

CASE NO. 16-5247  
IN THE UNITED STATES SUPREME COURT

HENRY PERRY SIRECI,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

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RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE  
QUESTIONS PRESENTED FOR REVIEW

[Restated]

Whether this Court should grant review of a state post-conviction ruling denying a new trial on the basis of a dilatory claim challenging hair comparison evidence admitted at trial where such testimony was a small and insignificant piece of evidence in a case where Sireci's guilt was never seriously contested and is supported by his confessions to seven different individuals and where the state court decision does not conflict with any of this Court's precedent, present an unsettled issue of constitutional law or conflict with an opinion of any other state or federal court?

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**OPINION BELOW**

The decision below is the Florida Supreme Court opinion reported at Sireci v. State, 192 So. 3d 42 (Fla. 2015), affirming the denial of Sireci's successive motion for post-conviction relief.

**STATEMENT OF JURISDICTION**

The Supreme Court of Florida issued its opinion on December 16, 2015 and Sireci's motion for rehearing was denied February 15, 2016. On July 18, 2016, the instant petition was docketed in this Court.

Respondent acknowledges that this Court has jurisdiction to review a final judgment by the highest court of a state pursuant to 28 U.S.C. § 1257.

**CONSTITUTIONAL PROVISIONS INVOLVED**

Petitioner cites the Fifth, Sixth, Eighth, and Fourteenth Amendments as the constitutional provisions implicated in this case. However, none of these constitutional provisions are implicated in the resolution of this fact specific ruling in state court below.

## STATEMENT OF THE CASE AND FACTS

Respondent rejects Petitioner's Statement of "facts" because it is both argumentative and incomplete. Respondent relies instead upon factual summaries compiled from the various court opinions below.

### **A. State Court Procedural History**

As an initial matter, Sireci asserts he has always maintained his innocence in this capital case. However, even at trial, the identity of Sireci as the person who killed Mr. Poteet was not genuinely in dispute. In closing argument, defense counsel argued the State had not proved first-degree murder, but conceded that Sireci was guilty of third-degree murder. (T4/702-12). In affirming Sireci's conviction and death sentence on direct appeal, the Florida Supreme Court provided the following factual summary:

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 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 him. 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 v. State, 399 So. 2d 964 (Fla. 1981).

On May 17, 1982, this Court denied certiorari. Sireci v. Florida, 456 U.S. 984 (1982), rehearing denied, 458 U.S. 1116 (1982).

Sireci subsequently unsuccessfully sought post-conviction 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), 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 post-conviction relief. A limited evidentiary hearing on this post-conviction motion was granted by the Ninth Judicial Circuit Court, and the State unsuccessfully appealed. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

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). 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.

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). The U.S. Supreme Court subsequently denied certiorari. Sireci v. Florida, 503 U.S. 946 (1992).

On or about August 21, 1997, Sireci filed his Third Amended Motion for Post-Conviction Relief challenging his conviction and resentencing. This motion was 147 pages in length and presented 33 claims for relief. On February 9, 1999, the state post-conviction court summarily denied Sireci's motion for post-conviction relief. Sireci appealed the denial of his motion to the Florida Supreme Court. On September 7, 2000, the court affirmed the lower court's denial of post-conviction relief in Sireci v. State, 773 So. 2d 34 (Fla. 2000).

Sireci embarked on a series of motions seeking release of various items of evidence for DNA testing. Ultimately, Sireci filed a third amended motion for DNA testing. On July 15, 2003, the trial court denied Sireci's third amended motion for DNA testing. The court stated that Sireci failed to meet the technical requirements of Florida Rule of Criminal Procedure 3.853 and that Sireci failed to show a "reasonable probability" of acquittal or that he would receive a "lesser sentence" on retrial. After briefing, the Florida Supreme Court issued an opinion, holding that the trial court erred in finding that the technical requirements of the rule were not met, but affirming the trial court's finding that such testing carried no "reasonable probability" of a different result. The court stated:

Sireci also contends that the circuit court erred in ruling that his motion failed to meet the "reasonable

probability" standard in rule 3.853(c)(5)(C). He contends that DNA testing would show the following: (a) that the hair on Poteet's sock was not Sireci's hair; (b) that the blood on the denim jacket found in the motel room was not Poteet's blood; and (c) that hairs found on towels in the motel room were Perkins's hairs. Sireci contends that this proposed DNA evidence satisfies the "reasonable probability" standard. We disagree.

