No. 16-5247

CAPITAL CASE

IN THE SUPRME COURT OF THE UNITED STATES

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HENRY PERRY SIRECI,

*Petitioner,*

vs.

STATE OF FLORIDA

*Respondents*

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*On Petition for a Writ of Certiorari to the Florida Supreme Court*

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# REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Statement of Facts:

The State in its Brief in Opposition makes several factual errors that require correction for the record. Most significantly, the State falsely asserts that Sireci failed to seek DNA testing of the hair at issue when he sought testing through the consent agreement with the State Attorney for the Ninth Judicial Circuit. Brief in Opposition, p. 8.

Mr. Sireci, through the assistance of his post-conviction counsel and the Innocence Project, was able to persuade the State Attorney's office[1] to allow DNA testing of a limited number of items of evidence through a Consent Agreement. SR1:32-34.

Initially in 2008, the Innocence Project sent a letter to then Governor Crist requesting executive intervention for Mr. Sireci to get DNA testing on numerous items, including the hair on the sock. See Appendix A. In 2009, when no response was received from the governor's office, the Innocence Project reached out to the State Attorney's office through local counsel, Cheney Mason, to see if the State Attorney's office would consider DNA testing. See Appendix A. Again, the hair on the sock was a part of that request. Jeffrey Ashton, then an assistant state attorney, was assigned to the matter. He indicated he would meet with counsel and that he was open to discussing DNA testing. A meeting between Mr. Ashton, post-conviction counsel and attorneys from the Innocence Project occurred on August 4, 2009. See Appendix A. DNA testing and the items to be tested were discussed, including the hair on Mr. Poteet's sock.

At the meeting, Mr. Ashton would not consent to DNA testing of the hair on the sock. Moreover, in order to obtain the Consent Agreement, the State required Sireci to waive the right

[1] The Attorney General's office was not a party to the consent agreement.

to seek additional DNA testing through the courts. Mr. Sireci, on the advice of counsel, felt he had no option but to agree to limited DNA testing and waive testing of the hair when the only other option he was given was no DNA testing at all.

Ultimately, on August 24, 2009, the Innocence Project memorialized in a letter to Mr. Ashton the negotiations and agreement reached by the parties and specifically noted the items defense counsel had given up in the negotiations in exchange to be allowed to test other items. See Appendix A. The assertion the State made in its Brief in Opposition that Mr. Sireci never requested the hair to be tested is patently untrue.

The State also erroneously claims that identity at trial was not an issue. Brief in Opposition, p.2. The basis for this argument is the fact the Mr. Sireci's trial counsel, who was later found to be ineffective, argued for third degree murder. An argument by an ineffective lawyer does not establish that Mr. Sireci committed the murder. To the contrary, Mr. Sireci has consistently maintained his innocence. Further, although the State, in its Brief in Opposition, attempts to downplay the significance of the microscopic hair comparison testimony at trial, a fair reading of the record shows that Mr. Munroe's testimony, and the State's argument, exceeded the bounds of accepted science.

Mr. Sireci's case is indistinguishable from *Manning v. Mississippi*, 726 So. 2d 1152 (Miss. 1998). Willie Jerome Manning was convicted of multiple murders and sentenced to death. *Id.* During one of Mr. Manning's trials, prosecutors relied on witness and FBI expert testimonies. An FBI forensics expert said Manning's hair matched hair found at the crime scene. His attorneys argued, just as Mr. Sireci has consistently argued, that Manning should be allowed to conduct DNA testing on a hair linked to Manning that was found in the victim's car. In Mr.

Manning's case, the FBI admitted, "While this case did not involve a positive association of an evidentiary hair to an individual, the examiner stated or implied in a general explanation of microscopic hair comparison analysis that a questioned hair *could be associated with a specific individual to the exclusion of all others — this type of testimony exceeded the limits of science.*" See http://thinkprogress.org/justice/2015/05/06/3655660/one-inmate-four-death-penalty-sentences-exonerated-twice/ (last visited August 23, 2016) (emphasis added)[2]. This is precisely the type of testimony given at Mr. Sireci's trial and that Mr. Sireci is challenging.

Mr. Munroe, in Sireci's case, testified that "I found no significant difference, in all probability, this hair came from that individual." TR3:406-7. This testimony that it was Mr. Sireci's hair to the exclusion of others is precisely the type of testimony that exceeds the limits of science as described in the FBI and ASCLD/LAB review and the type of testimony involved in *Manning*. Furthermore, the prosecutor at trial obviously felt confident in the strength of Mr. Munroe's opinion as he told Mr. Sireci's jury, without objection, that the hair on the victim's sock "matched" Mr. Sireci's.

When taken as a whole, both Mr. Munroe's testimony and the State's closing argument exemplify the errors described in the FBI's review and encompassed in ASCLD/LAB's advisement to agencies like FDLE of their "ethical obligation" to conduct a comprehensive review. Mr. Sireci was entitled to have his case properly reviewed by FDLE and the hair in question subjected to DNA testing. At the very least, Mr. Sireci was entitled to an evidentiary hearing to explore the reasons for FDLE's failure to conduct this review.

There is no discernible difference between Mr. Munroe's improper testimony in Mr.

2 Ultimately, one of Mr. Manning's convictions has been overturned and the second conviction is also under scrutiny, again due to faulty forensic conclusions.

Sireci's case and those cases where FBI analysts conducted the examination and offered similar testimony. In July of 2013, the FBI, the Innocence Project, and the National Association of Criminal Defense Attorneys entered into an Agreement that identified the specific types of hair comparison testimony that exceeds the limits of science:

> Microscopic hair analysis is limited, however, in that the size of the pool of people who could be included as a possible source of a specific hair is unknown. An examiner report or testimony that applied probabilities to a particular inclusion of someone as a source of a hair of unknown origin cannot be scientifically supported. This includes testimony that offers...opinions regarding frequency, likelihood, or rareness implicitly suggesting probability. Such testimony exceeds the limits of science and is therefore inappropriate.

SR:1: 168-169.

