IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-520

Lower Tribunal No.: 91-19140-CF10A

ROBERT CONSALVO	vs. STATE OF FLORIDA
Appellant	Appellee

On appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida:

Trial Court's denial of any and all issues raised under Rules 3.850 and 3.851.

AMENDED INITIAL BRIEF OF APPELLANT

[This brief is filed on behalf of the Appellant, ROBERT CONSALVO]

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PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "ROA" will be used to designate the record on this appeal, volumes 1 through 11. The symbol "PCT" will be used to designate the postconviction transcript of the final hearing on claims I through IV, volumes 1 through 6. The symbol "R" will be used to designate the original record of the trial and direct appeal. The symbol "SR" will be used to designate the original supplemental record of the trial and direct appeal. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The judgment of conviction under attack was rendered by the Seventeenth Judicial Circuit in and for Broward County, Florida, the Honorable Howard M. Zeidwig presiding as Circuit Judge throughout the guilt phase, penalty phase and sentencing hearing. The date that the judgment of conviction and imposition of the death sentence were rendered in the trial court was November 17, 1993 [R 3771-3781].

The length of the sentence imposed on count I (first degree murder) is a death sentence [R 3771-3773] and the length of the sentence imposed on count II (armed burglary) is a habitual felony offender life sentence imposed consecutive to the sentence in count I [R 3774-3776].

The appellant, ROBERT CONSALVO, is currently a state prisoner incarcerated at Union Correctional Institution in Union County, Florida. He is in the custody of Hon. James V. Crosby, Jr., Secretary, Florida Department of Corrections. His prison number is 941687.

On October 23, 1991, the appellant was indicted by a Broward County, Florida Grand Jury and charged with felony crimes in count I "Murder One" and in count II "Armed Burglary" [R 3343].

The offenses occurred sometime between September 27, 1991, and October 3, 1991, in Coconut Creek, Broward County, Florida [R 3343]. On October 29, 1991, the appellant entered a plea of not

guilty to all counts of the Indictment [SR 3].

Trial of the appellant was by jury. The guilt phase of said trial commenced on January 19, 1993, and the jury returned a verdict of guilt on both counts I and II on February 11, 1993 [R 2719-2720].

The penalty phase commenced on March 19, 1993, and the jury returned its recommendation of the death penalty (by majority vote of eleven to one) on March 25, 1993 [R 3708, 3117].

The trial court held the sentencing hearing on November 17, 1993 [R 3263-3318] and, following the recommendation of the jury, the trial court entered a written sentencing order [R 3751-3768], judgment [R 3769-3780] and disposition [R 3781] on November 17, 1993.

The appellant did not testify at the guilt phase of the trial nor did he testify at the penalty phase of the trial. Likewise, he did not testify (or make any statement) at any pre-trial hearing, post trial hearing or sentencing hearing.

The appellant appealed from the judgments of conviction. After the timely filing of a notice of appeal on November 22, 1993 [R 3782-3783], there was a direct appeal of the judgments and sentences to the Supreme Court of Florida in Case No. 82,780. The appeal was denied and the appellant's judgments and sentences were affirmed on October 3, 1996. See ***Consalvo v. State*, 697 So.2d 805 (Fla. 1996)**. Rehearing was denied on July 17, 1997, and on October 16, 1997. The mandate, amended mandate and second amended

mandate were all issued on November 17, 1997.

The appellant then filed a timely petition for writ of certiorari in the Supreme Court of the United States (Case No. 97-8148) which was denied on May 4, 1998. The direct appeal, the petition for writ of certiorari, and the second amended motion for postconviction and/or collateral relief constitute all of the postconviction proceedings filed on behalf of the appellant to date. This is the first and only claim filed on behalf of the appellant pursuant to Rules 3.850 and 3.851, Florida Rules of Criminal Procedure, in this court.

The appellant's present court appointed counsel is Ira W. Still, III, Esq. who was appointed on July 27, 1998. The appellant was represented at trial by Jeffrey Glass, Esq. (special public defender). He was represented on direct appeal to the Supreme Court of Florida and in the Supreme Court of the United States by the Hon. Richard L. Jorandby, Public Defender, Fifteenth Judicial Circuit of Florida, and members of his staff including Jeffrey L. Anderson, Esq. No other attorneys have represented the defendant throughout these proceedings.