First, if DNA testing had shown that the hair on Poteet's sock was not Sireci's hair, the State would not have introduced that hair into evidence at his trial. Second, the testing of blood on the denim jacket was not asserted by Sireci as an issue in his present rule 3.853 motion and is procedurally barred at this point. [n5] Third, the Court has already addressed the testing of hairs on the towels and has decided this issue adversely to Sireci. [n6] Finally, we conclude that, in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock. As we have noted, seven witnesses testified that Sireci admitted to them that he killed Poteet. We find no error in this regard. See generally *Cole v. State*, 895 So. 2d 398 (Fla. 2004); *Tompkins v. State*, 872 So. 2d 230 (Fla. 2004); *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004); *Robinson v. State*, 865 So. 2d 1259 (Fla. 2004); *King v. State*, 808 So. 2d 1237 (Fla. 2002). Sireci's remaining claims are without merit. [n7]

Sireci v. State, 908 So. 2d 321, 325 (Fla. 2005) (footnotes omitted) (emphasis added). Sireci filed a petition for writ of certiorari in this Court, which was denied December 12, 2005. Sireci v. Florida, 546 U.S. 1077 (2005).

#### B. Federal Court Procedural History

Sireci filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida, on October 3, 2002, which was held in abeyance pending resolution of

state court litigation. Sireci ultimately filed an amended petition and memorandum of law in support thereof on July 24, 2006, to which the State filed its response on November 29, 2007. The District Court, the Honorable Mary S. Scriven, denied the Petition on March 12, 2009. Sireci's motion to alter or amend the judgment was denied on July 28, 2009. On October 15, 2009, the District Court granted a certificate of appealability on Sireci's claim that the prosecutor asked a question from which the jurors could infer Sireci had been previously sentenced to death, the denial of a motion for mistrial on that basis, and, the denial of his attempt to interview the jurors. The Eleventh Circuit Court of Appeals affirmed the district court's decision. Sireci v. Attorney General, 406 Fed. Appx. 348, 351-352 (11th Cir. 2010) (unpublished). Sireci filed a petition for writ of certiorari in the United States Supreme Court, which was denied October 3, 2011.<sup>1</sup> Sireci v. Bondi, 132 S. Ct. 223 (2011).

**C. State Court Proceedings On The Decision Below**

Sireci's successive motion for post-conviction relief was filed on April 21, 2014, asserting a claim of newly discovered

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<sup>1</sup> On April 18, 2013, Sireci filed a Section 1983 Complaint in the United States District Court for the Middle District of Florida, challenging Florida's lethal injection procedures. An amended complaint was filed November 12, 2013. The State responded to the amended complaint on February 20, 2014 and the case remains pending in the federal district court.

evidence based upon the unsound or over stated significance of hair comparison testimony introduced during his trial. Following the filing of the State response and a case management hearing, Sireci filed an amended successive motion for post-conviction relief on July 28, 2014. The court issued its order summarily denying Sireci's successive motion for post-conviction relief on November 24, 2014. Sireci's motion for rehearing was denied on January 15, 2015.

