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

HENRY SIRECI,

Appellant,

v.

STATE OF FLORIDA,

Appellee

REPLY BRIEF OF THE APPELLANT

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ARGUMENT I

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

The State argues that the denial of Mr. Sireci's motion is supported by competent and substantial evidence and that the evidence is "overwhelming." (Appellee's Brief, page 13). The state further asserts that "even a cursory review of the record in this case supports the [circuit] court's decision." (Appellee's Brief, page 11). A cursory review of the record might in fact support the circuit court's decision, but a *detailed, thorough review, consistent with this Court's directives*, does not.

As noted in Mr. Sireci's initial brief, the testimony linking Mr. Sireci to the crime was based in large part on Barbara Perkins, Bonnie Arnold and other witnesses to his alleged confessions. The state argues that the "sources of these confessions are not simply a jail house snitch or a possible co-defendant ...[but] ... friends, relatives... and at least one detective." (Appellee's Brief, page 13). The sources of the confessions are, in fact, two possible co-defendants, two jail-house snitches, Mr. Sireci's brother-in-law and brother, both of whom had a strained relationship with Mr. Sireci, and one detective.

A critical review of the testimony of those witnesses shows that Mr. Sireci's 1976 trial was not an adversarial testing. Ms. Perkins was the type of witness whose credibility could reasonably be doubted: she had been convicted of four or five crimes of dishonesty or false statement (1990 Vol. VIII, R. 1046) and had entered a guilty plea to the robbery of Mr. Poteet in exchange for a three-year prison sentence and a promise not to be prosecuted for other crimes.(1990 Vol. VIII, R. 1043). Bonnie Arnold, another witness to a confession by Mr. Sireci, was not charged in the case but certainly could have been charged as an accessory after the fact based on his own testimony. Mr. Arnold was not cross-examined on this issue. (1976 Vol. III, R. 442-476). Bonnie Arnold also had an interest in protecting Ms. Perkins in that he engaged in sex with Ms. Perkins the morning after the murder, prior to taking Ms. Perkins and Mr. Sireci back to his residence which he shared with his girlfriend who presumably was unaware of his morning tryst. (1976 Vol. III, R.467-469). Harvey Woodall, the jail house snitch , was a six-time convicted felon. (1976 Vol. III R. 437). Defense counsel also *failed to ask a single question* in cross examination of at least two witnesses, Detective Gary Arbisi (1976 Vol. IV, R. 609) and Peter Sireci (1976 Vol. III, R. 426). Further, as noted in Mr. Sireci's initial brief at page 4-5, fn. 4, the statements made to the various witnesses by Mr. Sireci were in many ways inconsistent. By way of example, Harvey Woodall, the six-time

convicted felon, testified that Mr. Sireci told him he picked up the wrench on the premises. (1976 Vol.III R. 437). Bonnie Arnold 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 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 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).[1]

Of more significance to this appeal, however, is the fact that the state presented scientific testimony (hair analysis and blood-typing) linking two pieces of physical evidence to Mr. Poteet and Mr. Sireci: the blood-stained jacket and the

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[1]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).

hair on Mr. Poteet's sock. The introduction of these two pieces of evidence allowed the state to argue an objective link to Mr. Sireci and thereby bolster the testimony of the witnesses, especially Barbara Perkins, and convict Mr. Sireci of the murder of Mr. Poteet. It is these pieces of evidence which Mr. Sireci now asserts should be subject to DNA analysis. Mr. Sireci further asserts that the blood on the jacket cannot be linked to Mr. Poteet, nor can the hair on Mr. Poteet's sock be proven to belong to Mr. Sireci. Without these pieces of objective evidence, the state's case against Mr. Sireci amounts to no more than inconsistent statements offered by co-defendants (one charged and one not charged), two jail house snitches, and others, most of whom had a motive to lie or fabricate, and/or were not subject to a meaningful cross-examination.

The state also argues that the "issue of DNA testing has already been *largely* litigated before this Court." (Appellee's Brief, page 11). Mr. Sireci disagrees. The issue of testing the hairs found on the towels was addressed by this Court in Sireci v. State, 773 So. 2d 34 (Fla. 2000), as conceded by Mr. Sireci in his initial brief. However, this Court has *never addressed*, in dicta or otherwise, the request for DNA testing of the jacket purported to belong to Mr. Sireci and allegedly stained with the blood of Mr. Poteet, or the hair found on Mr. Poteet's sock at the crime scene.

