IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 15-307

HENRY SIRECI,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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DATED: June 18, 2015
**Not admitted in this Court*

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INTEREST OF AMICUS CURIAE

The Innocence Network (the "Network") is an association of more than sixty organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. Based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, the Network has become keenly aware of the role that unreliable or improper scientific evidence has played in producing miscarriages of justice, particularly in cases where the prosecution is largely dependent on expert forensic testimony. The so-called "science" underlying such testimony and the resulting convictions has been exposed as flawed and, in some cases, outright false.

In approximately half of the 330 convictions overturned through DNA evidence in the United States, flawed or inaccurate forensic evidence and disciplines—such as blood-type testing, hair analysis, and fingerprint analysis—played a role in the wrongful conviction. Nearly one-quarter of wrongful convictions thus far overturned have involved the use of microscopic hair analysis.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal

defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files amicus briefs in the U.S. Supreme Court, this Court, and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. To improve the reliability of forensic science and the labs and practitioners responsible for testing evidence, NACDL has been working with the U.S. Department of Justice, the FBI, and the Innocence Project on an unprecedented review to identify cases in which testimony or reports on microscopic hair comparison analysis exceeded the limits of science.

Especially in convictions resting on forensic "sciences," the Network and NACDL are committed to ensuring that convictions are premised upon accurate and reliable forensic work—an interest directly implicated by Henry Sireci's case.

STATEMENT OF FACTS

The Network and NACDL adopt by reference the statement of facts as set forth in Mr. Sireci's Initial Brief of Appellant, which was filed on June 8, 2015.

SUMMARY OF ARGUMENT

Nearly four decades after Henry Sireci's conviction, the Federal Bureau of Investigation ("FBI") has undertaken a review of thousands of cases involving hair microscopy evidence and determined that precisely the type of hair comparison evidence that formed the basis of Mr. Sireci's conviction is scientifically invalid. Indeed, in 2013, the FBI *admitted* that testimony provided by its agents, identical in all relevant ways to the testimony offered by crime laboratory analyst William Munroe in this case against Mr. Sireci, is scientifically unsupportable. Put simply, were the State to offer today the same testimony used to convict Mr. Sireci, it would be *inadmissible* as a matter of law.

According to the FBI, while forensic hair microscopy may still be used to determine whether a contributor of a known sample hair could be included in a pool of people of unknown size as a possible source of a crime-scene hair, or to determine whether a person is excluded as a possible source, the FBI has admitted that testimony like that offered against Mr. Sireci—that a crime-scene hair "in all probability" comes from a particular individual—is scientifically invalid.

The FBI's recent admission of errors, combined with a parallel acknowledgement by an association of state and local crime labs, easily meets the requirements for new evidence and entitles Mr. Sireci to post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. By its own

admission, the State relied substantially upon the forensic hair comparison evidence introduced through Munroe. This evidence has now been fatally undermined. And contrary to this Court's findings in *Duckett v. State*, 148 So. 3d 1163 (2014), a hair comparison case decided last year, the balance of the evidence against Mr. Sireci does not support his conviction. Indeed, without the hair comparison evidence purporting to definitively link Mr. Sireci to the crime scene, there is serious doubt that Mr. Sireci would have been convicted of a crime.

In short, Mr. Sireci is entitled to an order remanding the case for an evidentiary hearing and/or post-conviction relief as requested in his Initial Brief.

ARGUMENT

I. FLAWED FORENSIC EVIDENCE LIKE THAT USED TO CONVICT MR. SIRECI IS SCIENTIFICALLY INVALID

A. Faulty Forensic Evidence And Related False Testimony Have Contributed To The Convictions Of Innocent People.

In the United States alone, DNA evidence has thus far been used to exonerate 330 people who were wrongfully convicted. Faulty and misleading forensic evidence—like the hair comparison evidence on which Mr. Sireci's conviction was based—contributed to the underlying conviction in approximately half of these cases.[1] Indeed, in 2009, a study analyzing the trial transcripts of 137 individuals who had been exonerated and whose trials included the introduction of