Sireci asserts that in seeking a consent agreement from the State to conduct DNA testing of various items, the State refused to allow certain evidence to be tested, including hair collected from Mr. Poteet's "sock" - - the hair that "allegedly tied Mr. Sireci to the scene of the crime." (Cert. Petition at 5). This is an inaccurate account of the proceedings below and in particular, of the consent agreement. In the consent agreement entered into in 2010, Sireci, notably, did not seek DNA testing of the hair found on Mr. Poteet's sock. (V1/28-29). That agreement also included the stipulation that Sireci would not seek additional DNA testing in either state or federal court. (V1/29). Only after the agreed upon testing had been conducted did Sireci, through the Innocence Project, request testing of the hair located on Mr. Poteet's sock

in a letter sent to the State Attorney's Office.<sup>2</sup>

The Florida Supreme Court affirmed the denial of Sireci's successive motion for post-conviction relief, Sireci v. State, 192 So. 3d 42 (Fla. 2015), and denied rehearing February 15, 2016.

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<sup>2</sup> The State acknowledges that Sireci did seek DNA testing of the hair on the sock in his earlier Rule 3.853 motion. See Sireci, 908 So. 2d at 325. However, Sireci inexplicably failed to seek testing of the hair in the subsequent consent agreement.

### REASONS FOR DENYING THE WRIT

This Court should decline to grant review of a state court post-conviction ruling denying a new trial on the basis of a dilatory claim challenging hair comparison testimony admitted at trial where such testimony was a small and insignificant piece of evidence in a case where Sireci's guilt was never seriously contested and is supported by his confessions to seven different individuals and where the state court decision does not conflict with any of this Court's precedent, present an unsettled issue of constitutional law or conflict with an opinion of any other state or federal court.

Sireci asserts that the state post-conviction court erred in failing to grant him a new trial on the basis of a challenge to the forensic testimony admitted at trial, linking Sireci to a hair located on the murder victim's sock. However, Sireci's claim challenging some of the testimony and conclusions from an FDLE analyst was untimely and otherwise plainly insufficient to warrant post-conviction relief under well established state law. Sireci's petition fails to assert either a conflict with this Court's precedent, or with any other state supreme court. Nor, does he assert that this case presents an important or unsettled issue of law. See Rule 10, Supreme Court Rules of Practice and Procedure (Certiorari review appropriate for cases which decide an "important question of federal law" which represent a conflict with relevant decisions of this Court, between United States courts of appeals, among state courts of last resort, or, present "a significant unsettled question" for this Court). Rather, he simply

complains that under the facts of this case, as he sees them, he was entitled to post-conviction relief on the basis of misleading or inaccurate forensic testimony. As such, this case is of no importance except to the parties. Accordingly, there is clearly no basis for certiorari review of the decision below. See Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

Sireci fails to articulate a legitimate constitutional controversy worthy of this Court's review on the denial of his successive post-conviction motion below. As found by the post-conviction court, upon any reasonable interpretation of the facts of this case, the result of his trial would not be different absent the challenged forensic testimony. The state court record establishes that Sireci's claim was meritless. Because no constitutional question has been presented, Respondent submits that this Court should deny review of the instant case.



*There is no constitutional question or controversy implicated in the decision below and a fact specific review of that decision establishes the correctness of the outcome.*

The absence of a constitutional question or controversy is apparent from Petitioner's failure to identify such a claim or controversy in his petition. Florida provides defendants a means to obtain post-conviction relief on the basis of newly discovered evidence. However, in order for Sireci to obtain a new trial based on newly discovered evidence, under Florida law, he must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence.<sup>3</sup> Second, "the newly discovered

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<sup>3</sup> The post-conviction court acknowledged that the timeliness of Sireci's successive motion was subject to question, but, apparently found it easier to dispose of this case on the merits. Regardless, it is clear this claim was filed well beyond the one-year time limit for filing such motions under Florida Rule of Criminal Procedure 3.851(d)(2). Since this was a successive motion, Sireci had to show that he exercised due diligence in bringing his claim. See Hunter v. State, 29 So. 3d 256, 267 (Fla. 2008) ("Rule 3.851 requires motions filed beyond the time limitations to specifically allege that the facts on which the claim is predicated were unknown or could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.851(d)(2)(A)."). Obviously, the trial record description of the hair by the FDLE analyst and the prosecutor's argument regarding that comparison have been available to Sireci since the time of trial. In addition, the report upon which Sireci relies to come within the newly discovered evidence time frame [1 year] was not the first published report or criticism of hair comparison testimony. To the contrary, studies and reports criticizing the significance or science of hair comparison have been well known in

evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (Jones II). As noted by the Florida Supreme Court in Johnston v. State, 27 So. 3d 11, 18-19 (Fla. 2010), "[n]ewly discovered evidence satisfies the second prong of the Jones II test if it 'weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.'" (quoting Jones II, 709 So. 2d at 526).