A. Hair From The Hotel Room

The state argues that this Court has already found that DNA testing of the hair on the towel in the abandoned hotel room would not probably produce an acquittal on retrial. Mr. Sireci concedes that, should the hairs on the towels be shown to belong to Ms. Perkins, that fact in and of itself would not be sufficient to produce a reasonable probability of acquittal on retrial. However, the cumulative effect of such evidence, considered in conjunction with DNA testing of the blood-stained jacket and the hair on Mr. Poteet's sock, would be sufficient to probably produce an acquittal on retrial or a lesser sentence.

B. The Jacket

The state argues that Mr. Sireci's motion made no reference that the testing of the blood found on the jacket might somehow exonerate Mr. Sireci and therefore this issue is waived for appeal. (Appellee's Brief, page 14). Mr. Sireci disagrees. Mr. Sireci's motion explicitly references the blood on the jacket:

"Inasmuch as the evidence connecting the jacket which was stained with blood consistent with the victim's was heavily dependent on Barbara Perkins' testimony; evidence which tends to impeach Perkins' testimony also tends to exculpate Henry Sireci." (V-6, 705) . Mr. Sireci further argued in his motion that just as testing of the hairs proving them to belong to Ms. Perkins would undermine

Ms. Perkins testimony "identical logic applied to the issue of the denim jacket results in the same conclusion, Henry Sireci is innocent of the first degree murder of Howard Poteet." (See Attached Appendix A) Further, under the section entitled "Location of Evidence to be Tested," Mr. Sireci specifically listed the items he wanted tested which were in the possession of the Orange County Clerk of Circuit Court. Mr. Sireci described Item #10 on his list: "State's exhibit No. 41- denim jacket from hotel." (V-6, 707). Under the section entitled relevance, Mr. Sireci stated "DNA testing, blood and hair analysis requested in this motion will exonerate Henry Sireci." (V-6, 708).

The state further argues that "during oral argument on the motion, counsel conceded that the blood on the jacket was that of the victim." (Appellee's Brief, page 14). Mr. Sireci disagrees. Counsel did *not* concede the blood on the jacket belonged to Mr. Poteet. The quote used by the state to support this argument is taken out of context and, in fact, was included in Mr. Sireci's initial brief to this Court. The quote is:

> 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. (Vol. 2, R.33-37)

Viewing the statement *in context* it is clear that counsel was *summarizing the testimony and evidence that was presented by the state.* Nowhere in this statement, nor in his motion, does counsel say that he concedes or stipulates that the blood-type matching of the blood on the denim jacket is accurate.

The state also argues that it "strains credulity to suggest that testing on the jacket might somehow produce a different result at trial." (Appellee's Brief, page 14). Mr. Sireci disagrees. The jacket was an important piece of evidence linking Mr. Sireci to the crime through *the blood* of Mr. Poteet. The state argued in closing that the jacket was "*significant* because the blood on that jacket matched the blood of Mr. Howard Poteet." (emphasis added)(1976 Vol. IV, R. 680) The state also argued outside the presence of the jury that 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." (emphasis added)(1976 Vol. III, R. 549). Further, the state intertwined the testimony of the blood match on the jacket and the hair match on the sock with the testimony of Ms. Perkins to build the rope of its case. Absent the hair on the sock and the blood-stained jacket there was virtually no other significant physical evidence against Mr. Sireci. Other key pieces of physical evidence, such as Mr. Poteet's credit cards, were found in the possession of Ms. Perkins.

C. Hair on the Murder Victim's Sock

The state argues "the hair found on the victim's sock was not significant evidence of Sireci's guilt." (Appellee Brief, page 15) Identical to its newly found argument about the blood match on the jacket, the state's newly found argument about the hair on the sock is inconsistent with its theory of the case in 1976 as argued to the trial court and jury. The prosecutor told the jury in 1976, "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." (1976 Vol. IV R. 679) The purported match of the hair found on the sock Mr. Poteet was wearing when he died provided an objective link placing Mr. Sireci in the office with Mr. Poteet at the time of his death. The state is engaging in sophistry when it argues that the hair (and the jacket) are now no longer significant pieces of evidence.

