IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 21-1467

STATE OF FLORIDA

Appellant

v.

HENRY P. SIRECI,

Appellee.

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

ANSWER BRIEF OF APPELLANT

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COUNTER-STATEMENT OF THE ISSUES

1. Given longstanding practice among Florida's State Attorneys of conducting DNA testing on consent – and Appellant's concession below that Rule 3.853 is not the exclusive vehicle through which a defendant may obtain post-conviction DNA testing – may a Circuit Court enter a ministerial order effectuating a State Attorney's agreement to test DNA evidence, outside the procedures that govern contested DNA litigation in Fl. Rule Crim. Proc. 3.853?
2. Did the Circuit Court correctly find that State Attorney for the Ninth Judicial Circuit had the legal authority to enter a Joint Stipulation and Order to Release Evidence for DNA Testing with Appellee in May 2021, using the exact same (i) form of order, and (ii) filing and notice procedures, as were followed by the State Attorney's predecessor in office in 2010?
3. Like the 2021 Joint Stipulation and Order, the 2010 DNA Testing Agreement and Order were entered into by the parties without notice to, or the prior consent of, the Attorney General; and Appellant has conceded that the 2010 Agreement and Order were a lawful exercise of the (former) State Attorney's discretion and authority. Is that concession fatal to its current challenge to the 2021 order?

4. In the alternative, should this Court dismiss the appeal for lack of jurisdiction and/or on equitable grounds, including principles of judicial estoppel and contract law?

REQUEST FOR ORAL ARGUMENT

Henry Sireci has been sentenced to death and maintains his actual innocence of the crime for which he was convicted. The resolution of issues involved in this action may determine whether he has access to DNA evidence for the purpose of proving his claim of innocence, and ultimately, whether he is executed. In addition, the Attorney General's proffered interpretation of the relevant statutes and constitutional provisions raise legal issues of first impression that may impact the remedies available to other capital defendants. This Court has not hesitated to allow oral argument in other capital cases raising similarly significant claims. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Henry Sireci, through counsel, respectfully requests oral argument.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its brief to this Court, the Attorney General portrays the May 2021 Joint Stipulation and Order for DNA Testing ("the 2021 Order") as a radical departure from Florida law and a threat to the administration of justice in capital cases. It is neither. Nothing in Florida law prohibits State Attorneys from exercising their discretion to release DNA evidence for testing as they deem appropriate, without requiring the defendant to proceed under Rule 3.853 or to obtain the consent of the Attorney General. State Attorneys in both the Ninth Circuit and around the State have done precisely that for decades, both before and after Rule 3.853's enactment in 2001. If anything, as the circuit court found, it is Appellant's unwarranted attempt to interfere with the State Attorney's routine exercise of prosecutorial discretion that threatens confusion, chaos, and prejudicial delays in this area of law.

Indeed, for more than twenty years, the Florida Legislature, State Attorneys, defense counsel, and Circuit judges have worked in tandem to provide prompt and meaningful access to post-conviction DNA testing to those who may have been wrongly convicted. This historic effort has proceeded on two parallel, complimentary tracks. First, in 2001, the Florida Legislature enacted Fl. St. §925.11 and Fl. Rule Crim. Proc. 3.853. These rules provided – for the first time – a statutory vehicle for convicted persons

who could not obtain the State Attorney's consent to DNA testing to seek a court order mandating such relief. At the same time, the law continued to give Florida prosecutors the same discretion to consent to DNA testing requests made by persons claiming innocence as they enjoyed before Rule 3.853's enactment – *i.e.,* allowing State Attorneys to release evidence for DNA testing in appropriate cases, without burdening the circuit courts with requests to review motions and exhibits, hold hearings, and make the detailed findings required by Rule 3.853 motions. That process has spared the circuit courts an unnecessary burden. It has also, critically, reduced the time that the wrongly convicted spend in prison or on death row for crimes they did not commit before they obtain DNA testing, and accelerated the timetable on which the State may use any exculpatory DNA results to identify the actual perpetrators of these crimes, thus protecting public safety.

While no aspect of our justice system is perfect, Florida's post-conviction DNA testing regime has been appropriately lauded for its successes. After initial concerns about a potential "flood" of DNA litigation by convicted prisoners did not materialize, and the innocent were exonerated by DNA in increasing numbers, this Court and the Florida Legislature have repeatedly amended Rule 3.853 and its companion statute, Fl. St. §925.11 – at each turn, choosing to expand the law to make post-conviction DNA

testing more readily available to convicted defendants. At the same time, significant numbers of Floridians continued to obtain such testing through consent agreements with State Attorneys, wholly outside the procedures set forth in Rule 3.853. To date, there have been at least eighty-four post-conviction exonerations recorded in Florida. In twenty-one of those cases, an innocent person was cleared by post-conviction DNA testing; and in eleven such cases, the exonerated person was originally sentenced to death.[1] Appellant has cited no case, rule, constitutional provision, or compelling circumstance that warrants disturbing the well-established legal rules that have made it possible for Florida's prosecutors and courts to do justice in these cases.

Appellant's challenge to the 2021 Order is not just unsupported by law. It is particularly disingenuous because -- over a decade ago, in this same case -- the State Attorney's predecessor entered into a comprehensive consent agreement for DNA testing and a virtually-identical DNA testing order (the "2010 Agreement and Order"), which Appellant never challenged. The 2010 Agreement and Order were drafted outside the provisions of Rule

[1] *See Exonerations by State*, The Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last updated Feb. 4, 2022).

3.853, and were entered by the court without notice to, or consent from, the Attorney General. At that time, the Attorney General did not object – as it now does – that the former State Attorney exceeded his legal authority, "violated" Rule 3.853, or was required to first obtain the Attorney General's consent before "waiv[ing]" the Rule's requirements. Indeed, in subsequent litigation, the Attorney General repeatedly invoked certain provisions of the 2010 Consent Agreement to Mr. Sireci's detriment. And notably, in the proceedings below, Appellant conceded that (1) Rule 3.853 is not the exclusive vehicle through which a convicted person may obtain DNA testing, and (2) the former State Attorney had full legal authority to unilaterally enter into the 2010 Agreement and Order without notice to Appellant.

Appellant apparently disagrees with the current State Attorney's decision to allow Mr. Sireci – a 72 year-old man who has been on death row for over half his life – to conduct one final round of DNA testing before the State carries out his execution. But Florida law does not give the Attorney General the right to obstruct this well-established exercise of official discretion. Nor does it give the Attorney General the right to appeal the entry of a ministerial order effectuating the parties' DNA testing agreement, one that falls nowhere within the limited jurisdiction of this Court.

For these and other reasons set forth below, this Court should affirm the Circuit Court, and/or dismiss the appeal, so that DNA testing in Appellee's case may proceed without further delay.

STATEMENT REGARDING JURISDICTION

For the reasons stated in Appellee's Motion to Dismiss dated November 15, 2021, and as stated in Part IV.A, *infra*, this Court lacks jurisdiction to hear Appellant's challenge to the stipulated order entered by the Circuit Court below, and this Court should dismiss the appeal.

STATEMENT OF FACTS

Henry Sireci is 72 years old and has been on Florida's death row since 1976 – over 45 years. Since his first voluntary interview with law enforcement during the murder investigation that ultimately led to his arrest and conviction, Mr. Sireci has consistently maintained that he played no role whatsoever in the robbery-murder of a used car salesman for which he was sentenced to death forty-five years ago. These protestations of innocence have included, *inter alia*, a letter Mr. Sireci sent to the judge presiding over his trial, in which he asked for new counsel to be appointed because his assigned counsel had failed to conduct any meaningful investigation into his

innocence, which included numerous potential alibi witnesses. See R. 171-173, R. 236-247.[2]

[2]The only issue presented in this appeal is Appellant's novel challenge to the procedural mechanism through which the circuit court entered a consent order for DNA testing. Yet Appellant devotes a considerable portion of its merits brief towards an effort to demonstrate that post-conviction DNA testing would (in its view) serve no legitimate purpose, because of other evidence supporting the jury's guilty verdict in the 45-year-old trial and investigative record.

Two separate State Attorneys who spent months familiarizing themselves with that extensive record – one in 2010, and one in 2021 -- concluded otherwise. And with good reason. For example, the seven unrecorded "confessions" cited *ad nauseum* by Appellant are either vigorously contested by Appellee or are not such a nature as to defeat even the possibility of his innocence. Two of the sources of the so-called confessions are the very alternate suspects who, unlike Mr. Sireci, were caught in possession of the murder victim's stolen property and were prime suspects themselves; two others were jailhouse informants with their own pending charges at the time they alleged Mr. Sireci had "confessed" to them. *See* R. 171-173, R.236-247. The potential bias and unreliability of incentivized informants is well known to this Court. *See, e.g., Simpson v. State*, 2022 WL 120867 at *5-*9) (Fla. Jan. 13, 2022). In addition, one of the "confessions" was allegedly made by Mr. Sireci to an investigating police officer who himself apparently found the statement of so little probative value that he told Mr. Sireci he was free to leave the interview and did not charge him with any crime. R. 165-169, R. 236-247

In addition, even if any of the statements attributed to Mr. Sireci were considered to be "confessions" to murder in the traditional sense, it is now well established – in large part thanks to the irrefutable science of post-conviction DNA testing -- that innocent persons can and do confess to crimes they did not commit. *See, e.g.,* West & Meterko, *DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 Alb. L. Rev. 717, 759-63 (2016) (finding that 27% of the first 325 known DNA exoneration cases involved false confessions by an innocent defendant, many of which were highly detailed, recorded narratives of the crime).

Forensic DNA testing was unavailable in any form at the time of Mr. Sireci's trial. In 2002, immediately following the enactment of Fl. Rule Crim. Proc. 3.853, Mr. Sireci filed a Motion for Post-Conviction DNA Testing, seeking to use newly available technology to conduct a DNA test on a hair from the murder victim's sock that the State's analyst had claimed at trial (based solely on a visual, microscopic examination) was a "match" to Mr. Sireci's own. The State opposed the motion, and the Circuit Court denied his application.