[1] *See* Innocence Project, *Forensic Oversight*, available at http://www.innocence project.org/fix/Crime-Lab-Oversight.php.

forensic evidence found that 60% involved invalid forensic testimony.[2] The study also found that the scientifically invalid testimony "was not the product of just a few analysts in a few states, but of 72 forensic analysts employed by 52 laboratories or medical practices in 25 states." *Id.*

Similarly, flawed forensic evidence formed much of the foundation for Mr. Sireci's conviction. Identified as an "expert chemist," Crime Laboratory Analyst William Munroe repeatedly told the jury that a single hair found on the sock of the victim "in all probability" belonged to Mr. Sireci. The FBI has admitted that this type of testimony is erroneous because it exceeds the limits of science.

Nationwide DNA exonerations prove that flawed forensic science and misleading testimony based on faulty forensic techniques are devastating to the truth-seeking function of the criminal justice system and that what often appears to be conclusive evidence of guilt is not always reliable. Because genetic material can be subjected to DNA analysis in no more than approximately ten percent of all criminal cases, crime labs oftentimes rely upon other forensic techniques, like blood-type testing or fingerprint analysis.[3] Defendants have been exonerated when

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[2] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

[3] *See* Daniel S. Medwed, California Dreaming: The Golden State's Approach to Newly Discovered Evidence of Innocence, 40 U.C. Davis L. Rev. 1437, 1440 (2007); *see also* The National Registry of Exonerations, Univ. of Mich. Law Sch. & Ctr. on Wrongful Convictions at Northwestern Univ. Sch. of Law, available at https://www.law.umich.edu/special/exoneration/Pages/about.aspx.

the testimony of forensic experts was discredited, including in a substantial number of cases in which the forensic evidence was undermined by the advance of scientific understanding and the attendant recognition that conclusions offered by experts in these disciplines were false and/or misleading.[4]

The number of DNA exonerations has helped highlight the dangers of flawed forensic evidence, leading courts to acknowledge both the unreliability of certain forensic techniques and the perilous effects of grossly misleading testimony relating to such evidence.[5] Accordingly, Congress tasked the National Academy of Sciences ("NAS") with evaluating the scientific validity and reliability of various forensic techniques (including hair microscopy) and examining ways to improve the quality of those forensic techniques in criminal investigations and trials. In 2009, the NAS published a report that revealed fundamental flaws in many common forensic disciplines and acknowledged that "[n]ew doubts about the accuracy of some forensic science practices have intensified with the growing numbers of exonerations resulting from DNA analysis (and the concomitant

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[4] Such forensic disciplines, which like hair comparison analysis lack the scientific and statistical underpinnings to provide conclusions to any degree of scientific certainty, include comparative bullet lead analysis, bitemark comparison, and arson. *See* Michael J. Saks & David Faigman, *Failed Forensics: How Forensic Science Lost Its Way and How It Might Yet Find It*, Ann. Rev. L. & Soc. Sci. 149, 150-53 (2008).

[5] *See, e.g., Hinton v. Alabama*, 131 S. Ct. 1081, 1090 (2014) ("We have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts . . . ") (internal citations omitted).

realization that guilty parties sometimes walk free)."[6] With respect to hair comparison evidence, the NAS was particularly critical:

> No scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population . . . . There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match.'

NAS Report at 160. In 2013, the FBI and American Society of Crime Laboratory Directors ("ASCLD") acknowledged that hair comparison analysis, as previously practiced, was invalid. Indeed, the FBI and Department of Justice are currently engaged in a full-scale review of microscopic hair comparison cases to ensure that erroneous statements like those made by Munroe are identified and, when appropriate, remedied.

B. Forensic Evidence Plays A Key Role In Wrongful Convictions Because Such Evidence Is Generally Perceived As Infallible.