STATEMENT OF THE FACTS

The trial court determined at the *Huff* hearing held on December 10, 2001, [PCT vol. 5, pp. 518-577] that appellant's claims I, II, III and IV [ROA vol. 5, pp. 772-784] in the second amended motion for postconviction relief [ROA vol. 5, pp. 765-806], needed to be tried to the court in a final evidentiary hearing [PCT vol. 5, p. 519]. These claims involved the recantation of two of the State's witnesses, Mark DaCosta and William Palmer. Both were inmates of the Broward County Jail in October 1991 just following the appellant's arrest and incarceration. These two jail witnesses sought the favor of the State by coming forward to testify that the appellant had discussed his case with them while they were all together in the cell. Both of these men testified under oath to the police [Defense Exhibits #1 and #8 at evidentiary hearing], and to the Grand Jury [Defense Exhibit #2 and State's Exhibit #3 at evidentiary hearing], and Palmer testified in a pretrial discovery deposition during the original trial proceeding [Defense Exhibit #11 at evidentiary hearing].

One witness, William Palmer, actually testified at trial [R vol. 15, pp. 2373-2426]. His carefully and cleverly constructed one-paragraph of testimony [R vol. 15, p. 2376] purported to describe how and why the appellant had murdered the victim was repeated loud and often during the trial process by the State.

It was discussed in the State's opening statement [R vol. 7, p. 1072], brought out through Palmer's trial testimony [R vol. 15, p. 2376] and repeated again in the State's closing argument [R vol. 16, pp. 2545; and 2642-2647]. It was again repeated in State's argument for the death penalty [R. vol. 19, pp. 3091-3093]. This one-paragraph of Palmer was cited by the trial court in its sentencing order [R vol. 20, pp. 3274-3277]. It was also cited by the Florida Supreme Court in its written opinion on the direct appeal [*Consalvo*, 697 So. 2d 805, 819].

Without Palmer's rendition there would have been no picture painted of the portrayal of the murder and no means for trial court to apply the "avoid arrest aggravator." In fact, there would be no other evidence that put the appellant at the crime scene at the time of the murder. This evidence was not only pivotal but it was crucial for the State to win a conviction and the death sentence of Mr. Consalvo.

Only one inmate, William Palmer, actually testified at trial. However, the role played behind the scenes by the other inmate, Mark DaCosta, in briefing Mr. Palmer was of ultimate value for the State. Palmer was facing an habitual offender sentence [Defense Exhibit #9 at evidentiary hearing] for up to twenty-years [Defense Exhibit #10 at evidentiary hearing]. Based upon his testimony at trial in the case, the lead detectives went to his court [Defense Exhibit #10 at evidentiary hearing] and were able to convince Judge Eade to reduce Palmer's sentence to probation [Defense

Exhibit #9 and #10 at evidentiary hearing] and he walked out of jail free on probation.

Years later Palmer recanted his testimony by affidavit [Defense Exhibit #12 at evidentiary hearing]. He stated that he had knowingly lied in his trial testimony "due to the fact that he was facing a lengthy prison term and wished to mitigate his sentence." [Defense Exhibit #12, paragraph 13 at evidentiary hearing]. Palmer stated that "the testimony he gave in February 1993 was derived from information orally given him by another inmate, Mark DaCosta" [Defense Exhibit #12, paragraph 14 at evidentiary hearing].

Follow-up with Mark DaCosta in another Florida State Prison facility led to his own recantation affidavit [Defense Exhibit #7 at evidentiary hearing] and unraveling the clandestine plot of the State to manufacture testimony to convict and aggravate the sentence to death [PCT vol. 1, pp. 35-37; 40-45; 47-49; 50-51].

When appellant brought forth the recantation evidence of these two jail snitch witnesses, everyone was aware that they had no credibility as that term of art is normally understood by trial lawyers. They were both convicted of multiple and numerous serious felonies. DaCosta had a lifetime of mental health and psychiatric problems [PCT vol. 1, pp. 182-187]. So did Palmer [PCT vol. 3, p. 393]. They were both lifetime drug addicts. They had spent most of their lives incarcerated and institutionalized. Palmer admits that he is an open and notorious

admitted liar [PCT vol. 3, pp.427-429] who had submitted recantation affidavits testifying that hey had lied in their prior testimonies in this case. There was nothing credible or reliable (in the traditional sense) about these two unsavory characters. Yet, the State had used them for trial. The State presented them via the testimony of William Palmer at trial and due in largest part to his short and succinct one-paragraph trial testimony [R vol. 15, p. 2376], the appellant was convicted, sentenced to death and has been on death row for over ten years.