This Court affirmed, finding that a DNA test excluding Mr. Sireci as the source of the hair would not in and of itself create a reasonable likelihood of his acquittal. *Sireci v. State*, 908 So. 2d 321 (Fla. 2005).[3] That decision, however, was issued at a time when DNA testing was considerably less advanced than it is today; before Mr. Sireci was assigned or retained counsel with expertise in DNA science; before the FBI itself disavowed the scientific

[3] It is worth noting that if the DNA testing agreed to by the State Attorney proves exculpatory, he would not be the first wrongly convicted person in Florida to be proven innocent through testing conducted by agreement even after having unsuccessfully sought testing under Rule 3.853, as Mr. Sireci did in 2004. *See, e.g.,* Innocence Project of Florida: James Bain (detailing procedural history of James Bain, was denied testing five times by the Florida courts before he was exonerated and declared actually innocent through DNA testing conducted with the consent of a new State Attorney), *available at* https://www.floridainnocence.org/james-bain.

validity of the forensic hair-analysis testimony used to convict Mr. Sireci; and before a series of subsequent changes in both state and federal law that expanded a convicted defendant's ability to access DNA testing.[4]

In 2006, the Innocence Project agreed to review Mr. Sireci's case. The Innocence Project receives thousands of requests from convicted persons and typically rejects more than 98% of such requests. After reviewing Mr. Sireci's file, however, the Innocence Project concluded that Mr. Sireci's had a credible claim of innocence that could be proven by advanced DNA testing – including, but not limited to, the hair evidence that he had unsuccessfully sought to have tested under Rule 3.853.

In 2008, the Innocence Project wrote to then-Governor Charlie Crist, urging him to refrain from setting an execution date in light of the considerable doubts about Mr. Sireci's guilt in the existing record and the numerous items of DNA evidence that had yet to be tested.[5] R. 246.

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[4] *See* R. 165-169, R175-178. *See also* Part I.(B)(2), *infra* (discussing series of amendments to Rule 3.853 and Fl. St. §925.11 between 2004 and 2010); *Dist. Atty's Off. for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009) (declining to recognize freestanding constitutional right to DNA testing, but finding that convicted persons have a constitutionally-protected "liberty interest" in reasonable access to DNA testing where a state provides a statutory vehicle to seek relief from a conviction based on actual innocence).

[5] The Innocence Project also newly cited the investigative value of comparative fingerprint analyses from both the Poteet murder scene and

In 2009, Mr. Sireci's co-counsel asked then-State Attorney Lawson Lamar to reconsider whether DNA testing would serve the interests of justice for all parties. This request was partially successful: the State Attorney agreed to some, but not all, of the DNA testing Mr. Sireci sought.

The State, however, drove a hard bargain. The State Attorney proposed that the parties enter into a formal agreement that would allow Mr. Sireci to obtain certain DNA testing immediately, without litigation. But in exchange, the State demanded that Mr. Sireci (1) forever waive his right to file a successive motion for DNA testing under Rule 3.853 (even though Rule 3.853 allows for successive motions, and places no time limitations on such filings), and (2) waive certain prospective, post-DNA-testing claims for relief. See R. 262-264.

The parties' final agreement contained two critical safeguards that Mr. Sireci's counsel had negotiated in response to the State Attorney's waiver demands. These expressly preserved Mr. Sireci's right to (1) additional DNA testing and/or (2) DNA-based post-conviction relief if at any time in the future the State Attorney consented to same. Specifically, the Agreement – signed by Mr. Sireci, his counsel, and the State Attorney's Office – made clear that

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another murder scene with what appeared to be a similar modus operandi, but at which no fingerprints from Mr. Sireci had been found. *Id.*

"nothing in this agreement shall preclude the parties from conducting DNA testing on additional items of evidence (whether by consent or court order) should the State agree at a future date that such testing would be appropriate." See R. 263.

The purpose and effect of the signed Agreement was to take the DNA testing issues in Mr. Sireci's case out of litigation. It limited testing only to circumstances in which Mr. Sireci could satisfy the State Attorney that testing was appropriate. In exchange for the broad waiver of his right to future litigation, Mr. Sireci was granted (1) DNA testing on certain items immediately, and (2) a streamlined procedure to obtain such testing in the future, if -- but only if -- he was able to convince the State Attorney's Office that it had merit.

At the State Attorney's request, the parties then filed a copy of the Agreement with the Circuit Court, along with a proposed Order to Release Evidence for DNA Testing. No Rule 3.853 motion was filed because there was no need for motion practice, a response from the State, or a hearing on the consent agreement and stipulated order.

On July 19, 2010, the Circuit Court signed and filed the parties' proposed Order. R. 269-270. Because the Order was agreed upon by the

parties, the Court did not hold a hearing, nor make any of the enumerated findings under Rule 3.853 that would be required in contested litigation.

The Attorney General was not a party to the 2010 Agreement or Order. State Attorney Lamar's office did not notify the Attorney General before the 2010 Agreement was signed, nor before the 2010 testing order was entered. Yet at no time in the eleven years since has the Attorney General ever asserted that the 2010 Agreement and Order were procedurally defective, or otherwise unlawful.

Instead, Appellant repeatedly invoked and relied upon the waiver terms of the 2010 Agreement in subsequent litigation against Mr. Sireci. It did so before the circuit court, before this Court, and before the United States Supreme Court. See, e.g., R. 137 (citing "the consent agreement entered into in 2010" which "included the stipulation that Mr. Sireci would not seek further DNA testing in either state or federal court"); R. 137 (Attorney General's brief in opposition to writ of certiorari filed in United States Supreme Court, invoking 2010 Agreement as a "material" aspect of the case's procedural history upon which the Court should reject Mr. Sireci's constitutional claims); R.134-37 (detailing other instances in which State invoked the 2010 Agreement and Order to Mr. Sireci's detriment).

The initial DNA testing conducted on evidence from the crime scene pursuant to the 2010 Agreement yielded no DNA from Mr. Sireci. However, the testing also did not yield DNA from a potential third-party perpetrator, and thus was inconclusive on the ultimate question of innocence. R.133.

For the next eleven years, Mr. Sireci faithfully abided by the terms of the 2010 Agreement. Even as changes in law and DNA technology provided Mr. Sireci with new grounds to seek further testing under Rule 3.853, he did not do so. Instead, beginning in 2012, he availed himself of the one option expressly reserved to him under the 2010 DNA Agreement: he made his case to the State Attorney's Office for testing on consent. Two such requests were deferred or denied. Then, in May 2021, the current State Attorney completed a lengthy review of the case and agreed that additional testing on DNA (as well as fingerprint evidence) was appropriate in light of the record and the current state of forensic analysis.[6] She authorized her staff to confer

[6] The current State Attorney for the Ninth Judicial Circuit is Monique Haughton Worrell. State Attorney Worrell's immediate predecessor, Aramis Ayala, adopted a broad policy of declining to seek the death penalty in all cases, leading to issuance of an extraordinary writ of quo warranto. *See Ayala v. Scott*, 224 So.2d 755 (2017). By contrast, State Attorney Worrell has adopted no such policy. State Attorney Worrell supports the death penalty in appropriate cases, and determines whether to seek the death penalty, as well as how to defend claims brought regarding existing capital convictions and death sentences, on a case-by-case basis.

with defense counsel and prepare a Joint Stipulation and Order, directing the Clerk to transfer the evidence to accredited forensic laboratories.

The parties' agreed-upon Order -- virtually identical to the one entered in 2010 – was entered by the circuit court on May 10, 2021. R.103-106.

On June 3, 2021, Appellant filed a Motion to Stay and Motion to Reconsider the 2021 Order. Appellant asked the Circuit Court to take the unprecedented step of invalidating an out-of-court DNA agreement between a State Attorney and counsel for a capital defendant, by asserting that Fl. St. §16.01(6)'s provision authorizing the Attorney General to "act as co-counsel of record in capital collateral proceedings," combined with Fl. R. Crim. Proc. 3.851(f)'s requirement that the Attorney General be served with all "pleadings" under Rule 3.851, entitled Appellant to independent notice of any DNA testing agreements between the State and a capital defendant, and, further, the affirmative "acquiescence" of the AG before any such orders may be entered. R. 108-110.

Appellant also argued that the 2021 Order was invalid because the parties and the Court had not followed the procedures governing contested DNA motions set forth in Fl. R. Crim. Proc. 3.853, and (because the parties did not proceed under Rule 3.853) the circuit court had not made the

enumerated findings that would be required in Rule 3.853 proceedings. R. 103-106.

The circuit court stayed its order to permit further briefing. In his response, Mr. Sireci argued that (1) the Attorney General should be judicially estopped from seeking to vacate the parties' agreed order, because the Attorney General had not only failed to challenge the parties' 2010 consent agreement, but had relied on and invoked its terms to Mr. Sireci's detriment in prior litigation; (2) Rule 3.853 applies only to contested DNA testing motions that must be litigated in the Circuit Court, and its procedures do not apply where, as here, counsel for the State has agreed that DNA testing is appropriate (an argument supported by numerous case examples in which State Attorneys – from both political parties, and an array of Circuits – had agreed to DNA testing outside Rule 3.853) (*see* R. 383-426); and (3) the Florida Constitution (art. V § 17) establishes that the State Attorney is the duly elected "prosecuting officer" for the State who serves as lead counsel in capital proceedings in the Circuit Courts, and none of the statutes cited by the Attorney General authorizing it to appear and be compensated as co-counsel in any way overrides the constitutional authority conferred upon the State Attorney in such proceedings. *See* R. 123-162.

Oral argument was held on September 29, 2021. In response to questions from the circuit court, Appellant made several notable concessions. These included that (1) Rule 3.853 is not the exclusive vehicle through which a circuit court may order post-conviction DNA testing, and (2) a convicted person can, in fact, obtain DNA testing on consent and – in counsel's own words – "outside the Rule." R. 490-491.

In addition, Appellant conceded at the hearing that (1) the Attorney General is not a "party" in capital litigation, but merely serves (at most) as the State Attorney's co-counsel for the party these offices represent: the State of Florida (R. 493-494); (2) the Attorney General did not challenge the prior State Attorney's authority to enter into a virtually identical Agreement and Order without a Rule 3.853 motion in 2010, and that 2010 Order was valid despite a lack of notice to the Attorney General (R. 514); (3) the Attorney General in fact invoked the 2010 Agreement and Order to defeat other claims brought by Mr. Sireci in subsequent litigation (*id.*); and (4) other than the AG's own proffered interpretation of the statutes cited in its motion, the AG had no judicial precedent or authority supporting its claim that as "co-counsel" it may independently oppose or override a local prosecutor's decisions in Circuit Court proceedings. (R. 496-497.)