The NAS also concluded that juries will give "undue weight to evidence and testimony derived from imperfect testing and analysis," and social science research has further demonstrated how difficult it is for lay jurors to detect flaws in putative scientific evidence. NAS Report at 4.[7] Although many forensic disciplines,

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[6] Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l Research Council of the Nat'l Acads., *Strengthening Forensic Science in the United States: A Path Forward* (2009) (hereinafter, the "NAS Report"), at 7.

[7] *See also* Bradley D. McAuliff, et al., *Can Jurors Recognize Missing Control Groups, Confounds, and Experimenter Bias in Psychological Science?*, 33 L. & Hum. Behav. 247, 248 (2009); N.J. Schweitzer & Michael J. Saks, *Jurors and*

particularly hair microscopy, are "based on observation, experience, and reasoning without an underlying scientific theory," *Id.* at 128, lay jurors typically presume that forensic evidence is neutral and objective, since it is presented with the trappings of actual science and proffered by a well-credentialed "expert" using esoteric scientific jargon. *Id.* at 48, 222. Research has further demonstrated that introducing evidence through an expert witness tends to make jurors less critical of the evidence and more likely to be persuaded by it than they otherwise would be.[8] This concept, sometimes called the "gatekeeper effect," suggests that jurors assume that judges review all expert evidence before it gets to the courtroom. *Id.* The U.S. Supreme Court has likewise recognized that "[e]xpert evidence can be both powerful and quite misleading."[9]

The aura of infallibility associated with "science," the "gatekeeper effect" of

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Scientific Causation: What Don't They Know, and What Can Be Done About It?, 52 Jurimetrics J. 433, 450 (2012); Bradley D. McAuliff & Tejah D. Duckworth, *I Spy with My Little Eye: Jurors' Detection of Internal Validity Threats in Expert Evidence*, 34 L. & Hum. Behav. 489, 496 (2010).

[8] *See* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol., Pub. Pol'y & L. 1 (2009).

[9] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 595 (1993); *see also United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse"); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen").

expert-delivered testimony, and difficulties understanding expert testimony and detecting flaws in such "science" all contribute to the danger of juries overvaluing even invalid forensic evidence. *See* NAS Report at 4, 95. This is particularly true where, as in Mr. Sireci's case, Crime Laboratory Analyst William Munroe was identified as an expert from the Sanford Regional Crime Laboratory, affiliated with the Florida Department of Criminal Law Enforcement. That identification enhanced his credibility to the jury, making the false evidence introduced against Mr. Sireci all the more material to his conviction.

II. THE HAIR COMPARISON EVIDENCE USED TO CONVICT MR. SIRECI HAS BEEN DISCREDITED

A. Hair Comparison Evidence Like That Proffered Against Mr. Sireci Is False And Has Contributed To At Least 75 Wrongful Convictions.

The use of microscopic hair comparison evidence to associate a defendant with hair found at a crime scene has played a role in no fewer than 75 wrongful convictions.[10] Indeed, in the time since Mr. Sireci filed his successive motion to vacate his conviction, three other men have been formally exonerated from their wrongful convictions, which were based on hair comparison evidence.[11]

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[10] *See* Innocence Project, *Forensic Science Breakdown by Discipline*, available at http://www.innocenceproject.org/docs/FSBreakdownDiscipline.pdf.

[11] Keith L. Alexander & Spencer S. Hsu, *Man Exonerated in 1982 D.C. Killing; DNA Reveals FBI Error in Conviction*, The Washington Post, July 21, 2014, available at http://www.washingtonpost.com/local/crime/dc-man-exonerated-in-1982-rape-and-murder-dna-reveals-fbi-error-in-conviction/2014/07/21/ee7cc490-

At its most basic level, hair comparison relies on two hypotheses: (1) that a properly trained hair examiner can make an association between a sample hair and a hair from a criminal suspect; and (2) that the examiner can provide a scientifically valid estimate of the rareness or frequency of that association.