The State in its Brief in Opposition claims the evidence against Mr. Sireci is overwhelming and the newly discovered evidence does not undermine the reliability of Mr. Sireci's conviction. The State further claims that the hair evidence is a small fraction of the evidence against Mr. Sireci. Brief in Opposition, p. 10. This argument must fail.

The technician who testified at trial identified the hair on Mr. Poteet's sock belonged to Mr. Sireci. The prosecutor compounded this error when he declared that the hair "matched" and emphasized the importance of that "match" to the jury, contrary to the State's assertion that the "prosecutor did not overstate or even expound upon what the term 'match' signified". Brief in Opposition, p. 15. This type of testimony, it is now known, far exceeds the limits of the science to the point that the statements presented to Mr. Sireci's jury were inherently misleading. Testing of the hair, of course, would remove this issue entirely, but the State has persistently refused to do.

In Mr. Sireci's case, the only physical evidence linking him to the scene was the hair on

the victim's sock. There were no fingerprints connecting Mr. Sireci to the scene. No property belonging to the victim was discovered in Mr. Sireci's possession. In fact, it was Barbara Perkins, who was alone in Las Vegas (after stealing Mr. Sireci's car) when arrested, who possessed the victim's credit cards. While the State did present evidence of supposed confessions or admissions by Mr. Sireci, those statements are dubious at best.

Mr. Sireci suffers from organic brain damage and is functionally retarded. He is easily suggestible and prone to confabulation. Additionally, many of the witnesses who offered testimony about these alleged admissions had biases against Mr. Sireci or were otherwise unreliable. Barbara Perkins and Bonny Arnold were both implicated in the crime. Harvey Woodall was a six time convicted felon and jailhouse snitch. Both Peter Sireci and David Wilson had prior family conflicts with Mr. Sireci that were not adequately investigated or presented by trial counsel. The alleged admissions were not even consistent with each other.

The impeachment evidence and unreliability of the witnesses in this case must be taken into account as the evidence is relevant to the legal analysis of a newly discovered evidence claim. The trial court admittedly failed to do so. Thus, the trial court's finding that it would 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'" is erroneous and contrary to established law. SR2:207.

Mr. Sireci has pointed out the inconsistencies in his purported admissions and has alleged that he would provide additional evidence at an evidentiary hearing.

The State wholly fails to acknowledge the impossibilities and inconsistences in Mr.

Sireci's prior statements and also fails to acknowledge the widely recognized statistics on false confessions as cited in both Mr. Sireci's initial brief and the amicus brief in the state court below. Mr. Sireci has attacked the credibility of the "confession" witnesses consistently since the inception of post-conviction proceedings. The lack of reliability of the purported admissions is relevant to the evaluation of the newly discovered evidence in this case, as it provides a total picture of the case and all the circumstances of the case.[3] The evidence developed in prior post-conviction proceedings undermining the legitimacy of the confessions, combined with the unreliability of the hair microscopy evidence, strongly undermines Mr. Sireci's conviction.

Mr. Sireci Has Presented a Constitutional Controversy and the Writ Should Be Granted:

The State fundamentally misapprehends the issue presented and claims the writ should be denied for failure to articulate a constitutional controversy. This argument must fail, as Mr. Sireci has presented a constitutional controversy. This Court has long held that a conviction based on the use of false evidence by the State violates the Due Process Clause of the Fourteenth Amendment and, if the false evidence is likely to have affected the outcome of the trial, compels a new trial. *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150,153 (1972); *Miller v. Pate*, 386 U.S. 1,7 (1967); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957); *White v. Ragen*, 324 U.S. 760, 64 (1945); *Pyle v. Kansas*, 317 U.S. 213,216 (1942); *Mooney v. Holihan*, 294 U.S. 103,112 (1935). *See also United States v. Young*, 17 F.3d 1201,

3 The State, in an oddly personal attack on collateral counsel (Brief in Opposition, p. 17, n. 15), claims that Sireci never attempted to undercut the confessions in the most recent motion or present witnesses. Again, as the entire post-conviction record makes abundantly clear, Mr. Sireci has consistently attacked these confessions since the inception of his post-conviction proceedings and has *previously litigated that issue*. The State's allegations are misleading at best, and ignore the totality of the record on this case.

1203-04 (9th Cir. 1994)("A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness.").

Furthermore, it is a mischaracterization to claim that this dispute is a mere matter of fact correction as the State asserts. It has been recognized that scientific evidence has a uniquely persuasive impact on juries[4], which are predisposed to credit the testimony of scientific experts and to believe that conclusions reached through the application of scientific methods are trustworthy.[5] "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980). *See also United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (Noting that "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen...).

Both the FBI and ASCLD/LAB conceded that the kind of testimony about mircoscopic hair comparison the State presented in Sireci is based on inaccurate forensic science. Indeed, faulty forensic methodology was used to convict Mr. Sireci and presented to his jury as scientific proof that Mr. Sireci was at the crime scene and had to be the perpetrator. The forensic

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[4] "[J]urors place substantial weight on forensic evidence. A 1978 survey of jurors conducted immediately after their discharge from serving on criminal cases revealed forensic science experts are the most persuasive of all witnesses testifying at trial." Tara Marie La Morte, Comments, *Sleeping and Gatekeepers:* United States v. Llera Plaza *and the Unreliability of Forensic Fingerprinting under* Daubert, 14 Alb. L.J. Sci. & Tech. 171,208 (2003)(citing reference omitted).

[5] "There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect." John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony By Restrictions of Function, Reliability, and Form*, 71 Or. L. Rev. 349, 367 n.81 (1992)(citing references omitted).

techniques used in this case were unreliable and this newly discovered evidence clearly demonstrates, in a specific way, that the testing methods or opinions in Mr. Sireci's case were deficient. The hair evidence in Mr. Sireci's case was presented to his jury as a definitive match, when the reality is that such a finding was beyond the bounds of the science. This new evidence in Sireci's case, coupled with the State's continued refusal to conduct DNA testing on the sock, the only piece of physical evidence linking Sireci to the crime scene, require this Court to intervene.