Aside from the lack of a constitutional claim or controversy, a factual review of this claim only confirms the correctness of the result below. In rejecting this claim, the post-conviction court stated:

In the instant case, regardless of the timeliness, vel non, of the motion, the court finds that the claim does not warrant an evidentiary hearing and should be summarily denied.

At trial, seven witnesses testified that Defendant confessed to them, at different times, that he murdered Mr. Poteet. Defendant now claims that the testimony some

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the public domain years prior to the 2013 report upon which Sireci now relies. See e.g. Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 48 (2009) (citing studies, publications and presentations which have questioned hair comparison accuracy and significance). Sireci fell far short of establishing any diligence in bringing this claim, much less the due diligence that Rule 3.851 requires. See Com. v. Edmiston, 65 A. 3d 339, 352-353 (Pa. 2013) (finding challenge to hair testimony untimely, stating that "the Commonwealth is correct that the facts compiled in the NAS Report [challenging the accuracy of hair comparison testimony] were not new, and existed in various sources prior to the publication of that report.").

of those witnesses is unreliable. Certainly, the time to assert that allegation was well before now. Such a claim cannot possibly be considered "newly-discovered evidence" and Defendant cannot boot-strap this allegation onto his current claim regarding the hair analysis in an attempt to make the claim of witness unreliability timely. Thus, the court will not entertain the Defendant's contention that "[t]he new evidence ... coupled with all the other evidence demonstrating the bias and unreliability of the lay witness testimony ... creates a reasonable probability that Sireci would be acquitted on a retrial." The success or failure of Defendant's claim rests solely on the allegation of newly discovered evidence regarding the microscopic hair analysis.

The State cites to Duckett v. State, 2014 WL 2882627; 39 Fla. L. Weekly S456 (Fla. 2014) to support its position, while Defendant claims that Duckett is distinguishable on the facts. According to Defendant, there was "considerably more evidence linking Duckett to the crime than there is linking Mr. Sireci to the crime." The court does not agree. The court cannot overlook the seven confessions Defendant made. Regardless of the testimony by the hair analysis, the court finds that it was these confessions that most likely led to Defendant's conviction. If the testimony of Bill Munroe were excluded, is not likely that Defendant would be acquitted at trial. Thus, even if the report of the ASCLD could be considered newly discovered evidence, it is not of such nature that it would probably produce an acquittal on retrial.

(V2/207-08).

Sireci's assertion that the hair comparison testimony exceeded accepted scientific principles is tenuous in this case. William Monroe, the FDLE analyst testified at trial that one hair recovered from the victim's sock was "consistent" with the known head hair of Sireci. (T3/406-07). Monroe explained that consistent with meant "that of the characteristics of the hair I examined, I

found no significant differences, that in all probability, this hair came from that individual." (T3/407). On cross-examination, the analyst correctly testified that "hairs cannot be confirmed as absolutely [coming] from any individual." (T3/413). In closing argument, the prosecutor made a single and brief reference to a "match" found by Monroe for the hair recovered from Mr. Poteet's sock. (T4/684). The prosecutor did not overstate or even expound upon what the term 'match' signified.