On July 18, 2013, the FBI—an agency that had trained thousands of hair examiners nationwide and frequently defended the validity of the underlying techniques—admitted that the testimony offered by its hair examiners has for decades been exaggerated and scientifically invalid with respect to the significance of the link between a suspect's hair and a crime-scene hair. *See FBI Statement on Microscopic Hair Comparison Analysis* (annexed hereto as Exhibit A) (the "FBI Agreement"). In light of the FBI's stunning repudiation of its past practices, the ASCLD recommended that all state and local crime labs conduct a broad review of "reports and testimony provided in microscopic hair comparisons made prior to the routine implementation of DNA technology in hair comparisons." Notification, ASCLD, Apr. 21, 2013 (the "ASCLD/LAB Notification"). Indeed, the ASCLD reminded lab directors of their "ethical obligation to 'take appropriate action if

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0ec8-11e4-8341-b8072b1e7348_story.html; Spencer S. Hsu, *D.C. Man Imprisoned by Flawed FBI Forensic Evidence Exonerated*, The Washington Post, May 23, 2015, available at http://www.washingtonpost.com/local/crime/dc-man-imprisoned-by-flawed-fbi-forensic-evidence-exonerated/2015/05/23/ed382f70-00c6-11e5-8b6c-0dcce21e223d_story.html; Cullen Browder, *Joseph Sledge Declared Innocent in 1976 Double Murder*, WRAL.com, January 23, 2015, available at http://www.wral.com/declared-innocent-sledge-freed-after-37-years-for-double-murder/14381367/.

there is potential for, or there has been, a miscarriage of justice due to circumstances that have come to light, incompetent practice or malpractice.'" *Id.*

More specifically, the FBI identified three types of testimonial errors that its examiners frequently made:

- Type 1 Error: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others;
- Type 2 Error: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association; and
- Type 3 Error: The examiner cited the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual.

FBI Agreement at 1.

According to the FBI, these testimonial conclusions—the second of which was presented to Mr. Sireci's jury—are scientifically invalid. The FBI admitted that "[a]n examiner report or testimony that applies probabilities to a particular inclusion of someone as a source of a hair of unknown origin cannot be scientifically supported." FBI Agreement at 1. The FBI has stated that the only scientifically supportable use of hair microscopy is that it may indicate, at the broad class level, that a contributor of a known sample *could be* included in a pool

of people of unknown size, as a *possible source* of the hair evidence. *Id.* (emphasis added). Testimony regarding a positive association that exceeds this range of conclusions is false as a matter of science. *Id.*

In recognition of both the power of misleading evidence to corrupt the truth-seeking function of criminal trials and the injustice of raising procedural bars to litigating whether invalid "scientific" evidence they themselves presented to the jury influenced the verdict, the U.S. Department of Justice has agreed for the first time in its history to waive any procedural objections in order to permit the resolution of legal claims arising from this erroneous evidence. Further, the FBI crime lab has agreed to provide free DNA testing if the hair evidence is still available and the chain of custody can be established.

B. The Hair Comparison Evidence Introduced Through William Munroe And Relied Upon By The State Was Erroneous.

Munroe's testimony, combined with the State's characterization of that testimony, infected Mr. Sireci's trial with the type of error identified by the FBI.[12] It provides a disturbing example of the impact that the submission of this discredited testimony can have, particularly in a capital case that lacks any other physical evidence connecting the defendant to the crime.

Munroe's testimony fell squarely within the Type 2 Error identified by the

[12] While Munroe was not employed by the FBI, the hair comparison conclusions he offered at Mr. Sireci's trial were identical in all relevant ways to those expressly discredited by the FBI and called into question by the ASCLD.

FBI as beyond the bounds of science. After initially describing the two hairs as "consistent," Munroe testified that:

> "**[I]n all probability, this hair came from [Henry Sireci].**" (Tr. 407.); and
>
> "**In my opinion, in all probability the hair is from [Henry Sireci].**" (*Id.* at 413.)

