown a reasonable probability that he would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." (Vol. VII, R. 997). The circuit court did not indicate what information in the record from the 1976 and 1990 trials that it considered in relying on its ruling but did note in its order that "no evidence was introduced at the hearing, the parties relied upon their papers in the court file." (Vol. VII, R. 996).

At the conclusion of the hearing, the circuit court stated: "All right. You gentleman know the case far better than I do. When it was reassigned to me, all 12 volumes brought to my chambers, I reviewed them. I didn't read them word for word. I did read in its entirety the moving party's amended motion and the earlier motion. I did read in its entirety the state's response to the third amended, as well as the other papers in the last volume. At this time I'm going to deny the defendant's motion." (Vol. II, R. 41). It is unclear from this record whether the circuit judge even reviewed or read any of the transcripts of the 1976 guilt phase or 1976 record on appeal. The

1990 Record on Appeal itself is comprised of 26 volumes, 14 more than the 12 the circuit court reviewed. The 1976 Record on Appeal consists of four volumes. Mr. Sireci's file also includes approximately eight volumes from proceedings in 1987 which were also the subject of an appeal.

The lower court's failure to state its rationale and to refer to factual findings which support that rationale impairs this Court's ability to give Mr. Sireci meaningful appellate review. In a case involving a summary denial without a hearing of a Florida Rule of Criminal Procedure 3.850 motion, this Court has instructed the lower courts to state their rationale in their decision or attach relevant portions of the record. Assay v. State, 769 So. 2d 974, 989 (Fla. 2000). Rationale is the reasoning behind a court's decision and is preferred to the use of broad categorical terms under which a court can justify its denial of a claim.

The Second District Court of Appeal reversed and remanded for further proceedings a trial court's denial of a defendant's motion for post-conviction DNA testing based on the inadequacy of the order and record.[10] Riley v. State, 851 So. 2d 811 (Fla. 2d DCA 2003). During the trial, according to Riley's motion, the State introduced into evidence certain items found at the victims' apartment, which was the scene of the crime, and evidence from Riley's apartment. Id. The State, in its written

[10] The facts of the case are addressed in more detail in Argument I,B,2 supra.

response, contended that it did not claim at trial that the shirt contained the blood of the victims and that there was "ample incriminating evidence" against Riley. Id at 812.

The appellate court noted that, because of the limited record before them (the trial testimony was not part of the appellate record), "neither the trial court nor this Court can address the factual discrepancies that exist between Riley's allegations and the State's response." Id. at 813.

The State suggested in its written response to Mr. Sireci's motion for DNA testing that the hair on the victim's sock is not relevant. The State claimed in its motion, that the "only evidentiary value of the hair match was to suggest that the person who produced it had been in Poteet's office at some point." (Vol. 6. R. 722). However, a reading of the 1976 transcript shows that was not the State's argument at trial as it related to the physical evidence against Mr. Sireci. In 1976 the prosecutor told the jury that "we didn't bring in each item, we brought in those that were relevant. The socks became relevant because on the socks was a hair.... We have the jacket in evidence ... and that became significant because the blood on that jacket matched the blood of Mr. Howard Poteet." (1976 Vol. IV R. 679-680). Given these factual discrepancies, the lack of factual findings by the lower court in its written order and the brief oral pronouncement at the hearing, it is impossible to discern the lower court's rationale and thereby subject it to meaningful review. Accordingly, if this Court does not reverse this case for the grounds stated elsewhere in this brief, this Court

should remand this case for further proceedings consistent with the lower court making findings of fact and stating its rationale for its ruling.

ARGUMENT III

THE CIRCUIT COURT'S DENIAL OF MR. SIRECI'S MOTION FOR POSTCONVICTION DNA TESTING VIOLATED HIS RIGHTS TO HABEAS CORPUS RELIEF UNDER BOTH THE FLORIDA AND U.S. CONSTITUTIONS

A. STANDARD OF REVIEW

Because this issue involves questions of law this Court should apply a standard of de novo review.

B. DENIAL OF DUE PROCESS

The Florida Constitution and U.S. Constitution provide a right to access evidence for the purposes of DNA testing if that DNA testing could be used to prove one's innocence or to appeal for executive clemency. See Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001), Anstead, J. (concurring in part and dissenting in part) (stating "At its core, access to DNA testing is simply a unique means of establishing a claim… under the constitutional writ of habeas corpus…. Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution…. The salient issue in such proceedings is whether there is a credible claim that a

fundamental injustice has occurred.") 807 So. 2d at 636-37. See also Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) Luttig, J. (concurring) (arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.) When DNA testing could prove a man innocent, denying him such tests and executing him would deny Due Process, Equal Protection and access to the courts under the Fifth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION

No harm can come to the State if this Court reverses the lower court's denial of DNA testing. Mr. Sireci filed a properly pled motion following the law of this State and demonstrated a reasonable probability of acquittal as to guilt and a reasonable probability of acquittal of the death penalty. Accordingly he should be allowed to test the evidence against him and asks this Court to vacate the circuit court's order and remand for DNA testing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on this _____ day of December, 2003.

MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL MIDDLE REGION
3801 Corporis Park Drive, Suite 210
Tampa, FL 33619
813-740-3544
813-740-3554 (Facsimile)
COUNSEL FOR PETITIONER

Copies furnished to:

The Honorable Thomas B. Smith
Circuit Court Judge
Orange County Courthouse
425 North Orange Avenue
Courtroom 10A
Orlando, FL 33802

Chris A. Lerner
Assistant State Attorney
Office of the State Attorney
415 North Orange Avenue
Orlando, FL 32801

Scott A. Browne
Assistant Attorney General
Office of the Attorney General
3507 E. Frontage Road
Suite 200
Tampa FL 33607-7013

Henry Sireci
DOC# 056338; P6210S
Union Correctional Institution
7819 NW 228th Street
Raftered, FL 32026

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL MIDDLE REGION
3801 Corporis Park Drive, Suite 210
Tampa, FL 33619
813-740-3544
813-740-3554 (Facsimile)
COUNSEL FOR PETITIONER