Ruling from the bench, the circuit court denied Appellant's motion. Consistent with Appellant's concession at the hearing, and with longstanding practice statewide, the court found that Rule 3.853 is not the exclusive vehicle through which a convicted defendant may obtain DNA testing. The court further concluded that the May 2021 Joint Stipulation and Order – like the 2010 order agreed to by a prior State Attorney – was not made pursuant to Rule 3.853, and that the Florida Constitution conferred on the State Attorney the discretion to enter into such agreements for DNA testing "outside" the Rule, i.e., without requiring formal motion practice or detailed findings by the Circuit Court. R. 529. The court found that reading the Florida Constitution and cited statutes as a whole, the State Attorney – not the Attorney General -- is the constitutionally designated "prosecuting officer," and empowered to act as lead counsel in all Circuit Court proceedings. R. 521-524. By contrast, Fl. St. §16.01(6) authorizes the Attorney General to "assist" the State Attorney. R. 524.

The circuit court noted various ways in which chaos and confusion would result from the Attorney General's bid to serve as co-equal counsel, with the power to oppose or challenge the State Attorney's decisions in circuit court proceedings. The court reasoned that unlike with criminal defendants (or civil litigants), if co-counsel for "the State" have conflicting views on how

to proceed (for example, whether to call a particular witness at a hearing or not), a court cannot ask the "client" to decide which counsel's views should prevail. Thus, the court observed, Appellant's novel interpretation of the law risked making the circuit court "the managing lawyer for the State of Florida on every death penalty case, on any occasion when the State Attorney for a particular jurisdiction and the assigned Assistant Attorney General don't agree on how to proceed" – a highly impractical scenario that would exceed the court's authority and burden its limited resources. R. 518.

As for Appellant's complaint that it had received no formal notice of the 2021 Order before it was filed, the court found that the defense had made a "fair argument" that the parties were "simply asking the Circuit Court to engage in a ministerial function," and the proposed order they submitted in May was not a "motion" or "pleading" requiring service on the AG under Fl. R. Crim. Proc. 3.851(f). However, the court determined that it did not need to decide whether Appellant was entitled to be served with a copy of the proposed order, because Appellant had no standing to veto the State Attorney's consent to DNA testing in any event, and the State Attorney could simply resubmit the same agreed order for the court's signature. Thus, any alleged defect in notice had been cured by giving Appellant its requested stay and an opportunity to be heard at argument. R. 524-525.

Finally, although the circuit court permitted argument on Mr. Sireci's judicial estoppel claim, it declined to rule on that claim, because the statutory and constitutional authorities cited provided independent grounds for ruling in Mr. Sireci's favor. R. 536-537. The court did note, however, that "Mr. Sireci has been on death row for the majority of his life," and made "an agreement [with the State] back in 2010" to allow future DNA testing without litigation; this history supported the court's conclusion that no legitimate purpose would be served by delaying the execution of the parties' agreement by providing Appellant with the pre-filing notice it requested, *i.e.,* by requiring that Appellant be served with a stipulated order that it had no authority to challenge. R. 520-521.

The court directed Appellant to prepare an order summarizing the ruling and directing the evidence clerks to transfer the physical evidence to their designated laboratories as agreed to by counsel.[7] R. 528.

[7] The Order entered by the circuit court in May 2021 effectuated the parties' agreement to submit DNA and fingerprint evidence for reanalysis, using forensic methods unavailable at the time of Mr. Sireci's trial. Appellant challenged only the portion of the stipulated order that relates to DNA testing. However, the entire order was stayed pending appeal, and the circuit court has no authority to direct the evidence custodians to carry out the portion of the order that Appellant has not challenged. Thus, the fingerprint analyses also have been delayed pending resolution of this appeal.

On October 15, 2021, the Attorney General filed its Notice of Appeal. On November 15, 2021, Mr. Sireci moved to dismiss the appeal for lack of jurisdiction, and Appellant filed its response to the motion on November 24, 2021. By order dated January 6, 2022, this Court reserved decision on Mr. Sireci's Motion to Dismiss pending briefing on the merits of the appeal.

ARGUMENT

I. As Appellant Expressly Conceded Below, Rule 3.853 is Not the Exclusive Vehicle Through Which a Convicted Defendant May Obtain DNA Testing in Florida – Which Defeats the Only Claim Appellant Raises in this Court

Appellant raised various legal challenges to the 2021 Stipulated Order in the proceedings below. But in this Court, Appellant has narrowed its case to one single issue: "Whether the circuit court's order for DNA testing violates Florida Rule of Criminal Procedure 3.853." App. Br. at (i). However, Appellant expressly conceded below that courts are free to enter consent orders for DNA testing outside the provisions of Rule 3.853 – just as the State Attorney did here, and as her predecessor did in 2010. This concession is fatal to its entire appeal.

Beyond Appellant's express concession, there are numerous other reasons why this Court should find that Rule 3.853 is not, and was never intended to be, the exclusive vehicle through which a State Attorney or a

circuit court may submit evidence for post-conviction DNA testing. These include (1) the text of the Rule, and (2) the Rule's undisputed purpose of facilitating, not burdening, timely access to post-conviction DNA testing.

A. Appellant's Concession Waives Its Sole Appellate Claim

At oral argument below, Judge Wooten began the hearing by asking the Attorney General's Office ("AG") to confirm the Court's understanding that one of several grounds on which the AG had challenged the legality of the 2021 Order for DNA Testing was its claim that "the only vehicle or method for Mr. Sireci to obtain additional DNA testing would be pursuant to" Rule 3.853. R. 488-491. Assistant Attorney General Scott Browne, appearing for the AG, answered affirmatively. R. 495. The Court's next question to the AG, and the AG's response, was as follows:

> **The Court**: All right. And is it your position that 3.853 is the only method by which a defendant could have evidence re-tested, or DNA evidence re-tested?
>
> **Mr. Browne**: But, your Honor, that's – that's interesting, because –<u>no, I'm not claiming that – that under no circumstances could a consent agreement be entered</u>. I'm – and certainly, <u>that's not the Attorney General's position</u>.

R. 490-91 (emphasis supplied).

After stating that the Attorney General's Office might itself consent to DNA testing without litigation "in the appropriate case," Mr. Browne went on to again concede the non-exclusivity of Rule 3.853 as a vehicle for court-

ordered testing: "we're not saying that you can only go by the Rule." R. 491 (emphasis supplied).[8]

This record could not be clearer: Appellant repeatedly and expressly conceded that the Legislature's enactment of Rule 3.853 did nothing to curb the circuit courts' longstanding authority to effectuate consent orders for DNA testing that are -- in the Attorney General's own words -- "outside the Rule." But in this Court, Appellant seeks to abandon this concession and claim just the opposite. See App. Br. at (i) (Appellant's sole "issue" for appeal is "whether the circuit court's order for DNA testing violates Rule 3.853.").

It is axiomatic that a party may not litigate a claim on appeal that it has waived below. *See, e.g., Jones v. State*, 998 So.2d 573, 581 (Fla.2008). Such waivers may arise either from the party's failure to raise a legal claim in the trial court, *see id.*, or by making concessions of fact or law that are relied on by the trial court in issuing the very ruling that the party challenges on appeal (sometimes known as the "invited error" doctrine). *See, e.g.,*

[8] Having disposed of that issue, the circuit court devoted the remainder of the hearing to the Attorney General's other claims, such as whether the AG was required under other provisions of Florida law (such as Fl. St. §16.01(6) and Fl. R. Crim. Proc. 3.851(f)) to notice and an opportunity to be heard on a consent order for DNA testing before its entry; and what controlling or preclusive effect, if any, the 2010 Consent Agreement for DNA Testing entered into by the State and Mr. Sireci might have on the AG's current challenge. See, e.g., R. 527-528.

Saridakis v. S. Broward Hosp. Dist., 468 F. App'x 926, 932 (11th Cir. 2012). Indeed, "it is 'waiver in the truest sense' when a party goes 'beyond failing to raise a relevant argument' and in fact 'affirmatively relie[s] on' a 'standard that they now argue is erroneous.'" *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 65 (11th Cir. 2013) (*citing G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012)).

Surely, Appellant cannot now complain that the circuit court "violate[d]" a statute whose terms it repeatedly and expressly told the court were not controlling. That Appellant would do so now – much less make such a claim the sole ground for its appeal – is troubling. That choice may reflect Appellant's current awareness that absent a "hook" under Rule 3.853 -- which contains a specific provision (Rule 3.853(f)) allowing appeals to be taken from orders granting or denying a "motion" filed under the Rule – this Court would dismiss this appeal for lack of jurisdiction, as the ministerial order of the circuit court otherwise does not provide grounds to appeal under Fl. Const. art. V, § 3(b)(1)-(10*). See* Appellee's Motion to Dismiss for Lack of Jurisdiction, filed Nov. 15, 2021. A desperate bid to confer jurisdiction cannot erase Appellant's prior waiver of that very claim.

B. The Circuit Court Correctly Found that Rule 3.853 is Not the Exclusive Procedural Vehicle Through Which a Defendant May Obtain Post-Conviction DNA Testing

Even if the Attorney General had not expressly conceded as much, the circuit court correctly found that the State and a convicted defendant may conduct DNA testing outside the detailed procedures set forth in Rule 3.853. No court has held otherwise in any case since Rule 3.853's enactment twenty-one years ago.

1. By its Plain Terms, Rule 3.853 Governs Only Contested Motions for DNA Testing, Not Agreed DNA Orders

The Attorney General's argument that the circuit court's order "violates Florida's comprehensive rule-based scheme governing post-conviction DNA testing" (App. Br. at 16) ignores the text of the Rule itself. The Rule details only those procedures that must be followed when a circuit court is asked to adjudicate a request for DNA testing filed by a defendant made over the State's objection; it does not apply when the State Attorney agrees to testing.

Rule 3.853 and its companion statutes, Fl. St. §925.11 and §925.12,[9] concern cases where the defendant is the moving party, and the prosecutor is the respondent opposing relief. It has no provisions concerning cases in

[9] Fl. St. §925.12 applies to cases in which the defendant-movant pled guilty or nolo contendere to the underlying offense; it contains similar procedures to §925.11 but heightened substantive requirements for the moving defendant to obtain an order for DNA testing.

which the parties jointly seek the Court's ministerial assistance in effectuating their agreement for DNA testing. For example, §925.11(1)(a) ("Petition for examination") speaks only of petitions for DNA testing filed by a convicted person individually, not joint applications with the State:

> A person who has been tried and found guilty of committing a felony and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate that person or mitigate the sentence that person received.

Fl. St. §925.11(a)(1) (emphasis supplied).