There is absolutely no scientific basis for Munroe's testimony, in part because the size of the pool of people who could be included as a possible source of a specific hair is unknown. His testimony exemplifies precisely what has been expressly discredited and abandoned by the FBI. Indeed, the FBI has admitted that it is error for an expert to have "assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source." FBI Agreement at 1. Moreover, a phrase like "in all probability" will generally lead a jury to believe that the examiner was able to conclusively identify the defendant as the source of the hair.[13]

The significance of Munroe's erroneous testimony was exacerbated during the State's closing argument when the State focused on Munroe's error-ridden testimony and exaggerated it. In closing, the State focused the jury's attention on

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[13] *See* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, 1170 (2008) (finding that phrases such as "analytically indistinguishable" and "similar in microscopic characteristics" generally lead jurors to believe that an exact match has been found).

the hair: "Now, one of those clothing items became very important later on and that was Mr. Poteet's socks . . . . The socks became relevant because on the socks was a hair." (Tr. 679.) Later, the Prosecutor told the jury:

> "We started with calling Bill M[u]nroe who was an expert chemist who did comparison tests on the evidence submitted to him and came to the finding on the socks, that on the socks of [the victim], there was a hair which matched the hair of [Henry Sireci]." (Tr. 684.)

As this Court has recognized, when an expert testifies to a certain scientific conclusion, and a prosecutor mischaracterizes and exaggerates that conclusion, the cumulative effect on the jury can lead to wrongful convictions. *See Swafford v. State*, 125 So. 3d 760, 769-72 (2013) (reversing denial of post-conviction relief where forensic analyst overstated significance of conclusion and prosecutor in closing exaggerated the conclusion with a statement of unsupportable certainty).

In short, the FBI conceded that a claim that one hair "matches" a specific individual is groundless and entirely unsupportable. Such testimony or argument is particularly damaging when witnesses cloaked in scientific expertise testify that forensic evidence can be "matched in the laboratory to the defendant . . . to the exclusion of all other persons in the world, [because] that testimony is likely to be accepted as conclusive."[14]

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[14] Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008); *see also* Mark A. Godsey & Marie Alao, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI Effect"*, 17 Tex. Wesleyan L. Rev. 481, 483-84 (2011); Allen

III. THIS COURT'S RULING IN DUCKETT IS NOT CONTROLLING

This Court's prior ruling in *Duckett v. State*, 148 So. 3d 1163 (2014), does not dictate the outcome of Mr. Sireci's appeal because Mr. Sireci's case is materially different in a number of ways.

In *Duckett*, the defendant was a police officer convicted of sexually assaulting and killing an eleven-year-old girl. The State's case involved the testimony of an FBI hair analyst, Michael Malone, who erroneously testified that there was "a high degree of probability" that a hair found on the victim's underpants had been left by Duckett. In denying Duckett's appeal, this Court reasoned that Duckett had already "extensively challenged" the hair evidence, and Duckett's newly discovered evidence did not demonstrate that the field of forensic hair comparison had been at that point discredited.

Here, the facts, circumstances, and evidence are materially different. First, the newly discovered evidence presented by Mr. Sireci reflects a far broader, systemic problem with the manner in which hair comparison evidence has been presented at trials. In *Duckett*, the newly discovered evidence was comprised of a report prepared by an independent analyst narrowly evaluating the testimony offered by one forensic witness, Malone. While this Court recognized significant problems in Malone's forensic testimony, it noted that unlike the field of

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Raitz, et al., *Determining Damages: The Influence of Expert Testimony on Juror Decision Making*, 14 L. & Hum. Behav. 385 (1990).

comparative bullet lead analysis ("CBLA"), "the field of forensic hair analysis has not been discredited, and the FBI has not discontinued the use of such analysis." *Duckett*, 148 So. 3d at 1169. Moreover, the report in *Duckett* did not provide the broader context for which this Court seems to have been looking. Here, the newly discovered evidence, which was not available at the time of the *Duckett* appeal, provides that broader perspective.