Although the State, in its Brief in Opposition, attempts to downplay the significance of the microscopic hair comparison testimony at trial, a fair reading of the record shows that Mr. Munroe's testimony, and the prosecutor's argument regarding its importance, exceeded the bounds of accepted science. The misleading testimony, combined with equally misleading argument violates the Due Process Clause of the Fourteenth Amendment and likely affected the outcome of Mr. Sireci's trial, which compels a new trial. *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150,153 (1972); *Miller v. Pate*, 386 U.S. 1,7 (1967); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957); *White v. Ragen*, 324 U.S. 760, 64 (1945); *Pyle v. Kansas*, 317 U.S. 213,216 (1942); *Mooney v. Holihan*, 294 U.S. 103,112 (1935).

## CONCLUSION

For the foregoing reasons, Mr. Sireci respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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AUGUST 29, 2016.

## PROOF OF SERVICE

I, Maria DeLiberato, do swear or declare that on this 29th day of August, 2016, as required by Supreme Court Rule 29 I have served the enclosed REPLY TO BRIEF IN OPPOSITION on the party to the above proceeding, by depositing an envelope containing the above documents in the United States mail properly addressed to them and with first-class postage prepaid. The name and address of the party served is as follows:

Candace M. Sabella, Chief Assistant Attorney General
Scott A. Browne, Senior Asst. Attorney General
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This 29th day of August, 2016.

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# Appendix A

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January 10, 2008

***By overnight mail***

Governor Charlie Crist
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Dear Governor Crist:

Nearly five years ago, in December 2002, I flew to Tallahassee on the eve of the scheduled execution of a man named Amos Lee King to urge then-Governor Bush to issue a stay of execution for purposes of conducting DNA testing. My office had been contacted about the case just a few weeks before by Mr. King's counsel, who were then making their last of several ultimately unsuccessful pleas to the Florida courts to allow DNA testing prior to the execution. After the Governor and his legal advisors graciously agreed to a personal meeting with me and a telephone conference with top DNA analysts, the Governor exercised his authority to issue a rare stay of execution that day, on the ground that – notwithstanding the courts' prior rejection of his claims for DNA testing – the DNA testing requested had the capacity to prove Mr. King's innocence or confirm his guilt, and should be performed before any execution was carried out.

The DNA testing in that case was, ultimately, inconclusive (as the evidence proved too degraded to obtain an interpretable result) and Mr. King was executed in early 2003. But I have always been grateful to Gov. Bush for the thoughtfulness and courage he demonstrated in ordering the stay of Mr. King's execution in order to pursue advanced DNA testing. I have also remained mindful of his parting words to me as I left the Capitol that day:

"Next time, don't wait until the last minute to bring a case like this to my attention!"

It is with Governor Bush's admonition in mind that I now write to you about a similar death penalty case in Florida that has recently been brought to my office's attention – one in which, fortunately, no execution date has been set, but in which there are equally strong reasons as in the *King* case for DNA testing to be performed. Knowing that you share your predecessor's commitment to ensuring that no innocent Floridian remains incarcerated or on death row (and mindful, as well, of your extraordinary leadership on the issue of compensation to Florida's wrongfully convicted and other criminal justice issues), I was confident that you would want to be personally informed about the substantial grounds for DNA testing as soon as possible.

The defendant is a man named Henry P. Sireci, who is on death row for the 1975 murder of Howard Poteet. Mr. Poteet was the owner of an Orlando used car dealership who was found stabbed to death in his office. Shortly after his trial and death sentence in the Poteet case, Mr. Sireci reluctantly agreed to plead guilty to the murder of a gas station attendant, John Leonard Short, which occurred several days prior to Mr. Poteet's murder (at a location several blocks away and with a similar *modus operandi*), to avoid another death penalty trial; he received a life sentence in that case.[1]

After my office reviewed extensive materials provided to us by Mr. Sireci's counsel at the C.C.R.C. (Middle Division), we concluded that there exists a substantial amount of previously-untested DNA evidence from the crime for which he remains on death row that could either establish the truth of his longstanding claim of actual innocence or confirm his guilt. (Unfortunately, it appears that all DNA evidence from the other murder, for which Mr. Sireci is serving life, was destroyed by court order in 1980; however, fingerprint evidence does remain from both cases, which could potentially link the two crimes and establish the truth of Mr. Sireci's claim that he did not commit either crime.)

Mr. Sireci has, for over thirty years, maintained that he played no role whatsoever in the murder for which he was sentenced to death. He contends that the crime was likely committed by two acquaintances of his – Barbara Perkins and her boyfriend Bonny Arnold. Perkins was caught using the victim's stolen credit cards, and, after she and Arnold were arrested, they both claimed that Mr. Sireci was the killer and testified against him at trial.

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[1]The transcript of Sireci's plea colloquy reflects some difficulty on the parties' part in securing his agreement to plead guilty. He initially responded, "No, I didn't" when asked by the Court if he killed Mr. Short, and only after his counsel requested a break to address this "problem" with his client did Sireci complete the required colloquy.

At the very least, testing the DNA evidence available in the Poteet case could cast serious doubt on whether Mr. Sireci actually played a role in the crime sufficient to make him eligible for the death penalty. In turn, the testing could also directly implicate Perkins and/or Arnold as principals. (Of the two, only Perkins was charged in connection with the crime, and received a three-year sentence for robbery after she pled guilty to that lesser charge.)

I would be grateful for the opportunity to further discuss this proposed DNA testing with you and your staff, and to provide you with any documentation on the case that you may wish to review. In the meantime, for your review, we have prepared this detailed letter to summarize the facts of the case and the particular items of DNA evidence that appear to be most appropriate for testing. (As in the *King* case, some – but by no means all – of these arguments in favor of DNA testing have been made unsuccessfully by prior counsel in the Florida courts, but we trust that given the stakes involved, you would want to consider them anew in the context of your independent authority to order such testing.)