Similarly, Section 925.11(2) requires that in such cases, "the petition for post-sentencing DNA testing must be made under oath by the sentenced defendant," and must contain, inter alia, "a statement that the sentenced defendant is innocent[.]" Fl. St. §§925.11(2)(a), (c); see also Rule 3.853(b)(3) (requiring that defendant-movants include, "under oath . . . a statement that the movant is innocent"). Clearly, these requirements do not apply to stipulated orders filed jointly by the State and a convicted person, since the prosecuting authority could not (and would never be expected to) attest "under oath" to the defendant's actual innocence, and certainly not before DNA testing is performed.

Further, Rule 3.853(b)(6) requires the movant to certify "that a copy of the motion has been served on the prosecuting authority." And Rule 3.853(b)(2) and (3) specify when and under what circumstances the court "shall order the prosecuting authority to respond to the motion," and how the court shall adjudicate the merits (issue an order, hold a hearing, etc.) "[u]pon receipt of the response by the prosecuting authority." See also §§ 925.11(2)(c), (d) (same). There would be no reason for a court to order a "response" by a prosecutor to a stipulated application for DNA testing that was filed jointly by the prosecutor and the defense.

Appellant's claim that only "a valid waiver" can relieve a circuit court of its duty to ensure that the detailed provisions of Rule 3.853 are followed in every DNA testing case before allowing evidence to be sent to a DNA testing laboratory (App. Br. at 16) is a fiction. There is no "waiver" provision anywhere in Rule 3.853. And in contrast to the procedures for briefing and court findings laid out in the Rule for contested DNA motions, the Legislature gave no guidance or direction to the circuit courts as to what form such a "waiver" might take; which provisions (if any) of the Rule can or cannot be waived; or what would otherwise be required for said waiver to be "valid."

Appellant's claim that both the State Attorney and the Attorney General must consent to a purported "waiver" (if one was required) of any or all of

Rule 3.853's provisions is even more farfetched. The Attorney General is conspicuously absent from the text of both Rule 3.853 and §925.11 -- a notable contrast to other rules of post-conviction procedure in which the Legislature expressly included that office in one or more aspects of the litigation process, naming the Attorney General in addition to lead counsel for the "opposing party" (*i.e.,* the State Attorney).[10]

2. Rule 3.853 is a Remedial Statute, Designed to Facilitate – Not Burden – Defendants' Access to DNA Testing

Rule 3.853 was enacted in 2001 in response to certain highly publicized cases of convicted persons who maintained their innocence, yet were unable to use newly available DNA testing to exonerate themselves

[10]*Compare, e.g.,* Rule 3.853(b) (directing service only upon "the prosecuting authority"); Rule 3.853(c)(2) ("If the [defendant's] motion is facially sufficient, the prosecuting authority shall be ordered to respond") and Rule 3.853(c)(3) (specifying further procedures "[u]pon receipt of the response of the prosecuting authority") *with* Fl. R. Crim. Proc. 3.851(f) ((1)(All pleadings in the postconviction proceeding shall be filed with the clerk of the trial court and served on the assigned judge, opposing party, and the attorney general") (emphasis supplied). Appellant has cited no case, statute, or rule undermining that the circuit court's conclusion that references to the "prosecuting authority" in Rule 3.853 refer only to the State Attorney (R.464, 519-520), although the State Attorney may elect to seek the assistance of the Attorney General in capital cases involving contested Rule 3.853 litigation. And if the Attorney General is not required by statute to be served with Rule 3.853 motions, nor to respond to them, then clearly the Attorney General's consent to resolve such proceedings outside of court is not required.

because (1) the State opposed the release of evidence, and (2) Florida law lacked an express procedure authorizing courts to override the State's objection and order the testing, particularly in cases where the person seeking testing had exhausted their other post-conviction remedies years earlier.[11] To fill this gap in the law, Rule 3.853 and its companion statute created – for the first time – a vehicle for convicted persons to petition a circuit court to order state officials to release evidence for DNA testing, if needed. In such cases, the Rule sets forth certain procedures for the defendant-movant to follow (Rule 3.853(a)) and certain findings the court must make to grant the motion over the State's objection (Rule 3.853(c)(5)).

This State's commitment to ensuring timely and meaningful access to post-conviction DNA is further evidenced by the law's subsequent history. Between 2004 and 2010, this Court and the Florida Legislature have amended Rule 3.853 and its companion statute, Fl. St. §925.11, six times. Each of these amendments expanded the law's scope, i.e., to remove procedural hurdles and make DNA testing more readily available to

[11] *See Amendments to Florida Rules of Criminal Procedure Creating Rule 3.853* (DNA Testing), 807 So.2d 633 (Mem.) (Fla. 2001); *id.* at 635-37 (Anstead, J., concurring in part) (*citing, inter alia, Dedge v. State,* 723 So.2d 322 (Mem) (Fla. 5th Dist. Ct. App. 1999)).

convicted defendants. For example, the 2004 and 2005 amendments expanded the time in which to file DNA testing motions, and the 2006 amendments removed the filing time limitations and "due diligence" requirements altogether.[12] The 2007 amendments removed procedural hurdles relating to newly discovered evidence claims; the 2009 amendments improved the process for appointing counsel for indigent defendants; and the 2010 amendments expanded the pool of private laboratories eligible to conduct testing under Rule 3.853(c)(7).[13]

At no time since the enactment of Rule 3.853 two decades ago has any court held -- or, insofar as the undersigned are aware, even entertained a claim -- that Rule 3.853 goes so far as to "regulate" all post-conviction DNA testing in the State, as Appellant claims. And certainly, neither this Court nor any other has held that Rule 3.853 precludes a State Attorney from agreeing

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[12] *See Amends. to Fla. Rule of Crim. Proc. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 884 So. 2d 934, 937 (Fla. 2004); *In re Amends. to Fla. Rule of Crim. Proc. 3.853(D)*, 935 So. 2d 1218 (Fla. 2005); Ch. 2004-67, § 1, Laws of Fla. (amending § 925.11, Fla. Stat. (2001)); *In re Amendments to Fla. Rule of Criminal Proc. 3.853(d)*, 938 So. 2d 977, 978 (Fla. 2006); Ch. 2006-292, § 1, Laws of Fla. (amending § 925.11, Fla. Stat. (2001)).

[13] *In re Amends. to Fla. Rules of Crim. Proc*. 3.170 And 3.172, 953 So. 2d 513, 515 (Fla. 2007); *In re Amends. to the Fla. Rules of Crim. Proc.*, 26 So. 3d 534, 537 (Fla. 2009); *In re Amends. to Fla. Rule of Crim. Proc. 3.853*, 43 So. 3d 688 (Fla. 2010).

to such testing in the interests of justice, nor from presenting the circuit court with a simple joint order to effectuate the parties' agreement that bypasses the detailed procedures that govern litigated claims in Rule 3.853.

"[R]emedial statutes should be liberally construed in favor of granting access to the remedy provided by the Legislature." *Bruner v. GC-GW, Inc.*, 880 So. 2d 1244, 1246 (Fla. Dist. Ct. App. 2004) (*citing Golf Channel v. Jenkins*, 752 So. 2d 561, 565–66 (Fla. 2000)). Requiring the circuit courts to proceed under Rule 3.853 in each case would violate this canon, because it would make DNA testing in many cases more burdensome than before the Rule was enacted.

Before Rule 3.853, State Attorneys were free to consent to convicted persons' requests for DNA testing at agreed-upon laboratories, and to ask a circuit court to enter a ministerial order for the transfer of that evidence. But if Appellant's claim here prevails, each request for DNA testing, no matter how meritorious or urgent, would need to be accompanied by a formal motion and court proceedings under Rule 3.853 (unless the Attorney General and the State Attorney agreed to an undefined "waiver" of some or all of the Rule's requirements). Some circuit judges may well read the Rule's text to require – even in agreed cases – briefing, judicial review of a decades-old record, an evidentiary hearing, and written findings. Even if the result (a DNA

testing order) is the same, this unnecessary burden will not only tax the already overburdened circuit courts, but delay DNA testing that could exonerate the innocent and identify the guilty.

Further, this Court, like many others, has been appropriately reluctant to follow the doctrine of *expressio unius* ("the expression of one thing excludes others") unless the statutory language in question is clearly intended as a limitation. In *Nichols v. State ex rel. Bolon*, 177 So. 2d 467, 468 (Fla. 1965), for example, this Court rejected an argument that a Florida Constitution article's direction to the legislature to exclude people convicted of certain crimes from political office precluded the legislature from enacting any other limitation on who could hold office, and cited *State ex rel. Moodie v. Bryan*, 39 So. 929 (Fla. 1905), which held that *expressio unius* "should be applied with great caution to the provisions of an organic law relating to the legislative department[.]"[14]

[14] For a longer discussion of the perils of applying *expressio unius* to hold that a statute or constitutional provision that regulates state or individual action in one area necessarily precludes other acts which are not expressly covered by the provision in question, *see* Thomas C. Marks & Pamela Buha, *The Florida Supreme Court: Judicial Activism & Judicial Self-Restraint – Some Examples*, The Federalist Society (2007) at 6-8, *available at* https://fedsoc.org/commentary/publications/the-florida-supreme-court-judicial-activism-judicial-self-restraint-some-examples.

Under these principles, given the lack of any textual or historical support for Appellant's claim, this Court should hesitate to find that Rule 3.853 and § 925.11's procedures for adjudicating contested DNA motions includes a prohibition on DNA testing with the consent of the State Attorney. Since there is no statutory language or other indication that the Legislature intended to in any way supplant the State Attorney's longstanding authority to consent to DNA testing in any post-conviction case where it serves the interests of justice, the Attorney General's claim fails.

3. Appellant Has Never Challenged the Longstanding Practice of State Attorneys and Circuit Courts Who Have Conducted DNA Testing Outside Rule 3.853

The lack of merit to the AG's interpretation of Rule 3.853 is further underscored by its notable silence since 2001 as State Attorneys and Circuit Courts across Florida regularly entered DNA testing agreements and orders outside the Rule. Of course, the most telling example is its failure to challenge the former Ninth Circuit State Attorney's authority to do so in this very case in 2001 (see Part IV.C, *infra*). But this has also been standard practice in capital and non-capital cases for two decades. See R. 383-388 (Affidavit of S. Miller, detailing and appending representative sample of stipulated orders for DNA testing issued by circuit courts since 2001, without involvement of or notice to Attorney General); R. 421-424 (DNA testing order

in *State v. Glover*) (granting DNA testing in remanded post-conviction capital case, outside procedures of Rule 3.853, without involvement of or notice to Attorney General).[15] Many of these cases involved (1) orders for DNA testing that followed prior, unsuccessful efforts to litigate claims such testing over the State's objection (as with Mr. Sireci's unsuccessful Rule 3.853 petition in 2002), (2) orders for DNA testing at private laboratories by agreement of the parties, even without "good cause" findings; and/or (3) testing that yielded new DNA evidence exonerating the defendant. R. 389-426.