The record reflects that neither the FDLE expert nor the prosecutor in closing argument misled the jury as to the significance of the hair comparison at issue in this case. The hair recovered from Mr. Poteet's sock was consistent with Sireci's hair and was likely to have come from him. However, the analyst acknowledged that such a comparison could not absolutely be linked to any one individual. In closing argument, the prosecutor, notably, did not place any statistical significance on the comparison and simply stated the hair "matched" Sireci's. This was a single, isolated comment in an argument in which the prosecutor focused upon the immense amount of other testimony and evidence establishing Sireci's guilt. (T4/684-689). Consequently, the testimony at issue here is distinguishable from that of Manning v. State, 726 So. 2d 1152 (Miss. 1998), the case upon which Petitioner relies, where the examiner "stated or implied" that the questioned

hair could be "associated with a specific individual to the exclusion of all others. . ." (V1/74).

The most significant hurdle Sireci faces is that the hair testimony was a small, indeed insignificant piece of evidence introduced during Sireci's trial. Identity is simply not an issue in this case. As the Florida Supreme Court noted in affirming the denial of Sireci's previous 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<sup>4</sup>; (7) Gary Arbisi--detective." Id. at 43 n.16. "Those confessions were all consistent, detailed accounts of the murder." Id. at 43. The Florida Supreme Court reached a similar conclusion in affirming the denial of post-conviction DNA testing

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<sup>4</sup> The trial court allowed into evidence testimony from another former cell mate [Holtzinger] concerning an attempt by Sireci 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.

in this case. Sireci, 908 So. 2d at 325 ("Finally, we conclude that, in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock. As we have noted, seven witnesses testified that Sireci admitted to them that he killed Poteet. We find no error in this regard.") (citations omitted). 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. (T4/702-12). Given these facts, Sireci's belated and completely unsupported attempt to undermine the sources of just two of his own confessions, is absurd.<sup>5</sup>

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<sup>5</sup> Notably, while collateral counsel asserted at the case management hearing that she could provide support for Sireci's attempt to undercut at least some of the confessions (V2/246), she mentioned no specific witnesses or other evidence she was prepared to present should an evidentiary hearing be held in this matter. Such a dubious assertion is insufficient to merit a hearing. Indeed, Sireci's pleading was plainly insufficient under Florida's rules of criminal procedure governing successive motions. On a successive motion, the rule requires the defendant to provide the names and addresses of all witnesses which the defendant will be relying upon to support his claims in his motion. Rule 3.851(e)(2)(C). See also Doorbal v. State, 983 So. 2d 464, 484 (Fla. 2008) ("Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing and that specific facts and arguments need not be disclosed or presented until the evidentiary hearing.").

Sireci's challenge to the weight or reliability of the hair comparison evidence in this case does not in any way undermine that vast amount and weight of evidence presented to establish that Sireci brutally murdered Mr. Poteet. Consequently, this successive motion for post-conviction relief was properly denied by the post-conviction court without a hearing in state court below.

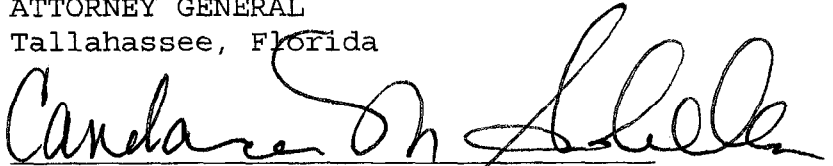
In conclusion, Petitioner has failed to show a denial of any constitutional right or conflict with any prior precedent of this Court. The instant Petition presents a fact specific claim, relying on factual assertions which were largely rejected by the lower courts. There are no implications beyond the parties involved in this case, mandating the denial of certiorari review. Butler v. McKellar, 494 U.S. 407 (1990); Ross v. Moffitt, 417 U.S. 600, 616-617 (1974).

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2016, a true and correct copy of the foregoing was furnished by U.S. mail to: Maria E. DeLiberato and Julissa Fontán, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, [deliberato@ccmr.state.fl.us](mailto:deliberato@ccmr.state.fl.us) and [fontan@ccmr.state.fl.us](mailto:fontan@ccmr.state.fl.us).

  
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