***Background***

The Crime and Arrests

On the morning of December 4, 1975, the body of Howard Poteet was found in the office of the used car lot that Mr. Poteet co-owned with his son on South Orange Blossom Trail in Orlando. No keys to the vehicles in the lot were stolen, although the back pocket of the victim's pants (where he kept his wallet) was torn, and his wallet was missing. The bloody scene told of a brutal assault, with signs of a close-range struggle including toppled chairs, broken glass, and defensive wounds on the victim's body. According to the medical examiner, Mr. Poteet died of multiple stab wounds to the upper chest and facial area.

In late January 1976, Mr. Poteet's widow received copies of credit card bills indicating that her deceased husband's stolen credit cards had been used to buy gas at various locations in Arizona, Oklahoma, New Mexico, and Texas between December 10 and December 14, 1975. Orange County, FL, investigators discovered that the vehicle for which the gas was purchased was registered to Sireci (under the name "Butch Blackstone").

However, the investigation also soon revealed that Sireci was not in possession of the car on those dates, having been arrested in Knox County, TN, on shoplifting charges on December 9, 1975. According to the Orange County Sheriff's Department's case report, Sireci telephoned the OCSD on February 2, 1976. He stated that after his arrest (and release on bond that day), a woman with whom he had been traveling through Tennessee –

former Orlando resident Barbara Perkins – had left him behind and taken his car while he was detained, and that he had subsequently tried to report the car stolen to police in Las Vegas, where he believed that Perkins had fled.

Sireci, a native of Illinois, had arrived in Orlando in the fall of 1975, seeking employment. Shortly after moving to town, he met Perkins and moved into her trailer, and, while working construction, helped to pay rent and support her three children. As Perkins had no car, each day she would drive Mr. Sireci to and from work and use his car during the day; nearly every night, he went to play pool at a bar called the Inferno, and she picked him up around 3:00 AM.

On February 4, 1976, Sireci was arrested on suspicion of the Poteet murder, but after consulting an attorney and declining to make a formal statement, he was released without charges. The actual use of Mr. Poteet's stolen credit cards was then traced to Perkins. She was placed under arrest in Las Vegas on February 9, 1976. After her arrest, both Perkins and her boyfriend Bonny Arnold alleged that Sireci committed the murder alone and offered to testify in detail against him. (Although Sireci was employed for most of his life doing manual labor, it was found by the Orange County Circuit Court in 1990 resentencing proceedings that he suffers from an organic brain disorder as well as borderline mental retardation – making it likely that, if he did not commit the murder, he might be seen as an easy "target" for guilty parties seeking to pin the crime on him.)

According to Perkins' trial testimony, she conspired with Sireci to have him scope out Mr. Poteet's used car lot the night of the murder, in anticipation of stealing keys to the vehicles there. She claimed she dropped him off alone at the lot that night, with the "plan" being for Sireci to talk to the victim about buying a car, and either steal a set of keys or return later to burglarize the office. She claims she later picked up Sireci in the parking lot of a nearby motel, one of their two alternate planned meeting spots. At that time, she claimed, Sireci stated that he had gotten into a "fight" with Mr. Poteet, hit the victim over the head with a lug wrench that he had with him, and stabbed him repeatedly. She further claimed that when she met Sireci in the motel lot, he was not wearing the denim jacket he had worn when she dropped him off at the car lot earlier that evening, and he told them he left it in the motel room because it was stained with blood. Perkins and her new boyfriend Arnold both claimed that they never entered the motel room where she allegedly picked up Sireci that night, nor did they enter the used car lot or participate in the murder of Mr. Poteet, other than Perkins' prior agreement to serve as a "lookout" for a subsequent car theft.

Three days later, Perkins, Arnold, Sireci, and Perkins' children left Orlando in Sireci's car and headed for Tennessee, where Sireci's wife and son resided and where Sireci said he intended to spend the holidays, with the

others planning to hitchhike to Las Vegas thereafter. (After Orange County officials sent a BOLO ("be on the lookout") alert about Sireci's car to Las Vegas police, the vehicle was ultimately recovered in Las Vegas.) Sireci has long maintained that these plans were unrelated to the Poteet murder and that, in fact, he had no idea at the time he left town with the others that the murder had even taken place, nor that Perkins and Arnold had any role in it.

Sireci did not testify at trial. He had announced his intent to take the stand, but he ultimately did not do so; the colloquy surrounding his decision not to testify appears to reflect that there arose some disagreement between attorney and client about trial strategy at that time. Sireci did, however, write at least one letter to the trial court which remains on file, protesting his innocence after the verdict; in that letter, he faulted his trial attorney for failing to call witnesses he claimed would exculpate him of the murder, and asked that he be assigned new counsel and permitted to testify about his innocence at sentencing. (The trial court, noting that Sireci had waived his right to testify at the guilt/innocence phase of the trial, declined the request, and the decision was upheld on appeal.)

Sireci's Account

For his part, he has repeatedly given post-conviction counsel a version of events that is diametrically opposed to Perkins' and Arnold's. He maintains that he did not participate in the murder; was at the Inferno bar all night, with his presence able to be corroborated (at the time) by numerous alibi witnesses that his trial attorney never interviewed; and had no knowledge of either the murder nor Perkins' possession or use of the victim's credit cards until he himself was arrested and charged in Illinois in February 1976. He believes that Perkins and/or Arnold committed the crime (whether alone or with another accomplice) and – having been advised by current counsel of the substantial risks if he is implicated by DNA testing – is adamant that he wishes to have any and all forensic evidence tested which could implicate any one of them in the murder.

Other witnesses at trial

In addition to Perkins' and Arnold's testimony, the State offered four other witnesses who claimed that they heard Sireci make various admissions to the murder. However, each of these witnesses may have had reasons to falsely implicate Sireci (and certainly, their credibility is not so immune from challenge, or otherwise supported by objective evidence, as to negate the potential for DNA testing to refute their claims).