The discretion that Florida law affords State Attorneys has already reaped significant benefits for the justice system. Most recently, in September 2020, Robert DuBoise was exonerated and freed from prison after 37 years in prison based on newly available DNA test results. Mr.

[15] *Glover* involved a request for DNA testing by a defendant convicted of murder and sentenced to death in Duval County in 2013, whose death sentence (but not conviction) was overturned by this Court. *See Glover v. State,* 226 So.3d 795 (Fla. 2017). He is presently facing a resentencing hearing at which the State Attorney has indicated she will again seek the death penalty. After initially opposing Mr. Glover's request, Mr. Glover sought an order for DNA testing in the circuit court; after the court indicated its intent to grant the motion, the State Attorney agreed to allow the testing to proceed at a private laboratory. The circuit court then entered an agreed order prepared and submitted outside Rule 3.853. The Attorney General had no involvement in the *Glover* proceedings and, notably, has not moved to stay or reconsider the *Glover* order.

DuBoise had been wrongly convicted of murder and sentenced to death in Hillsborough County in 1985. Like Mr. Sireci, he sought post-conviction DNA testing under Rule 3.853 soon after the Rule's enactment but was denied by the courts; however, in 2019, the newly formed CIU in the office of the 13th Circuit State Attorney agreed to allow the testing to proceed, through a consent agreement reached outside Rule 3.853. The results – tested at the same private DNA laboratory agreed to by the parties in Mr. Sireci's case – were profoundly exculpatory. They revealed that (1) seminal fluid found in the rape-murder victim did not come from Mr. DuBoise, and (2) another man whose DNA was in the national database, with a history of violent crime and no connection to Mr. DuBoise, was the source of the DNA. Upon receipt of the results, the State Attorney's Office declared Mr. DuBoise "innocent of the charges against him" and joined his counsel in a motion to vacate his conviction and sentence. Justice was done because of this agreed-upon testing, and fortunately, no delays from unnecessary Rule 3.853 litigation prolonged the time that this innocent man had already spent in prison.[16]

[16] Dan Sullivan, " An exonerated man adjusts to life in Tampa after 37 years away," Tampa Bay Times, September 13, 2020, available at https://www.tampabay.com/news/florida/2020/09/13/an-exonerated-man-adjusts-to-life-in-tampa-after-37-years-away/# and "Former Florida Death Row Prisoner Robert DuBoise Released After 37 Years in Prison," American Bar Association, October 28, 2020, available at https://www.americanbar.org/groups/committees/death_penalty_representa

* * *

For all of these reasons – including, but not limited to, Appellant's direct concession below – this Court should find that Rule 3.853 does not preclude consent agreements for DNA testing of the sort reached by the parties in this case, and should affirm the circuit court on the sole issue Appellant has raised in its merits brief.

II. The State Attorney Had the Authority to Present the Circuit Court with a Stipulated DNA Testing Order Without Notice to or a "Waiver" by Appellant

This Court should also reject Appellant's contention that its statutory designation as "co-counsel" in capital collateral proceedings invalidates any DNA testing agreement between the State and a convicted defendant unless the Attorney General is notified of and expressly approves of the terms. There is no precedent that would justify interpreting Fl. St. §16.01(6) to give Appellant an effective veto over agreed-upon DNA testing, and Appellant's concessions and past conduct refute its novel claim.

A. Appellant Has Conceded that in 2010, the Former State Attorney and the Circuit Court Judge Legally Authorized DNA Testing Under the Exact Same Procedures That Appellant Now Claims Are Unlawful

tion/project_press/2020/fall-2020/florida-death-row-prisoner-robert-duboise-exonerated-released/.

First and foremost, the Attorney General has notably drawn no distinction between the 2021 Order it asks this Court to nullify and what it concedes was a perfectly valid Consent Agreement and Order for DNA Testing stipulated to by the former State Attorney and Mr. Sireci and duly entered by the Circuit Court in 2010 that is identical, in all material respects, to the one at issue here.

That earlier proceeding (1) was conducted wholly outside Rule 3.853, (2) did not include any notice to the Attorney General before either the Consent Agreement was signed or before the circuit court entered the parties' 2010 Order to Release Evidence to a private DNA laboratory, and (3) included a written, binding contract between the parties (R. 262-264) in which the parties expressly agreed to remove all future DNA testing requests outside the procedures for contested litigation under Rule 3.853.

In its brief, Appellant concedes that the 2010 Agreement and Order were entered "without notice to" the Attorney General. (App. Br. 10.) Since no notice was given, the Attorney General of course could not have, and did not, concur with the State Attorney's decision to "waive" the so-called "requirements" of Rule 3.853 before the 2010 order was entered. Critically, Appellant did not then object, nor claim that any rules regarding Florida's "comprehensive" DNA testing laws were violated, as it now does. And in

2021, Assistant Attorney General Scott Browne (who was also assigned to Mr. Sireci's case in 2010, *see* R.495-497) conceded that the Attorney General's Office has never challenged, and does not challenge, the authority of the former State Attorney to unilaterally (1) enter into the 2010 Agreement and Order, and (2) bind the State to its terms. R.514; *see also* R.269-270.

Appellant's instant appeal is premised on its claim that entry of a consent order for DNA testing without notice to and the prior consent of the Attorney General is per se unlawful. Yet in its brief, Appellant does not once attempt to explain how the 2010 and 2021 Orders are distinguishable. It has cited no intervening change in law, nor any distinction based on the text or procedural history of the Orders. Indeed, other than the names of the State Attorney and presiding Judges who signed them; some of the items of evidence submitted for testing; and the designated private laboratories (all of which are fully accredited), these Orders are virtually identical. Compare R. 269-270 with R. 103-106; *see also* R.512-14 (detailing history).

Because the Appellant has offered no such grounds, its concessions (in both its words and actions) that the 2010 Order was lawfully entered wholly negate its challenge to the 2021 Order. *See also* Part II A and B, *infra.*

B. Appellant Cannot Rewrite the Parties' 2010 Agreement to Require the Consent of the Attorney General Before a DNA Testing May Be Conducted

Having conceded the validity of the 2010 Consent Agreement, and that the former State Attorney had the authority to unilaterally bind the State to its terms, Appellant next argues that this Agreement requires both the State Attorney and the Attorney General to expressly "agree" to DNA testing before it may be ordered (App. Br. 26). This argument fails, for several reasons.

First, Appellant did not raise this novel interpretation of the parties' 2010 contract below (*i.e.,* that any consent to DNA testing by "the State," as used throughout the Agreement, must include the Attorney General), despite extensive briefing and argument as to the Agreement's history, terms, and effect. It is therefore waived.

Second, the conduct of each "co-counsel" for the State over the last 11 years belies Appellant's claim. If the parties intended the Attorney General to be a necessary participant in all future DNA testing agreements or orders, then, among other things: (1) the AG would have been listed in, and/or a signatory to, the 2010 Agreement; (2) the Assistant State Attorney who drafted the 2010 Order would have notified and involved the AG at that time; (3) the AG would have challenged the lack of notice to/involvement of the AG in negotiating the 2010 Agreement; and (4) the AG, after becoming aware of the Agreement and affirmatively invoking its terms in subsequent litigation against the AG for years, would have notified the State Attorney that

it wanted to exercise its option of notice/consultation each time that Mr. Sireci asked the State Attorney's consent to DNA testing between 2012-2021; and (5) the AG would have disputed the validity of the 2010 Order to Release Evidence (to which it was not a signatory, nor waived its purported "rights"). But neither the AG nor the former State Attorney did any of these things. That is because they knew that the Agreement provides that the State Attorney, whoever he or she may be, has the authority to consent to DNA testing on behalf of the State in this case.

Third, the very "agency" rules that are (incorrectly) cited in Appellant's brief actually undercut its claim. See App. Br. 22-24. Appellant argues that the State Attorney has no power to unilaterally bind "the State" to a DNA testing agreement, because it must act jointly with its "co-agent," the Attorney General. Even assuming, arguendo, that the agency law of private parties covers the State of Florida's statutorily and constitutionally designated counsel, Appellant misstates the law. Appellant cites a Tenth Circuit case from 1981 and nearly century-old decision of this Court (*Chapman v. St. Stephens Protestant Episcopal Church*, 136 So. 238 (Fla. 1931)) to argue that the unanimous consent of a party's agents is required to act on the principal's behalf, unless one agent has been given express authority to act

independently. But Appellant ignores Florida's own statutes governing "Agents and Co-Agents," which was amended in 2011 to state otherwise.[17]

III. There Was No Defect in "Notice," and the Circuit Court Correctly Found that Appellant Suffered No Prejudice, Because Appellant Had No Authority to Veto the Order

Appellant's contention that statutory provisions outside Rule 3.853[18] also provide grounds to quash the circuit court's 2021 Order is also unavailing.

A. Appellant Has No Right to Notice Before a Stipulated DNA Testing Order is Entered

Appellant has offered no precedential support for its claim that as "co-counsel" for the State, it was entitled to be served with a copy the proposed 2021 Order before entry by the circuit court. Neither caselaw nor past practice in any way suggests, much less holds, that such notice is required. Instead, Appellant's claim rests on a novel interpretation of two statutes that

[17] *See* F.S.A. § 709.2111 ("A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently") (emphasis supplied); *see also Rosenkrantz v. Feit,* 81 So. 3d 526, 529 n.2 (Fla. Dist. Ct. App. 2012) (citing statute).

[18] Appellant has interspersed such arguments throughout its brief despite representing to the Court that the sole issue for appeal is whether the circuit court's order "violates Rule 3.853." Because they are in some respects analytically distinct from its arguments premised on Rule 3.853's text (which notably omits any reference to the Attorney General), they are addressed separately here.

have never been so applied: Fl. St. §16.01(6)'s designation of the Attorney General as "co-counsel of record in capital collateral proceedings," and Fl. R. Crim. Proc. 3.853(f)'s directive that "[a]ll pleadings in the postconviction proceeding shall be . . . served on the assigned judge, opposing party, and attorney general." See, e.g., App. Br. at 2, 3, 12-13.