D. Reasonable Probability of Acquittal or Lesser Sentence

The state argues in its brief that Mr. Sireci has "clearly failed to meet his burden of showing that the DNA testing would somehow exonerate him or lead to a lesser sentence." (Appellee's brief, page 18) Mr. Sireci respectfully disagrees. As noted in Mr. Sireci's initial brief, Florida Rule of Criminal Procedure 3.853(c)(5)(C) *explicitly* provides for DNA testing if there exists a reasonable probability the movant would have been acquitted *or* would have received a lesser sentence if the DNA evidence had been admitted at trial. A reasonable probability is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 473 U.S. 667, 682 (1985). In a different context, Justice Souter explained the legal standard of a reasonable probability:

> The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See ante, at 1952-1953; Kyles v. Whitley, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Instead, the Court restates the question (as I have done elsewhere) as whether " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence' " in the

> outcome. Ante, at 1952-1953 (quoting Kyles, supra, at 435, 115 S.Ct. 1555).

Strickler v. Greene, 119 S.Ct. 1936, 1956 (1999) (SOUTER,J. concurring in part and dissenting in part). The facts of the crime itself and other available evidence indicates that DNA testing "could reasonably be taken to put the whole case in such a different light as to undermine confidence" in Mr. Sireci's conviction *and sentence.* Id. Critical pieces of evidence, the hair on the sock and the blood on the jacket, would be missing from the state's case. Alternatively, the evidence would implicate another, most likely Ms. Perkins or Mr. Arnold. That evidence would put the case in a different light and undermine confidence in the verdict. Even if impeachment of Ms. Perkins' testimony through DNA testing was not sufficient to probably produce an acquittal on retrial, it certainly would cast a shadow on Mr. Sireci's death sentence. Impeachment of Ms. Perkins' testimony, coupled with her minimal three-year sentence for her admitted involvement as an accessory after the fact to Mr. Poteet's death, would establish a reasonable doubt about the accuracy of Ms. Perkins' claim that *only* Mr. Sireci was present during the murder of Mr. Poteet. Such impeachment would mitigate Mr. Sireci's death sentence.

In Gregg v. Georgia, the United States Supreme Court noted that "[t]he death penalty is said to serve two principle social purposes: retribution and

deterrence of capital crimes by prospective offenders". Gregg v. Georgia, 428 U.S. 153, 183 (1976). To justify imposition of the death sentence, the prosecution must prove that certain characteristics of an offender will serve those purposes. Id. For that reason, the United States Supreme Court has mandated that, in a capital case, "the sentencer ...not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. " Locket v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d973, 990 (1978); See also Eddings v. Oklahoma, 455 U.S. 104(1982); Hitchcock v. Dugger, 481 U.S. 393(1987); Skipper v. South Carolina, 476 U.S. 1(1986). Proof in the form of DNA evidence that the jacket Ms. Perkins testified belonged to Mr. Sireci was stained with Ms. Perkins' blood or that the hair on the victim's sock at the crime scene belonged to Ms. Perkins would establish a reasonable doubt that Mr. Sireci killed Mr. Poteet; or, would mitigate Mr. Sireci's sentence. In determining whether DNA evidence could probably produce a life sentence at retrial, the lower court should have considered the evidence adduced at the penalty phase and whether there is a probability that the cumulative effect of it with the new evidence, from the point of view of its possible effect on the jury, might "reasonably be taken to put the whole case in such a different light as to undermine confidence in the outcome." Strickler

v. Greene, 119 S.Ct. At 1956. "[I]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that the jury would change its recommendation." Bertolettie v. Dugger, 883 F.2d 1503, 1519 n.12(11th Cir. 1989). "The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency." Strickland v. Washington, 466 U.S. 668 at 695, 104 S.Ct. 2052 at 2068 (1984).

E. Discussion of the Law (as framed by the state)

The state argues that Hitchcock v. State, __ So. 2d __, 29 Fla. L. Weekly S13 (Fla. January 15, 2004) is similar. Hitchcock can be distinguished from the case at bar; Hitchcock's motion was denied because he failed to state with "specificity how the DNA testing of each item would give rise to a reasonable probability of acquittal confessed or a lesser sentence." Id. at S14. This Court noted that "[w]ith respect to the items listed in Hitchcock's motion, only a general reference and identification of the type of item was given, without any other relevant information." Id. at S16. Mr. Sireci, on the other hand, has specifically listed the items that he seeks to test (the blood-stained jacket, the hair on Mr. Poteet's sock

and the hairs from the motel room) and the relevance of those items.