Arguably the most damning testimony came from David Wilson, Sireci's brother in law, who claimed that (1) in February, Sireci told him in a series of conversations that he was in "serious trouble" and needed to leave

the country because he had killed a man in Orlando and stolen his credit cards, at which time Wilson agreed to give him money and assist him in fleeing to Canada; and (2) Sireci specifically told Wilson he used a knife to commit the murder and had hidden it in his parents' house. Wilson subsequently produced for detectives a knife he claimed he found in the ceiling of the basement of Sireci's parents' house (the detectives picked up the knife from Wilson, but were not present when it was allegedly discovered), as well as a pocketknife he claimed that Sireci had handed to him and requested that he disassemble to make it unrecognizable. (As noted below, no blood from the victim was identified on either knife.)

For his part, Sireci denies making these statements or attempting to hide the knives in question, and believes that Wilson may have fabricated this testimony because he wanted Sireci "out of the way" so that Wilson and his wife (Sireci's sister) could take possession of some land owned by Sireci's mother. The timing of Wilson's "discovery" of the knife also raises some questions, as he did not proffer it to police until the day *after* they had already searched the Sireci family home from top to bottom pursuant to a warrant; it was only the next day that Wilson said he went back to the house himself and found it (based on what Wilson claimed were indications that cobwebs in the ceiling had been brushed away, which allegedly led him to open up that portion of the ceiling and find the knife).

Peter Sireci, the defendant's brother, also testified at trial, claiming that Sireci had told him that "a girl named Barbara" had credit cards from a man who owned a car lot whom Sireci had killed. At the time, however, Peter was 18 years old, and Sireci contends that his younger brother was financially and emotionally dependent and under the control of state's witness David Wilson, who had recently bailed Peter Sireci out of jail on marijuana charges and provided him with a job and place to live. In addition, the State offered the testimony of Harvey Woodall and Donald Holtzinger, two inmates incarcerated with Sireci at the county jail, who claimed that he had made admissions to the murder to them – but who both had extensive felony records and were awaiting trial on new charges at the time. (While we have no proof that these men received specific benefits in exchange for their testimony, the perils of "jailhouse snitch" testimony – and such individuals' motivation to testify falsely for their own perceived potential benefit – is, of course, well known.)

***Forensic Evidence Available for DNA Testing***

Fortunately, there remains a wealth of evidence from the original investigation which can now be subjected to previously-unavailable DNA testing and determine whether these witnesses' testimony was true or false. Counsel for Mr. Sireci has confirmed that each of these items still exists and has been in the secure custody of the State since trial.

As a preliminary matter, I emphasize that in asking you to permit such testing, we do not make any representations that Henry Sireci is in fact innocent – indeed, the testing could just as easily prove that he committed the crime – but focus on the clear *potential* for DNA evidence to confirm or disprove his guilt. Whatever the results, however, we trust you will agree that ensuring the accuracy of such convictions, particularly when the ultimate sanction of death is at stake, would be well served by DNA testing.

Items from the crime scene and victim's person

1. ***Victim's fingernail clippings and/or "scrapings."*** It is clear from the trial record that whoever killed Mr. Poteet engaged in a close-range, protracted struggle with the victim prior to his death. The office where the body was found bore numerous signs of this struggle (toppled chairs, broken glass) as did the victim's corpse at autopsy – including a number of defensive wounds on his body which the medical examiner testified were hallmarks of an effort to defend himself against his attacker. The trial prosecutor emphasized as much in summation, highlighting the wounds and other evidence which indicated Mr. Poteet's "struggle to live" and the fact that he "did not part with his life easily" during the attack.

For DNA purposes, such a close-range struggle in homicide cases makes testing the victim's fingernail clippings and any material separately 'scraped' from those nails particularly probative. A number of studies (which we are happy to provide to you) have shown that foreign DNA material is highly unlikely to be deposited under an individual's nails through casual contact, but instead is usually a result of intimate sexual activity or, even more so, close-range struggles during crimes of violence. Despite the age of the case, the fingernail material clipped from Mr. Poteet at his autopsy has been preserved in sealed vials and remains available for advanced DNA testing – which could well (as it has in numerous other Innocence Project cases) detect small but significant amounts of DNA material (such as skin cells or traces of blood) that may have been deposited under the victim's nails while he was attempting to fend off his attacker during the stabbing. (The lab reports also note that glass fragments were found in the nails, also indicating a struggle.) Moreover, in a number of our cases, the quantity of DNA (even if not visible to the human eye) from an assailant has been sufficient to yield a full DNA profile that can be run in the CODIS convicted-offender database or compared to known individuals, even decades after the fact.

Here, the universe of possible alternate suspects is more limited, given the fact that Sireci's acquaintances and alleged co-perpetrators are known to have used the victim's stolen credit cards. Thus, we would propose testing the fingernail material and comparing any foreign DNA

profile(s) found to Sireci himself as well as to both Barbara Perkins and Bonny Arnold (both of whom have adamantly denied playing any role in the stabbing or even being present when it occurred, but whose claims could be directly rebutted by contrary DNA results), as well as running any eligible results through CODIS in case there is an additional, unidentified perpetrator involved. If Sireci is in fact excluded as the source and another individual (especially Perkins or Arnold) is implicated, that would of course provide powerful support for his claim of innocence or – at the very least – raise serious concerns about the integrity of the accomplice testimony against him, calling into question at least the propriety of his death sentence.

(As a procedural matter, Sireci's former lead counsel at the CCRC did not raise the possibility of testing the fingernail material in the state court proceedings under Rule 3.853 that have already been litigated; unfortunately, this is a problem we have faced in the past, as even able criminal counsel are sometimes unaware of the full potential of DNA technology and do not identify all probative items to be tested.)

2. ***Victim's rings and watch***

Mr. Poteet was still wearing two rings (a diamond ring, and a wedding band) along with a watch when his body was found. Blood was present on all three items. The sharp edges of these items (especially the diamonds) may well have captured DNA from the assailant(s) during the struggle that remains fully capable of analysis using advanced methodology today. As with the fingernails, the potential probative value of any DNA from someone other than the victim on these items is substantial. (No request to test these items was made during the prior litigation.)