Appellant's attempt to transpose these rules to the filing of agreed DNA testing orders fails, for at least three reasons.

First, a request that a court enter an agreed order for DNA testing is not a "capital collateral proceeding" under Fl. St. §16.01(6). The submission of a proposed order seeks only to effectuate an agreement for testing evidence that could (if favorable) provide grounds for a defendant to file a new application for post-conviction relief under Rule 3.850 or Rule 3.851. But filing the proposed order is not a "proceeding" that collaterally attacks Mr. Sireci's conviction. Indeed, the United States Supreme Court has found that even contested DNA litigation is not equivalent to a habeas corpus proceeding. *See Skinner v. Switzer*, 562 U.S. 521 (2011). As the *Skinner* court explained, even if a prisoner hopes that the DNA testing sought will someday provide new grounds to challenge his conviction, a motion for DNA testing is not such a challenge; it seeks only access to evidence that may prove exculpatory (or may not), and thus does not "necessarily imply" the

invalidity of, or otherwise constitute a collateral attack on, the underlying conviction. *Id*. at 534-36.

Second, as the circuit court noted, due process requires only that a party is noticed, through at least one of its counsel. R. 493. Appellant repeatedly complained below that the Attorney General, as an alleged "party to [this] litigation," was entitled to be served with the proposed order, and faulted Mr. Sireci for failure to follow this "basic" rule. R. 491-93. But the circuit court quickly honed in on Appellant's fundamental error -- "The party in this case is the State of Florida [not the Attorney General], correct?" – a point Appellant was forced to concede. R. 493. Appellant went on to concede (as it must) that the State, through at least one of its counsel, had been served with the proposed order (as the State Attorney had in fact prepared and jointly filed it).

That leaves only Appellant's claim to notice based on Rule 3.851(f) – which is clearly inapplicable here. For one, the fact that the Legislature included this mandatory service upon the Attorney General only in Rule 3.851 and not in Rule 3.853 or any other relevant provision of law shows that its scope was intended to be limited to Rule 3.851 petitions (those seeking to overturn a conviction or death sentence). For another, Rule 3.851(f)(1) expressly limits required service on the AG to "pleadings" – not stipulated

orders that provide for nothing more than the transfer of DNA evidence to a laboratory. *See* Black's Law Dictionary, 11th ed. 2019 ("Pleading: A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses").

B. The Circuit Court Correctly Found That There Was No Prejudice to Appellant from Any Defect in Notice, Because Florida Law Does Not Give Appellant a Veto Over the State Attorney's Decision to Allow DNA Testing

Even assuming, arguendo, that Rule 3.851(f)(1)'s requirement that the AG be served with "pleadings" in capital cases could be read broadly enough to require service of a proposed stipulated order for DNA testing, the circuit court correctly found that any defect in notice here had been cured by granting the Attorney General a temporary stay of the Order and the opportunity to argue its position at the hearing in September 2021. *See* R.492, R. 497-98.

This is because there is no provision of Florida law giving the Attorney General what it is actually seeking in this case: an effective veto over the State Attorney's discretion to grant DNA testing to a convicted defendant. For Appellant seeks not just "notice" but the right to unilaterally demand that the circuit court vacate an order for DNA testing agreed to by the State Attorney; to insist on motion practice and a full hearing on the merits under

Rule 3.853 – with two attorneys for the State taking diametrically opposed positions in that proceeding – before DNA testing may be conducted; and to unilaterally invoke other legal avenues (such as appealing a new DNA testing order) to block or delay DNA testing. *See* R.515. This it cannot do.

The circuit court correctly found that (1) it is the State Attorney – not the Attorney General – in whom Florida law vests the ultimate discretion to consent to DNA testing requests; and (2) the Attorney General's proposed role as "co-lead" counsel, whose consent is required before the State may reach an agreement with a defendant in any such matter, would be a recipe for chaos, confusion, and inefficiency.

1. The State Attorney is the Constitutionally Designated "Prosecuting Officer" in All Circuit Court Matters

Both Fl. Rule Crim. Proc. 3.853 and Fl. St. §925.11 omit any mention whatsoever of the Attorney General's role in DNA testing motions filed in the circuit courts. Instead, both exclusively refer to "the prosecuting authority." See, e.g., Rule 3.853(b) (directing service upon "the prosecuting authority"); Rule 3.853(c)(2) ("the prosecuting authority shall be ordered to respond" to a facially sufficient motion); Rule 3.853(c)(3) (specifying procedures "[u]pon receipt of the response of the prosecuting authority").

Florida law clearly vests the role of "prosecuting authority" in in the State Attorney. Under Fl. Const. Art. V., §17 ("State attorneys"), "[e]xcept as

otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts" in the Circuit (emphasis supplied). Similarly, Fl. St. §27.02 provides, "The state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party . . ." (emphasis supplied).

By contrast, the Attorney General's claim that it may exercise veto power over consent orders for DNA testing comes not from any constitutional provision,[19] but from a single subsection of Fl. St. §16.01(6). That subsection states only that the Attorney General "[s]hall act as co-counsel of record in capital collateral proceedings." But Appellant has cited no authority to

[19] Appellant also suggests, somewhat obliquely, that the authority it seeks to exercise in the DNA testing context may derive from the Florida Constitution, in that Art. IV, §4(b) designates the Attorney General as the "chief state legal officer." *See, e.g.,* App. Br. at 17, 19. Yet below, Appellant made no such claim, and in fact conceded that any such authority must be specifically conferred by statute. *See* R. 521 ("The Court: 'You would agree that Assistant Attorney Generals don't walk into court and appear and handle cases other than ones designated by statute?' A: "Absolutely, your honor, that is true").

Applying Art. IV, §4(b) in this fashion would also seem to have no logical limits. Would Appellant's proffered authority as "chief state legal officer" also give the Attorney General the power to demand notice of, and oppose the positions of, any attorney for the state (civil or criminal) in any Florida court, merely by citing its own place atop the hierarchy of "legal officers"? That is authority the Attorney General clearly does not have – in DNA testing proceedings, or any other – absent an express statutory grant.

support such a sweeping interpretation of this provision (see R.497-98). For as the Circuit Court aptly explained, the purpose and scope of Fl. St. §16.01(6) is far more modest:

> [T]he reason the statute you -- the statute you cited to existed was because the legislature realized they would have to create a method for the AG's Office to assist State Attorneys around the State of Florida with complex litigation, litigation that required special expertise, litigation that might involve resources above and beyond the ability of a particular State Attorney's Office. My reading of that statute is, it was created to avoid the other way for you to appear, which would be for individual State Attorneys to swear you as a Special Assistant State Attorney, which creates various problems in regards to how you get paid. You know, labor law issues might suddenly come into effect. Issues about whether you could be terminated or not come into effect. So my reading of that statute is, it allows -- it authorizes you to appear.
>
> I do not read that statute to say that you're co-equal with the State Attorney. I read that statute as to authorize you to assist the State Attorney in these capital proceedings.

R. 523-24; see also R. 527.

2. Allowing the Attorney General a right to appear as "co-equal" counsel for the State would cause unnecessary chaos and delay

The circuit court also correctly identified significant practical barriers to adopting Appellant's proffered interpretation of the statute. Simply put, allowing the Attorney General an independent right to appear in the circuit court and object to any action taken by the State Attorney in a capital case would be a recipe for gridlock and confusion. This is in part because -- unlike with private parties who retain more than one counsel -- "the State" cannot

resolve its counsel's internal disputes, leaving it (at best) to the court, with no discernable end. The circuit court's hypotheticals in the hearing below made this clear. For example:

> If we were in the context of -- for example, Mr. Sireci's attorneys were in disagreement about how to proceed, and they say, well, Judge, you know, one -- one of us wants to call this witness, the other person doesn't, you know, typically in a situation with the defendant . . . I'll ask the defendant, Mr. Defendant, you've got two lawyers here, they have a disagreement about strategy, they both represent you, do you want to tell me how you want -- you know, which strategy you want to follow, which lawyer you want to listen to. And I think that would -- not that it probably would ever get to me, but if that happened, that would be the easy answer for me; I'll let the defendant hear from his lawyers and then, whatever decision he makes, that's going to be the decision we go with. And I assume the lawyer who lost out would either say, as long as it's on the record that I advised against this, or -- maybe, if they were so bothered, they might withdraw and say, I can't be involved in this litigation based on these decisions, I want out, which I would consider.
>
> Obviously, I can't send a letter to every citizen of the Ninth Judicial Circuit and say, hey, tell me which lawyer you want to have address this. But I can take note of the fact that the citizens of the Ninth Judicial Circuit elected Ms. Worrell to be their State Attorney. [And] they've indicated that they want her to be lead counsel on all of the cases pending in the circuit.

R. 521-23.

By contrast, as the court noted, if the Attorney General were truly "co-equal" counsel with the State Attorney, the circuit court could well be called upon to resolve any number of their disputes throughout the capital litigation process, a role that would far exceed its proper authority:

> [M]y concern is creating a set of circumstances where I now become the managing lawyer for the State of Florida on every death penalty case, on any occasion when the State Attorney for a particular jurisdiction and the assigned Assistant Attorney General don't agree on how to proceed. I mean, just give me -- let -- I'll give you some examples that bubbled through my mind, Mr. Browne. Let's say that we're having an evidentiary hearing. You stand up and say, Judge, we're going to call Witness X. And the State Attorney stands up and says, no, we're not, Judge, we don't want to call that witness.
>
> Is it then my job to decide whether the witness is or is not called?

R. 518.

Counsel for Appellant struggled to answer, at first hedging that it was "an interesting question," and proceeding to surmise that since it had been, in the past, "very unusual" for the State Attorney and Attorney General's Office to have divergent views, the court's hypothetical would not be "much of an issue going forward." R. 519. Similarly, when asked whether he had support for the proposition that a circuit court even "has the authority "to intervene and mediate [a] dispute [between attorneys for the state] and/or select which attorney's position is the appropriate position," AAG Browne admitted he had only a "speculative answer," which was to "vacate the [DNA testing] order and see where we go from there." R. 493.