Recanting jail snitch witnesses begin the postconviction process as “not credible” and “unreliable” and “unworthy of belief” by traditional evidentiary standards. The trial court in its final order denying postconviction relief (entitled “Order on Amended Motion for Post-conviction Relief”) [ROA vol.11, pp. 1991-2010] found that both Palmer and DaCosta were not credible witnesses and rejected their entire testimonies. Then the trial court ruled that the appellant failed to prove its claims.

A review of the testimonies of these witnesses at the final evidentiary hearing follows.

A. DaCosta's false testimony:

Mark DaCosta testified at the final hearing that he had lied on his statement given to BSO Detectives, Thomas Gill and Frank Ilarraza, on October 10, 1991, [PCT vol. 1, pp. 37-39]. DaCosta

stated under oath that Robert Consalvo had confessed that he had committed the murder while they were cell mates in 6-C-1 of the Broward County Jail. This statement was entered into evidence as defense Exhibit #1 at the final hearing and as an attachment to this witness' recantation affidavit dated October 26, 2000, that was entered into evidence as Exhibit #7 at the final hearing [PCT vol. 1, pp. 83-85].

In fact, DaCosta testified at the evidentiary hearing that Robert Consalvo never talked about his case or any such details at all [PCT vol. 1, p. 52]. Mark DaCosta actually received those details from other sources. In conjunction with his own confabulation, DaCosta testified at his police statement [Defense Exhibit #1 at evidentiary hearing] as if he had received that information directly from Robert Consalvo during their discussions in the jail [PCT vol. 1, p. 52, l. 18 through p. 59, l. 2]. That was a lie. At the final hearing, DaCosta testified that Robert Consalvo never told him anything about his case at all [PCT vol. 1, p. 53, l. 1-22]. Specifically, Consalvo never told him that he had gone into the victim's apartment, startled her, she screamed, grabbed the phone to call police and he stuck or stabbed her to death [PCT vol. 1, p. 77, l. 6-25]. DaCosta explained this was all made up in order to achieve substantial assistance from the State.

Mark DaCosta and Robert Consalvo were not housed in the same pod at the jail by happenstance. Assistant State Attorney, Brian

Cavanagh had Consalvo transferred in to DaCosta's pod [PCT vol. 1, p. 50-51] following a meeting at the State Attorney's office when certain crime scene details were provided to DaCosta. According to DaCosta, the plan was that he was to find a couple other guys in the cell who wanted to help so that the ultimate trial witness would not have directly spoken to anyone from the State Attorney's Office. DaCosta then taught the material to William Palmer who became the State's key witness at trial.

On October 22, 1991, Mark DaCosta was subpoenaed by ASA Brian Cavanagh to testify at the grand jury proceedings on Robert Consalvo's Indictment [PCT vol. 1, p. 59]. That subpoena was entered into evidence as [Defense Exhibit #2 at evidentiary hearing]. DaCosta did in fact testify at the grand jury in the afternoon on October 23, 1991. The Grand Jury testimony has been conveniently lost by the State Attorney's Office and was never been provided to the defense as ordered by the Court in its finding that the defense was entitled to it. The State has located the deceased court reporter's notes from January 1992 onward but the records of October 1991 have mysteriously disappeared and have never been provided.

Mark DaCosta also testified at the final hearing that he lied in his grand jury testimony, on October 23, 1991, [PCT vol. 1, pp. 37-39] by testifying under oath as to certain facts that had been directly related to him by Robert Consalvo while they were cell mates in 6-C-1 of the Broward County Jail. This grand jury

testimony was consistent with the prior police statement DaCosta had provided to the BSO detectives at the jail [PCT vol. 1, p. 62, l. 1 to p. 63, l. 2]. The defense was precluded from examining this witness on the details of his prior Grand Jury testimony as the transcript of those Grand Jury proceedings is not available.

It should be noted that DaCosta was not listed or called to testify by the State at trial. The State also had Palmer who had not been speaking directly to the Assistant State's Attorney. Hence the defense did not conduct a pretrial discovery deposition of DaCosta [PCT vol. 1, p. 66, l. 9-15] who was not listed as a State witness for trial. The State had witness Palmer who had, apparently, been instructed in the factual details by DaCosta.

B. DaCosta's motivation for providing false testimony:

DaCosta was only too happy to have met with ASA Brian Cavanagh and to be able to have the opportunity to provide "jail snitch" assistance in this or any other case that would help him to diminish his own heavy pending criminal jeopardy [PCT vol. 1, pp. 45-46]. DaCosta was being held in the Broward County Jail on five counts of an Information that was filed September 23, 1991. This Information was entered into evidence as part of composite defense Exhibit #3 [PCT vol. 1, p. 67] at the final hearing.