3. ***Hair evidence***

The only forensic evidence used to directly implicate Sireci at trial was a hair found on the victim's sock. An expert in microscopic hair analysis who testified for the state told the jury that he had compared the hair to a sample from Sireci, and "found no significant differences" between the two samples, and that "in all probability" the hair from the sock "came from" Sireci. This evidence was relied upon quite heavily by the prosecution at trial, with the hair cited in summation as "very important" evidence that was proven to have "matched" Sireci's own hair.

As you may recall from the Wilton Dedge case (in which two pubic hairs found in the rape victim's bed were said to be "identical" to Mr. Dedge's own, yet were later shown not to be his through DNA testing), microscopic hair comparison has been shown to be extraordinarily unreliable – yet, in the pre-DNA days, was often enormously persuasive to juries. The Florida courts have thus far denied Sireci's request to submit this hair to

mitochondrial DNA testing pursuant to Rule 3.853, concluding that even if the hair were not his, that result alone would not prove his innocence nor have altered the result of the trial. While reasonable people may disagree about that conclusion (my own view is that this evidence was quite critical to the conviction, given the problems with the lay witness testimony and lack of any other inculpatory forensic evidence against Sireci), as one more "piece of the puzzle," it would seem to be well worth conducting a DNA test on this evidence in combination with other items. Among other outcomes, the results could show that, contrary to what the jury was told at trial, the hair was not from Sireci after all, but also/instead (1) that it actually came from either Perkins or Arnold, or (2) that it did, in fact, come from Sireci, which would provide far more reliable scientific evidence supporting the jury's verdict.

In addition to the hair on the sock that was "matched" to Sireci at trial, a number of other hairs from Mr. Poteet's person were also recovered at autopsy that were deemed unsuitable for microscopic comparison, but could well be suitable for DNA testing today. These include other hairs from the sock as well as hair found between the third and fourth fingers of Mr. Poteet's right hand, which may have been deposited during the struggle as well. While the hairs, of course, could have been unrelated to the murder, a DNA test showing that they came from Sireci, Perkins, and/or Arnold would be highly probative.

Other Items

*1.* ***Bloodstained towel and washcloth from motel room.*** When detectives searched the Rocking Chair motel (where Perkins claimed she picked up Sireci on the night of the Poteet murder), they discovered a room with several bloodstained items. These included a towel and washcloth that were heavily stained with blood. The FDLE's initial attempts to determine the blood typing on these stains using 1976 technology were inconclusive, and it appears no further testing was performed.

Today's DNA testing could reveal a combination of highly probative DNA profiles. Most notably, given the strong indications that the perpetrator(s) used this room to clean up after the murder and that no one entered thereafter (since the bloody items were still there when the police searched it), it is highly likely that the towel and washcloth contain a mixture of DNA from the victim (which the perpetrator(s) attempted to wash off) and some combination of skin/sweat or possibly blood from the perpetrator(s). These profiles could be readily compared to the victim's, Sireci's, Perkins's, and Arnold's, as well as potentially searched in CODIS.

Two other towels were recovered from the motel room which did not appear to contain blood; however, serological analysis conducted in 1976

was not remotely as sensitive as today's DNA technology, and such stains may well be detectible upon re-examination. Such testing could also reveal the presence of other DNA material (skin/sweat cells) from Sireci, Perkins, or Arnold if they used these towels to clean/dry themselves while cleaning up traces of the murder in that room.

2. ***Bloody jacket from motel room.*** A denim jacket stained with blood was also recovered from the motel room. Serological testing performed by the FDLE in 1976 yielded blood group enzymes that appeared to be consistent with the homicide victim. Perkins claimed that Sireci was wearing this jacket earlier in the evening but was not wearing it when she met up with him in the motel parking lot. Sireci denies that claim (consistent with his denial of any role in the offense or being present at the motel that night). He does, however, note that while he lived with Perkins, she often borrowed his clothing and he had several denim jackets (something she confirmed in her own trial testimony), so it is possible that the jacket was, in fact, Sireci's. But the critical issue in dispute is who wore it and left it in the motel room that night. Sireci contends that Perkins (whether alone, with Arnold, and/or another accomplice) must have worn and taken the jacket there.

Since either Sireci or Perkins, by their own accounts, may have worn the jacket at various times prior to the murder, DNA testing on the "wearer" portions of the jacket (collar, underarms, etc.) would not squarely implicate either one, as this DNA could have been deposited by either Sireci or Perkins at some other time. However, to the extent that such testing revealed either DNA from Arnold or a convicted offender in CODIS, the results would indeed be significant.

3. ***Hairs from motel room towels.*** Various hairs from the bloody towels were recovered. Some were deemed unsuitable for comparison, but others were foreign to the victim; however, for reasons that remain unclear, these "foreign" hairs appear not to have been compared to Sireci, Perkins, Arnold, or any other suspect. While these hairs might well have come from other motel room guests and be unrelated to the murder, given that Sireci, Perkins, and Arnold each denied being present in the motel room that night (and have pointed the finger at one another), DNA testing on these hairs could provide significant new evidence to support/rebut these claims and implicate the source of the bloodstained items linked to the crime.

4. ***Knife reportedly from Sireci's parents' basement.*** The "case" knife that Sireci's brother-in-law contended he found hidden in Sireci's parents' basement ceiling was introduced and discussed at length at trial. The knife revealed traces of blood when dismantled and examined by the FDLE; however, the amount present was insufficient to type

serologically, or even to determine whether the blood was of human origin. Today's DNA technology, however, should be more than sufficient to obtain a full profile, which could then be compared to an autopsy sample from the victim. While excluding the victim as the source would not, of course, alone prove Sireci's innocence, it would refute a significant inculpatory inference (and the sole corroboration provided for the brother-in-law's testimony) raised by the introduction of this "hidden, bloody knife" at trial – an inference that was no doubt persuasive to the jury. And, of course, a result showing that the blood did come from the victim would be powerful evidence implicating Sireci, which the State would be free to rely upon in future proceedings.