Ultimately, Appellant had no answer – and offers none here – as to how a circuit court could or would resolve such disputes, if the Attorney General were granted the right to independently appear and oppose the

State Attorney's positions in any capital collateral case. Appellant's assurances that such conflicts will be rare is mere speculation. Certainly, the potential areas of dispute and gridlock if Appellant's position prevails are considerable. For example, if Appellant is allowed to independently object to an order transferring DNA evidence to a laboratory, would this mean that a State Attorney cannot allow the lawyer for a death-sentenced prisoner to make copies of crime scene photographs, depose a witness, or simply adjourn a hearing date without first giving the Attorney General "notice" and an opportunity to be heard in court? What if Appellant disagrees with the State Attorney about whether certain documents are privileged? Or if a capital case is remanded for resentencing, would the Attorney General have the right to object to a life-without-parole plea offer by the State Attorney and tie the case up in hearings and appeals (at great taxpayer cost) for years?

There is simply no cause to add such unnecessary costs, delays, and legal complications to the capital litigation process, in the DNA testing arena or any other. And as the circuit court found, there is ample reason to reject Appellant's invitation to do so.

IV. This Appeal is Procedurally and/or Equitably Barred

While each of Appellant's challenges to the order below are without merit, this Court has ample reason to decline to adjudicate them at all.

A. Appellant Has Failed to Establish That This Court Has Jurisdiction to Review the Circuit Court's Ministerial Order

For the reasons stated in Appellee's Motion to Dismiss for Lack of Jurisdiction (on which this Court reserved decision), incorporated by reference herein, and for other reasons, this Court should dismiss the entire appeal on jurisdictional grounds.

Appellant has failed to show that any of the mandatory-jurisdiction criteria set forth in Fl. Const. art. V, §3(b)(1) or (2) are satisfied. Nor does its appeal from this routine, ministerial order simply directing county officials to transfer evidence to a DNA laboratory warrant the Court's exercise of its discretionary jurisdiction under art. V, §3(b)(3)-(10). The order also does not fall into one of the limited categories of orders in criminal cases that the State may appeal under Fl. R. App. Proc. 9.140(c).

The only Rule 9.140(c) designation that Appellant offers as even a potential claim to jurisdiction is Rule 9.140(c)((J) – "an order . . . granting relief under Florida Rule[] of Criminal Procedure . . . 3.853." App Br. at 13. This assertion is, to say the least, ironic – and certainly unavailing. For the Attorney General's entire appeal is premised on its contention that the State Attorney, Mr. Sireci, and the circuit court should have, but did not, proceed under Rule 3.853. It is precisely because the 2021 order did not grant relief "under" Rule 3.853, and did not follow its detailed procedures governing

contested DNA litigation, that Appellant challenges the legality of the order. In other words, Appellant's primary basis for asserting jurisdiction is its claim that the circuit court did exactly what – throughout its merits brief – it faults the circuit court for not doing.

Moreover, it is not difficult to discern the larger problems that would result from allowing an appellant to obtain jurisdiction in this way. It risks allowing appellants to obtain this Court's jurisdiction over an otherwise non-appealable order simply by naming a statute, type of relief, or form of order covered by Rule 9.140 and asserting that the lower court "should have" or could have proceeded as such, when it did no such thing. In addition, allowing an appeal from a ministerial order such as this one, which does nothing to disturb Appellee's underlying conviction or death sentence, is an unwarranted exercise of this Court's limited resources, particularly its rarely-exercised discretionary jurisdiction to issue writs of certiorari under Fl. Const. art. V, §3(b)(7) or Rule 9.142(c)91). See App Br. 14. Doing so would only invite untold numbers of what are essentially interlocutory appeals from ministerial orders that are best handled and disposed of in the circuit courts.

B. In the Proceedings Below, Appellant Withdrew Its Claims Under Rules 3.853(3)(5)(c) and (c)(7)

Appellant's merits brief also asserts that the circuit court's order "violated" Rule 3.853 because Mr. Sireci "failed to show" why favorable DNA

testing would create a reasonable probability of his acquittal under Rule 3.853(c)(5)(c), or why good cause existed to conduct testing at a private laboratory under Rule 3.853(c)(7).

That Appellant would raise such claims now is remarkable, as its counsel expressly declined to have the circuit court rule on those very issues below. After extensive questioning on the threshold legal claims in Appellant's motion – *i.e.,* whether the State Attorney and Mr. Sireci could file, and the court could grant, a stipulated DNA testing order outside Rule 3.853 -- the court asked Appellant's counsel whether he had any other arguments he would like to make. R.500. Counsel stated that he had "prepared" to argue that the order did not satisfy the substantive requirements of Rule 3.853 (including, but not limited to, its choice of laboratory (*see* R.490)). But since the only issue before the circuit court was whether the joint stipulation for DNA testing outside Rule 3.853 was lawfully entered, counsel conceded that it was – in his own words – "premature to argue the merits of any underlying 3.853 issues," and would reserve those "for another day." R.500.

On this limited procedural point, Appellant's counsel was correct. As the circuit court's questions and counsel's own answers made clear, the relief Appellant sought was to vacate the parties' stipulated order, and direct that any request for DNA testing proceed through Rule 3.853. If and only if the

court granted that relief (which it did not), Mr. Sireci would then need to move for testing under Rule 3.853, after which the circuit court would order response(s), review the record, hold a hearing, and make findings under the Rule, including on whether any facts, law, or scientific developments not before this Court in 2004 now warranted a different outcome. But of course, a court cannot find that a defendant's motion under Rule 3.853 "failed to" satisfy the Rule's requirements when such a motion has not even been filed. And certainly, Appellant cannot argue that the circuit court erred in failing to make such findings, when its counsel declined the circuit court's invitation to argue those claims and expressly conceded they were "premature."

C. Judicial Estoppel and the State's Contractual Obligations

In 2010, the State entered into a binding contract with Mr. Sireci, in which the parties agreed to remove all future DNA testing requests Mr. Sireci might make from the contested-litigation process, and allow testing to proceed only by stipulation. The 2010 Agreement thus involved a substantial waiver of rights by Mr. Sireci, as it provided that – unless he secured the State Attorney's voluntary agreement to such testing – he would forever be barred from asking a court to order testing, regardless of any favorable changes in law or advances in DNA technology. In exchange, Mr. Sireci received (1) an initial round of DNA testing on certain items in 2010, and (2)

an assurance that future DNA testing requests would be handled through a streamlined, consent/stipulation process.

Because Mr. Sireci did not, until 2021, secure the State Attorney's consent to additional testing, he was required to remain on death row for more than a decade and refrain from conducting any DNA testing before he could finally reap the benefits of the latter provision. And the 2021 Joint Stipulation and Order scrupulously follows the terms and procedures laid out in the 2010 Agreement, just as the 2010 Order did.

Appellant has been aware of and failed to challenge the terms of this binding contract for the last eleven years; moreover, Appellant has repeatedly relied upon and invoked it in court to defeat Mr. Sireci's due process challenges to his conviction and death sentence. Accordingly, this Court should dismiss and/or deny the appeal on the grounds that (1) Appellant's claims are barred by judicial estoppel, and (2) Mr. Sireci is entitled to specific performance of his 2010 contract.

1. Judicial Estoppel Applies Where, as Here, the Attorney General Repeatedly Invoked the 2010 Agreement to Mr. Sireci's Detriment, and Mr. Sireci Complied With and Relied on the Agreement's Plain Terms

Judicial estoppel is a flexible, equitable doctrine whose purpose is "to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment."

New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (internal quotations omitted). The doctrine "prevents parties from "playing 'fast and loose with the courts.'" *Id*. (internal citations omitted). Further, "because the rule is intended to prevent 'improper use of judicial machinery,' judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *Id*. (internal citations omitted).

The United States Supreme Court has emphasized that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]" *New Hampshire v. Maine*, 532 U.S. at 750 (internal quotation and citations omitted). However, among the factors that may inform whether to apply estoppel to a particular claim in a case include: (1) whether the party's current position is "clearly inconsistent" with an earlier position taken; (2) whether the party "has succeeded in persuading a court to accept that party's earlier position" ; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*. at 750-51 (internal citations omitted). In *New Hampshire*, the Court also emphasized that "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula

for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *Id*. at 751.

This Court has applied the doctrine in a similarly fact-specific and flexible manner. It has held, for example, that mutuality of parties is not required to apply judicial estoppel, since an exception to that rule may well be appropriate where "fairness or policy considerations appear to compel it." *Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1067 (Fla. 2001).

Whether applying the *New Hampshire* factors or case-specific equitable principles to ensure fundamental fairness, it is appropriate for this Court to "protect the integrity of the judicial process" by doing so here.

Appellant's claims to this Court simply cannot be squared with the position it repeatedly took in earlier litigation. From 2014-2016, during Appellee's Rule 3.851 litigation, Appellant argued that the 2010 Agreement was valid and binding on Mr. Sireci as to all litigation regarding the validity of the hair evidence from his trial. It then offered the Agreement as an exhibit at the Case Management Conference, at which time it was further noted that the Agreement had been part of the docket in this case since the implementing Order to Release Evidence in July 2010, to such an extent that it barred even an evidentiary hearing on whether DNA testing conducted by

the FDLE could reveal flaws in the evidence heard by Mr. Sireci's 1976 jury. *See* R.134-135.

It is difficult to imagine a more inconsistent position in any case than one in which a party (1) invokes the contract as an all-encompassing bar to relief sought by the other party, absent the satisfaction of certain express conditions set forth in that Agreement, only to later (2) ask the court to invalidate those same contract terms once the opposing party finally succeeds in satisfying those conditions and reaping their promised benefits.

The other two guiding factors in *New Hampshire v. Maine* are also satisfied. First, after citing the Agreement and its bar on further non-stipulated DNA testing through the so-called "back door," Appellant prevailed in its earlier efforts to bar Mr. Sireci from proceeding with even his modest request for discovery related to potential DNA analysis, as well as an evidentiary hearing on his underlying due process challenge. Appellant repeatedly invoked the Agreement's waiver terms to prevail in this regard in the circuit court, in this Court, and the United States Supreme Court -- yet here takes the position that the terms that benefit Mr. Sireci are not binding.

Second, Appellant would "impose an unfair detriment on" Mr. Sireci if its position here were to prevail. *See New Hampshire*, 532 U.S. at 751. In exchange for the strict waiver provisions demanded by counsel for the State

in 2010, Mr. Sireci bargained for an expedited procedure for DNA testing to be guaranteed to him in the future, if and when any duly elected State Attorney concluded that such testing would be in the interests of justice. He then waited patiently to obtain that benefit, asking each successive State Attorney to consider granting his request, but never once moving to compel such relief in court. Appellant cannot now – after repeatedly invoking the Agreement's waiver terms to defeat Mr. Sireci's earlier petitions for relief – have this Court effectively invalidate a contract term upon which Mr. Sireci relied in good faith for the last eleven years, and only after his plea for DNA testing using newly available technology has finally carried the day.