The state attempts to distinguish Mr. Sireci's case from Knighten v. State, 829 So. 2d 249 (Fla. 2d DCA 2002) and Riley v. State, 851 So. 2d 811 (Fla. 2d DCA 2003) by arguing that since Mr. Sireci, through his attorney, presented the defense of third degree murder, identity was not in issue. It is true that Mr. Sireci's attorney presented a defense of third-degree murder and did not argue Mr. Sireci's innocence or dispute his involvement in the crime. However, throughout the trial Mr. Sireci himself maintained that he was innocent. Two events in the record stand out. First, the trial court explicitly prohibited Mr. Sireci from testifying to his innocence during the penalty phase portion of his trial. Sireci v. State, 399 So. 2d 964, 972 (Fla. 1981) Second, Mr. Sireci wrote a letter to the court prior to sentencing wherein he maintained his innocence, sought to discharge his attorney because his attorney failed to present testimony which would have supported Mr. Sireci's claim of innocence, and requested a mistrial . (1976 ROA Vol. II R. 292-293 and 1976 Vol. Transcript of Sentencing R. 4) Therefor, there exists ample evidence in the record that throughout the proceedings Mr. Sireci himself maintained he was not involved in the murder and that he was innocent.

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 TRIAL COURT'S ORDER FAILS TO SUFFICIENTLY STATE ITS RATIONALE OR RENDER FACTUAL FINDINGS WHICH VIOLATE MR. SIRECI'S DUE PROCESS RIGHTS TO A FAIR APPEAL

The state claims the trial court's order sufficiently states its rationale. [2] Mr. Sireci disagrees. Webster's defines rationale as "(1)the fundamental reason or reasons serving to account for something. (2) a statement of reasons. (3) a reasoned exposition of principles." Webster's Encyclopedic Unabridged Dictionary of the English Language 1603 (new revised ed. 1996) In this case, the trial court has simply tracked the language of the statute without offering any explanation of how it reached its conclusion or the fundamental reasons for the conclusion. Further, the trial court's statement that it reviewed 12 volumes of records does not give this Court any meaningful guidance as to what documents or transcripts were reviewed. As noted in Mr. Sireci's initial brief, the 1990 Record on Appeal is comprised of 26 volumes, the 1976 Record on Appeal is comprised of four volumes, and the 1987 Record on Appeal consists of eight volumes. It is simply impossible to tell what the trial court reviewed in order to make its finding;

[2] The state appears to concede that the trial court did not make any factual findings.

did it review the 1976 guilt phase proceedings, the 1990 penalty phase, the 1987 proceedings or some combination thereof? Leaving this Court to engage in such a guessing game in a capital case, where the fact finder's decision determines whether or not a man will be executed, offends notions of due process and fundamental fairness.

The state also argues that summary denial of a 3.853 motion without a hearing is consistent with this Court's jurisprudence in Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). (Appellee's Brief, page 21). However, Anderson deals with the summary denial without a hearing on a motion under Florida Rule of Criminal Procedure 3.850. Rule 3.850 contains an explicit provision allowing a trial court to summarily deny a motion "if the files and records in the case conclusively show that the movant is entitled to no relief" and to attach the portion of the record which "conclusively shows that the movant is entitled to no relief." Florida Rule of Criminal Procedure 3.850(d). In contrast, Florida Rule of Criminal Procedure 3.853 contains no provision permitting the trial court to deny a hearing and attach portions of the record if the record conclusively shows that the defendant is not entitled to relief. Borland v. State, 848 So. 2d 1288, fn. 1 (Fla. 2d DCA 2003). Rather, Rule 3.853(c)(2) allows the court to deny the motion if it is facially insufficient. If the court finds that the motion is sufficient (which presumably the

trial court did in this case) it shall order the prosecuting attorney to respond. Fla. R. Crim. Pro. 3.853(c)(2). The trial court is then instructed to "review the response and enter an order on the merits of the motion or set the motion for hearing." Fla. R. Crim. Pro. 3.853(c)(3). Based on the record in this case, it appears that the prosecuting attorney filed its response, the trial court reviewed the response and set the matter for hearing and then made a ruling after, presumably, making certain factual findings. This was not a summary denial of a facially insufficient motion; nor was it a summary denial without a hearing. The trial court's findings of fact, his rationale if you will, are crucial to this Court's determination of the validity of the lower court's ruling. It is the marked absence of *oral or written* factual findings and a clearly stated rationale which inhibit this Court's 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.

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 March, 2004.

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