***Fingerprint evidence***

In addition to the DNA evidence above, there is also fingerprint evidence suitable for analysis from both the Poteet and Short murders. In the Short case (the gas station robbery/killing to which Sireci pled guilty following the Poteet trial), a total of 19 interpretable prints were recovered from the scene – none of which came from the victim, Sireci, Perkins, or Arnold. While some or all might have been deposited during the ordinary course of business at the station, the prints may be suitable for entry into IAFIS – the national convicted-offender print database, which was unavailable at the time of the original investigation, but could result in a "hit" to someone with a history of similar crimes. These prints could also be compared to unknown prints recovered from the motel room where the clothes stained with Mr. Poteet's blood were found; although these were deemed unsuitable for comparison using 1976 technology, upon re-examination, they could provide a revealing forensic link between the two crimes. As noted earlier, Sireci became a suspect in the Short murder because of the highly similar *modus operandi* between the two – both involved male victims working late in their places of business; both involved killing by multiple stab wounds to the upper body (25 in the Short case, 30 in the Poteet case) and a single similar laceration across the left side of the neck; and both were robbery/murders in the same area of town occurring within three days of each other.

Thus, while exuclpatory DNA testing in the Poteet case would not necessarily clear Sireci in the Short case (and could result in his remaining in prison for life, rather than his execution), fingerprint analysis could call that conviction into question as well, including by providing leads to possible donors of foreign DNA in the Poteet case or establishing that the fingerprints came from a common, third-party source.

***Conclusion***

I anticipate that even this highly detailed summary may leave you and your staff with questions that merit further discussion or follow-up information, and both Sireci's lead counsel (who will bear all costs of any DNA testing conducted) and I remain available for that purpose. I would also be more than happy to come to Tallahassee at a mutually convenient time to meet with you and further discuss the merits of DNA testing and any questions you may have, as would lead counsel from the C.C.R.C.

In the meantime, I thank you in advance for what I have no doubt will be your thoughtful and full consideration of this request. I can be reached anytime by cell phone at (917) 796-1150, or through my assistant, Elizabeth Vaca, at (212) 364-5393.

Sincerely yours,

Barry C. Scheck
Co-Director

cc: Marie-Louise Samuels Parmer, *Counsel for Mr. Sireci*
Maria D. Chamberlin, *Counsel for Mr. Sireci*

J. Cheney Mason, P.A.
Attorney and Counsellor at Law

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April 7, 2009

Lawson Lamar, State Attorney
Ninth Judicial Circuit
415 N. Orange Avenue
Orlando, Florida 32801

Dear Lawson:

As you certainly are well aware, there is a growing interest of the public in "cold cases". Some, justifiably, are looking for "closure" and what some perceive as justice. Others are relishing in the satisfaction of knowing that the Innocence Project has freed some two hundred people, at this point, who had been wrongfully convicted. We have had several in Florida in the last couple of years.

With this in mind, it seems to me that you, as State Attorney, should have a compelling interest in doing all that can be done to confirm and protect the integrity of prior convictions and, equally, do all that can be done to free wrongfully convicted citizens.

I am enclosing, herewith, a letter sent by Barry Scheck, Co-Director of the Innocence Project, to Governor Charlie Crist, over a year ago. Unfortunately, this letter appears to have been ignored, despite the very compelling suggestions and requests made therein. As part of the Innocence Project, I have agreed to assist in the Sireci matter and do now personally request your cooperation in reviewing the letter to Governor Crist. I would then request that we have a meeting, if you deem it necessary, to discuss the testing that can and should be done. At such meeting, I believe I can represent that Mr. Scheck and/or, one of his assistants, Staff Attorney Nina Morrison, (or both), would be happy to attend.

This is a case that cries out for new available DNA testing. The results will either confirm the validity of the conviction of Mr. Sireci, or establish basis to free yet another wrongfully convicted person. Given the fact that the defense is agreeing to pay all expenses related to the DNA testing, it would appear to me that you, as State Attorney representing the State of Florida, not only have nothing to lose, but you have much to gain, whichever way the results fall.

Please contact me as soon as possible, upon review of this letter, so that we can schedule a conference.

Sincerely,

J. Cheney Mason

JCM/kdm
Enclosure
cc: Nina Morrison, Esq.
Barry C. Scheck, Esq.

INNOCENCE PROJECT

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August 24, 2009

***By first class mail and fax***

Jeffrey L. Ashton
Assistant State Attorney
415 North Orange Avenue
Post Office Box 1673
Orlando, FL 32802

Dear Jeff:

Thanks once again for meeting with Cheney Mason, Maria Chamberlin of CCRC-Middle, and me on August 4th, and for the time and thoughtful consideration you've given to our request for DNA testing in this case thus far.

Since our meeting, we've talked further among ourselves and with the client about the general areas of agreement regarding DNA testing it appears we were able to reach at the meeting, as well as the concerns and counter-proposals you raised. In light of these discussions, I'm cautiously optimistic that we can reach an agreement that addresses your concerns about resolving the DNA testing issues, while preserving the parties' common interest in using today's DNA technology to reveal new and potentially exculpatory information that was unavailable to either side at the time of trial.

In that spirit, and on behalf of Mr. Sireci's various counsel, I decided to write to you to lay out what we believe to be the areas of agreement regarding the most probative items for DNA testing, and to respond to your request for a countervailing "waiver" of future testing and/or legal claims on Mr. Sireci's part. (I'm sure it goes without saying, but everything in this letter is offered in the context of a settlement negotiation, with all the usual prohibitions on the use of any statements made, should we not resolve this issue and the litigation over DNA access continues.) Lead counsel has discussed these issues with the client and he is generally in agreement with our recommendations, subject, of course, to working out the details and appropriate language.