In the time since Duckett filed his successive motion for post-conviction relief and briefed his appeal to this Court, the type and scope of errors and scientifically invalid testimony in the field of microscopic hair comparison analysis have been more fully and clearly revealed. Microscopic hair comparison, as it had been practiced for decades and as it came into evidence at Mr. Sireci's trial has been discredited and has been abandoned by the FBI in favor of scientifically supportable mitochondrial DNA testing.[15] As with CBLA, the FBI has now abandoned the erroneous practices identified above. Unlike the narrower newly discovered evidence in *Duckett*, the FBI Agreement and ASCLD/LAB Notification not only demonstrate that the hair comparison testimony offered against Mr. Sireci

[15] *See* Ed Pilkington, *Thirty Years in Jail for a Single Hair: The FBI's 'Mass Disaster' of False Confession*, The Guardian, Apr. 21, 2015, available at http://www.theguardian.com/us-news/2015/apr/21/fbi-jail-hair-mass-disaster-false-conviction; *see also* Spencer S. Hsu, *After FBI Admits Overstating Forensic Hair Matches, Focus Turns to Cases*, The Washington Post, Apr. 20, 2015, available at http://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b_story.html.

was scientifically unsupportable, but also that the broader field of microscopic hair comparison has been discredited and, as previously practiced, abandoned by the FBI, which now uses DNA analysis on hair evidence before presenting it to a jury.

Second, the hair comparison evidence and testimony introduced at Mr. Sireci's trial has never before been challenged or previously litigated. In *Duckett*, this Court found that the testimony of the State's chief forensic witness was "extensively challenged." Here, by contrast, Mr. Sireci's trial counsel asked only a handful of questions—literally five total—about Munroe's hair comparison testimony, and no additional forensic analysts were called as witnesses. (Tr. 412-13.) In contrast to this Court's finding that the hair comparison evidence was "challenged extensively" at Duckett's trial, it was barely questioned, much less challenged, at Mr. Sireci's trial.

Third, the single hair found on the victim's sock constitutes the *only* physical evidence connecting Mr. Sireci to the crime.[16] This Court found that there was significant additional physical evidence of Duckett's guilt. *Duckett*, 148 So. 3d at 1169. In contrast to that finding, the newly discovered evidence here casts substantial doubt on Mr. Sireci's conviction.

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[16] The remainder of the physical evidence—namely the jacket and credit cards—does not implicate Mr. Sireci individually and is instead consistent with his defense that Barbara Perkins and her new boyfriend committed the crime and pinned it on him. *See* Sireci Initial Brief.

IV. MR. SIRECI IS ENTITLED TO POST-CONVICTION RELIEF

To obtain a new trial on the basis of newly discovered evidence, a petitioner must establish (1) that the parties did not know, and could not through due diligence have learned, about the evidence, and (2) that the new evidence "must be of such nature that it would probably produce an acquittal on retrial." *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (1994); *Jones v. State*, 591 So. 2d 911, 915 (1991). Put another way, post-conviction relief should be granted if the newly discovered evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *See Jones*, 709 So. 2d at 526 (citing *Jones v. State*, 678 So. 2d 309, 315 (1996)). To make this determination, the Court must "consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 709 So. 2d 512, 521 (1998) (internal quotes omitted).

First, the FBI Agreement and ASCLD/LAB Notification easily satisfy the requirements for new evidence under Rule 3.851. Courts have recognized that revelations about new understandings of flaws in traditionally accepted forensic sciences may constitute newly discovered evidence.[17] Here, it was not until 2013

[17] *See State v. Edmunds*, 308 Wis. 2d 374, 391-92 (Ct. App. 2008) (holding that new scientific developments undermining critical scientific evidence presented at trial can constitute newly discovered evidence); *see also In re Henderson*, 384

that the FBI and ASCLD publicly announced the need to take action and identify the scientifically invalid testimony surrounding hair microscopy evidence provided at trials from decades ago, and the prior state of scientific knowledge clearly did not suffice to put Mr. Sireci on notice of the issues raised in the FBI Agreement.