Because "[a]dditional considerations may inform the doctrine's application in specific factual contexts," *New Hampshire*, 532 U.S. at 751, Mr. Sireci's reliance on the 2010 Agreement bears emphasis. The decade that Mr. Sireci abided by its waiver terms and did not file a motion for DNA testing that could have led to his freedom was a perilous one. He witnessed numerous individuals incarcerated with him on Florida's death row have their execution dates set and the ultimate penalty carried out; each day, Mr. Sireci lived with the knowledge that he could face a similar fate. During this time, he turned 65 and then 70 years old (age milestones at which the life expectancy of incarcerated men continues to plummet). And he watched as

the Covid-19 pandemic raged through this State's prisons, with men of his advanced age facing the greatest risk of serious illness and fatality.

Mr. Sireci patiently waited to reap the limited benefits of the hard bargain negotiated by the State in 2010. During that time, Appellant not only failed to challenge the Agreement, but repeatedly cited its terms in litigation. This Court should bar Appellant from taking a contrary position now.

2. Mr. Sireci is Entitled to Specific Performance of the 2010 Agreement – Namely, a Streamlined Process for DNA Testing That Bypasses Rule 3.853

This Court also need not consider any of Appellant's constitutional or statutory challenges to the 2021 Order because Mr. Sireci is entitled to specific performance of the 2010 Agreement. The fact that was not an individual signatory to that Agreement is of no import, because, as counsel for the State, Appellant is bound by the State Attorney's actions.

In *Santobello v. New York*, 404 U.S. 257 (1971), the United States Supreme Court famously rejected a claim by the State of New York that one of its prosecutors had the authority to disregard the earlier agreement of a fellow prosecutor. The first prosecutor had agreed that in exchange for Santobello's plea, the prosecution would make no sentencing recommendation. But when a new prosecutor took over the case, he argued that he was not bound by his colleague's earlier promises, and urged the

court to sentence Santobello to the maximum term. The Supreme Court refused, holding in no uncertain terms that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled" – and it matters not that "the prosecutor" representing the state was different than the one who earlier negotiated and bound the state to those terms. *Id*. at 499.

In the years since *Santobello*, its rule has largely been applied to the plea-bargain context (since outside the plea setting, contracts in criminal cases are relatively rare) – but not exclusively. *See, e.g., Lee v. State*, 501 So. 2d 591, 592 (Fla. 1987); *State v. Simons*, 22 So.3d 734 (Fla. 1st DCA 2009) (applying *Santobello* to enforce terms of comprehensive settlement agreement that had resolved both a criminal charge and related civil suit). Further, although the remedy for the State's attempt to breach the agreement may be either specific performance or withdrawal of the agreement, the court "ought to accord a defendant's preference considerable, if not controlling weight[.]" *Santobello*, 404 U.S. at 265 (Douglas, J., concurring); accord: *U.S. v. Rewis*, 969 F.2d 985 (11th Cir.1992).

Santobello's principles apply here. Much as a plea bargain removes the prospect of a costly and uncertain trial for both parties, the 2010 DNA

Agreement allowed both sides in this case to comprehensively resolve their DNA testing disputes and ensure that no such claims would be litigated by either party in the future. Notably, the State Attorney represented throughout the Agreement that it had the authority to make the promises enumerated therein on behalf of "the State." Yet now, eleven years later, Appellant asks this Court to effectively rewrite the Agreement and impose an additional requirement: that no DNA testing may proceed unless Mr. Sireci also obtains a separate "waiver" from the Attorney General's Office.

This it cannot do. The agreement clearly provides that as long as Mr. Sireci stands convicted and/or charged with the murder of Howard Poteet, he is entitled to any and all DNA testing on any evidence from that case without filing a motion under Rule 3.853 or any other provision, as long as the State Attorney for the Ninth Judicial Circuit agrees to allow such testing. Certainly, Appellant cannot now come into court, asserting standing as "co-counsel for the State," and renege on a contract that the State Attorney lawfully entered into on the State's behalf. Mr. Sireci is entitled to specific performance of the Agreement: an order for DNA testing without further litigation.

V. Appellant Does Not Satisfy the Demanding Standard Necessary to Prevail on Certiorari, Because the State Will Suffer No Harm – Much Less Irreparable Harm – from Additional DNA Testing

Even if this Court were to accept Appellant's suggestion to consider this appeal under its certiorari jurisdiction, Appellant has not come close to meeting the demanding standard necessary to obtain relief.

As Appellant concedes, this standard of review requires the party seeking relief from a circuit court order to satisfy two demanding tests: first, that the order "departs from the essential requirements of law," and second, that compliance with the order would cause "irreparable harm." App. Br. 14-15; *see also Jaye v. Royal Saxon, Inc.*, 720 So.2d 214, 215 (Fla.1998). For all the reasons stated in Parts I-III, supra, Appellant has shown no departure from the "essential requirements of law" governing DNA testing. As for irreparable harm, that standard is a highly exacting one, with good reason:

> To prevail in its petition for a writ of certiorari, a party must demonstrate that the contested order constitutes (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case, (3) that cannot be corrected on post-judgment appeal. *Sucart v. Office of the Comm'r*, 129 So.3d 1112, 1114 (Fla. 3d DCA 2013) (citation omitted). These last two elements are sometimes referred to as irreparable harm. *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So.3d 712, 721 (Fla. 2012).
>
> This higher standard applies because a more relaxed standard would allow "piecemeal review of non-final trial court orders [that] will impede the orderly administration of justice and serve only to delay and harass." *Bd. of Trustees of Internal Improvement Trust Fund v. Am.*

> *Educ. Enters., LLC*, 99 So.3d 450, 454 (Fla. 2012). Under this high standard, few non-final orders qualify for the use of a writ of certiorari. *Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So.3d 344, 351–52 (Fla. 2012).
>
> Under the high standard for issuance of certiorari, the first and necessary condition is demonstration of irreparable harm. Mere legal error without irreparable harm, even a departure from the essential requirements of law, while appealable at the end of the case, is not a basis for the issuance of a writ of certiorari. Unless the petitioner establishes irreparable harm, the court must dismiss the petition for lack of jurisdiction.
>
> In this regard, the Florida Supreme Court has repeatedly emphasized that "[a] finding that the petitioning party has 'suffered an irreparable harm that cannot be remedied on direct appeal' is a 'condition precedent to invoking a [] court's certiorari jurisdiction.'" *Bd. of Trustees*, 99 So.3d at 454–55 (*quoting Jaye v. Royal Saxon, Inc.*, 720 So.2d 214, 215 (Fla.1998)).

Damsky v. Univ. of Miami, 152 So. 3d 789, 792 (Fla. 3d DCA 2014)(emphasis supplied).

Appellant's challenge to the 2021 Order falls far short of this high bar. Allowing DNA testing to proceed under the 2021 Order would cause no "harm" to the State's[20] legitimate interests – much less irreparable harm. Indeed, the only risk of irreparable harm to either party is if Appellant's position prevails, adding unwarranted delays and roadblocks not just to Mr.

[20] As Appellant has already retracted its earlier position that the Attorney General's Office is "a party" to this litigation (R.493), only the State's interests are at issue.

Sireci's efforts to secure DNA testing, but to post-conviction DNA testing for other defendants who may have been wrongly convicted.

Appellant's claim that the circuit court's entry of an agreed DNA testing order somehow thwarts the interests of both the State of Florida and crime victims (App. Br. at 30) could not be more misplaced. Neither the State nor crime victims have any interest in wrongly convicting or executing the innocent. And the sole purpose of post-conviction DNA testing is to determine whether an innocent person is incarcerated or on death row for a crime he did not commit. It is a form of scientific discovery that does nothing to disturb the underlying conviction or death sentence (since to overturn the conviction, the defendant would need to file a new petition for relief under Rule 3.850 or 3.851, but only *after* the DNA testing is done, and only if the results are exculpatory). Clearly, the Florida Legislature does not view DNA testing as any threat to "finality" – evidenced by the fact that, *inter alia*, the Legislature chose to eliminate all time limitations on filing applications for DNA testing, and has not included any restrictions on successive motions in the post-conviction DNA statute or Rule. *See supra* n.11-13 and accompanying text (citing amendments).

Most fundamentally, the interests of crime victims and the State itself are advanced – not thwarted – by rules that do not unduly complicate or

burden a capital defendant's access to DNA evidence. Every time an innocent person is in prison or on death row, the person who actually committed the crime has not been brought to justice. Thus, wrongful convictions harm not just core principles of justice and due process, but the safety of the public. Indeed, in fully 29% of the post-conviction DNA exonerations documented over a twenty-five year period (1986-2014), the same DNA testing that exculpated a wrongly convicted defendant was used to identify a known alternate suspect in the crime. Tragically, many of these individuals belatedly identified through DNA testing had committed other violent crimes while the innocent defendants in their cases were wrongly incarcerated. As of 2014, sixty-eight of these perpetrators committed at least 142 additional violent crimes – including 34 homicides and 77 rapes.[21]

It is difficult to see how the Attorney General can seriously contend that either the State or crime victims suffer any harm, much less "irreparable harm," from the entry of an agreed DNA testing order. (Indeed, despite Appellant's claimed interest in "finality," the terms of the 2021 Order could have been fully carried out by now, had the Attorney General not engaged nearly a year's worth of meritless litigation to challenge it.) That the Attorney

[21] *See* West & Meterko, *DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, *supra* n. 2, at 730-731.

General would make such a claim shows that the office badly misapprehends both the purpose of Fl. R. Crim. Proc. 3.853 and the enormous benefits that DNA testing has brought to the wrongly convicted, the State, and the public at large for the last three decades.

CONCLUSION

For the foregoing reasons, Appellee Henry Sireci respectfully requests that this Court dismiss the appeal for lack of jurisdiction, or, in the alternative, affirm the circuit court's order.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Assistant Attorney General Scott Browne (Scott.Browne@myfloridalegal.com, capapp@myfloridalegal.com); Henry C. Whitaker, Solicitor General and Jeffrey Paul DeSousa (jeffrey.desousa@myfloridalegal.com, jenna.hodges@myfloridalegal.com) on March 24, 2022.

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. Proc. 9.045 and Fla. R. App. Proc. 9.210(a)(2)(D) and (E), I hereby certify that the foregoing brief was prepared with 14-point Arial font and consists of 69 pages of text, exclusive of tables and certifications.

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