Items to be DNA tested:

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It appeared at our meeting that we were all in agreement about the most probative items for DNA testing, and the primary purpose for testing these items – namely, to determine if DNA from Henry Sireci, Barbara Perkins, and/or Bonny Arnold is present on them. Specifically, we would agree to forgo any further litigation seeking testing by court order and proceed to test the following on consent:

- Fingernails of Howard Poteet ("victim")
- Victim's torn pants pocket
- Victim's ring
- Victim's watch

Testing on these items would be at the defense's sole expense, and would be conducted at Orchid Cellmark or another mutually-agreeable laboratory. In addition, to the extent any DNA foreign to the victim was obtained on these items, the State would obtain DNA samples from Perkins and Arnold (both of whom appear to still live in or near Orange County) and submit them for comparison purposes.

Waiver of right to litigate additional DNA testing:

In exchange for the state's agreement to allow the foregoing items to be tested, Mr. Sireci would waive his right to seek a court order for DNA testing – either in state or federal court -- of any and all additional items of biological evidence collected in this case. This waiver would extend, but not be limited, to the hair found on the victim's sock; as well as all items from the motel room that were offered into evidence against Mr. Sireci at trial (including the blood-stained jacket and towels found in the hotel room, on which bloodstains were found to be serologically consistent with the victim). Although the state would still (as required by law) preserve these items until such time as Mr. Sireci's death sentence is carried out or his conviction is vacated, his waiver of the right to litigate the merits of further testing would be binding upon him during that time.

As we discussed at the meeting, our hope is that if the results of the agreed-upon testing were exculpatory – or even if not wholly exculpatory, raised additional serious questions about his culpability – the State would agree, on its own, to permit additional testing in the furtherance of its truth-seeking function. But we recognize, and would agree, to waive the right to seek an order for such testing over the State's objection. This waiver would also survive any subsequent changes in law (including expansion by the Legislature or the Florida Supreme Court of the scope of Rule 3.853, or any recognition by the federal courts of a freestanding right to seek DNA testing under the U.S. Constitution).

Waiver of right to seek relief from conviction based upon "stray" foreign DNA

At our meeting, you also indicated that any agreement for DNA testing would also, in your view, need to include a waiver not just as to his right to seek additional testing, but on future litigation to vacate his conviction if he obtains DNA test results other than the ones he has hypothesized (that is, if the results show the presence of DNA from someone other than Perkins or Arnold).

As you can imagine, this is a particularly difficult and broad waiver to make before testing is actually conducted. For if Mr. Sireci is being truthful – that is, if he was neither present at nor played any role in the murder, either before or after the fact – he has no way to know who did it, and thus cannot know whose DNA will be revealed by the testing. While there is considerable evidence to support his (and counsel's) theory that, if Mr. Sireci is innocent, Perkins and Arnold were the true perpetrators – particularly the fact that they (unlike Sireci) were caught with the proceeds of the crime – he has no way of *knowing* whether the testing will point to them or to someone else. Thus, particularly in light of the fact that this is a capital case, it is a very grave matter to ask him to broadly waive any and all possible arguments about the probative value of such results before they are even in hand. On the other hand, we understand your concern that protracted, meritless litigation should not result from the detection of "stray" DNA, if the foreign DNA truly bears no relationship to the identity of one or more perpetrators of the crime.

In sum, we continue to have enormous concerns about the fairness of any requirement that Mr. Sireci waive his right to seek relief from any still-unknown, and potentially exculpatory, DNA test results. As such, we would ask that you wait to require any possible waiver at least until we test the DNA evidence initially and see if it excludes Mr. Sireci. But in the interest of reaching agreement, and in anticipation that you will require *some* waiver in that regard, we propose the following (albeit with serious reservations):

- Mr. Sireci will waive his right to litigate <u>any</u> further challenge to his conviction based upon DNA test results that reveal "unknown" DNA on the items tested (that is, foreign DNA that excludes Perkins or Arnold as the source), with two narrow exceptions:

- If the state does not on its own agree to relief, he may still litigate such challenges based upon (1) test results that reveal consistent foreign DNA on *multiple* items of evidence tested; and/or (2) the results of any CODIS search that affirmatively identify an existing profile in the database as the source of DNA on the items tested.

Regarding these exceptions, we hope you would agree that concerns about "stray" DNA (say, from casual contact with victim or the handling of an item of evidence) would be considerably lessened as compared to the probative value of the testing if the *same* unknown DNA profile turned up not just on one item, but on many (*i.e.*, under each of the victim's ten fingernails, *and* in his pants pocket, *and* on his bloody ring). Similarly, given how effectively the State has used CODIS in the past to identify the perpetrators of cold cases even where the suspects had no previous known connection to the crime at issue, we surely cannot foreclose the possibility that this case could yield a CODIS "hit" to a convicted offender in the database, and perhaps further exculpatory information when the State investigates or interrogates that individual.

Again, we have every reason to expect that the above scenarios are remote ones – that is, that the DNA testing will either point to Perkins/Arnold, or to Sireci himself – but if they were to result from the testing, each would give rise to the kind of more substantial claim he cannot reasonably be expected to waive. (Of course, should those results be truly exculpatory, we would hope to continue our dialogue, and anticipate that we could reach agreement about a fair disposition without litigation.)

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Conclusion

In sum, particularly in light of the Florida courts' expansive approach to DNA testing in capital cases in recent years, it is with great pause that we counsel our client to waive any future testing or claims based on previously-unavailable DNA evidence. However, we appreciate your willingness to consider further testing without burdensome litigation, and are eager to act on the parties' general agreement as to the merits of testing the most probative items identified and comparing the results to the alleged co-perpetrators.

If you're in agreement with our proposal, please let me know, and we can draft a letter agreement or Consent Order for testing that incorporates both the testing protocol and the waiver(s) discussed. Maria Chamberlin is going to visit Mr. Sireci on August 31st (next week), so to the extent you are able to get back to us (even in general terms) by then, that might help facilitate a prompt resolution as she could discuss the terms of the parties' agreement with the client in detail at that time.

We of course also remain available to discuss these details further, in person or by conference call, should that be necessary.

Thanks once again for your time and consideration.

Sincerely yours,

Nina Morrison, Esq.

c: J. Cheney Mason
Maria D. Chamberlin