Second, the newly discovered evidence here raises substantial doubt as to Mr. Sireci's conviction, given the extent to which the State relied on the false and misleading hair comparison evidence. Indeed, the State repeatedly emphasized that the hair comparison evidence was vital to its case and a key reason for conviction. For example, after reminding the jury that the hair evidence and testimony "became very important later on," the State argued during its closing, "We started with calling Bill M[u]nroe who . . . came to the finding on the socks, that on the socks of [the victim], there was a hair which ***matched*** the hair of [Henry Sireci]." (Tr. 684.) This assertion further exaggerated the already-flawed forensic testimony, which has been proven to be inaccurate and scientifically invalid. And as described in greater detail in Mr. Sireci's Initial Brief, the remaining evidence against Mr. Sireci is largely circumstantial and lacks any physical connection to the crime scene.

As is the case here, where "scientific" evidence served an essential role in

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S.W.3d 833 (Tex. Crim. App. 2012) (same); *Duckett v. State*, 148 So. 3d 1163, 1168 (2014) (recognizing that new report undermining hair comparison evidence "could not previously have been discovered...because it did not exist").

purportedly connecting the defendant directly to the scene of a crime, but where that evidence has significant scientific limits that were not made known to the fact finder at trial, the conviction must be called into question. The FBI Agreement noting the scientific limits of microscopic hair comparison discredits the testimony offered by William Munroe. Had the FBI Agreement and ASCLD/LAB Notification been available when Mr. Sireci was tried, Munroe would not have been able to testify as to his most persuasive (and misleading) conclusion, which individualized the source of the hair to Mr. Sireci. Put a different way, if the FBI Agreement and ASCLD/LAB Notification had been available at the time of Mr. Sireci's trial, the State would have been left without its single most powerful piece of physical evidence.

In short, this newly discovered evidence raises substantial doubt as to the accuracy and fairness of Mr. Sireci's conviction.

CONCLUSION

For the reasons discussed above and pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure, Mr. Sireci is entitled to, at a minimum, an order remanding the case for an evidentiary hearing and/or post-conviction relief as requested by Mr. Sireci.

Respectfully submitted,

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On behalf of Counsel for Amicus Curiae

DATED: June 18, 2015

*Not admitted in this Court

CERTIFICATE OF FONT COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point double-spaced Times New Roman.

Seth E. Miller, Esq.

INDEX TO APPENDIX

Exhibit A

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

MICROSCOPIC HAIR COMPARISON ANALYSIS

The following reflects an agreement between the FBI and the Innocence Project and the National Association of Criminal Defense Lawyers of what the science of microscopic hair examinations supports.

The scientific analysis of hair evidence permits a well-trained examiner to offer an opinion that a known individual can either be included or excluded as a possible source of a questioned hair collected at a crime scene. 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 applies 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 numbers or frequencies as explicit statements of probability, or opinions regarding frequency, likelihood, or rareness implicitly suggesting probability. Such testimony exceeds the limits of science and is therefore inappropriate.

Error Type 1: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of the science.

Error Type 2: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association. This type of testimony exceeds the limits of the science.

Error Type 3: The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual. This type of testimony exceeds the limits of the science.

Appropriate: The examiner's testimony appropriately reflected the fact that hair comparison could not be used to make a positive identification, but that it could indicate, at the broad class level, that a contributor of a known sample could be included in a pool of people of unknown size, as a possible source of the hair evidence (without in any way giving probabilities, an opinion as to the likelihood or rareness of the positive association, or the size of the class) or that

the contributor of a known sample could be excluded as a possible source of the hair evidence based on the known sample provided. An opinion as to the likelihood or rareness of a positive association may be appropriate in certain cases in which the examined hair samples display unusual or distinct characteristics, *e.g.*, repeated artificial treatments resulting in color variations along the length of the hair, hairs that have been crushed, broken, burned or damaged in some distinctive manner, or hairs that display specific characteristics associated with certain diseases such as pili annulati, monilethrix, or trichorrhexis nodosa.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically on this 18th day of June 2015, to the following persons:

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