The prosecutor in DaCosta's case, ASA James Tylock, was not involved in any way in the Robert Consalvo prosecution. The State filed a notice of intent to have DaCosta declared an habitual

offender based upon his several prior convictions on February 26, 1992. This Notice was entered into evidence as part of composite defense Exhibit #3 [PCT vol. 1, p. 67] at the final hearing.

DaCosta was facing a life sentence as an habitual offender. His case was tried to a jury and DaCosta was found guilty on February 26, 1992, on count I burglary of an occupied dwelling with a battery and count III aggravated assault. He was acquitted by the jury on count II false imprisonment and count IV possession of burglary tools and on count V exposure of sexual organs as reflected on the court status disposition sheet dated February 26, 1992. This disposition was entered into evidence as part of composite defense Exhibit #3 [PCT vol. 1, p. 67] at the final hearing.

Based upon the help he had provided in the Robert Consalvo case for ASA Jeffrey Marcus via ASA Brian Cavanagh, DaCosta actually received a sentence that was within his calculated guideline range and then habitualized by the court as opposed to an habitual enhanced sentence. On August 18, 1992, the Honorable Howard M. Zeidwig presiding over DaCosta's case sentenced DaCosta to 17 years Florida State Prison as an habitual offender as reflected on the court status disposition sheet dated August 18, 1992. This disposition was entered into evidence as part of composite defense Exhibit #3 [PCT vol. 1, p. 67] at the final hearing.

Accordingly, a Judgment and Sentence were entered on August

18, 1992 in DaCosta's case. The Judgment and Sentence were entered into evidence as part of composite defense Exhibit #3 [PCT vol. 1, p. 67] at the final hearing.

At DaCosta's sentencing hearing on August 18, 1992, the court was inclined to give DaCosta a significant departure sentence based upon the help he had provided to the State in the Robert Consalvo case. DaCosta had not and would not be testifying in the Consalvo trial. DaCosta's attorney proffered that she wanted DaCosta to wait to testify in order to get the full benefit of his assistance but that DaCosta did not want to wait and was demanding to be sentenced so he could get on to serving his sentence. The transcript of DaCosta's sentencing hearing was entered into evidence as defense Exhibit #4 [PCT vol. 1, p. 76] at the final hearing. {Note: page numbers hereinafter referred to in Exhibit #4 relate to DaCosta's appellate record but are being used to avoid confusion.} See Exhibit #4, pp. 356-357.

ASA Tylock informed the sentencing court that ASA Jeff Marcus was being brought to the sentencing hearing, but that the ASA Tylock was recommending a sentence of life in state prison for DaCosta. See Exhibit #4, p. 361. The court was determined to sentence DaCosta as an habitual but had a question as to the number of years it would impose. ASA Tylock stated that "Mr. Marcus accepted his cooperation." Attorney Wilkov requested a guidelines sentence of 12-17 years. See Exhibit #4, pp. 361-362.

ASA Jeff Marcus entered the hearing and stated:

> Actually, I never spoke with Mr. DaCosta on this case. At the time of the grand jury, another prosecutor handled it, Mr. Cavanagh. And he advised me that Mr. DaCosta did testify, and did help. Since that time, there's been reasons why the State chose not to use him as a witness. Quite frankly, we didn't think he was credible in front of the jury. And I don't think the evidence is sufficient that his testimony isn't necessary, but because of the credibility problems, we decided not to use him.
>
> See Exhibit #4, pp. 365.

The court decided upon DaCosta's departure sentence and stated as follows at Exhibit #4, pp. 377-378:

> THE COURT: Adjudicate him guilty, and sentence him to whatever time he served in the county jail.
>
> THE COURT: Three hundred fifty-one days. He was acquitted of Counts III, IV and V. No sentence will be imposed. I'm sentencing you to seventeen years as a habitual offender to Florida State Prison. My original intention was more, but the fact that Mr. Marcus appeared, and the fact that your father and Mr. Milici appeared, moved me, but didn't move me enough to where I would follow the recommendation of your lawyer. Your lawyer wanted me to give you straight time, and I'm not going to give you straight time.
>
> I'm going to declare you a habitual offender. So-- I'm not telling you that everybody that appeared didn't have some effect, but, you know--but your problem is what

> you did before you came here, not what you have done since you've been here, and that's why I sentenced you to seventeen years as a habitual offender.

Mark DaCosta testified at the final hearing that he recalled the August 18, 1992, sentencing hearing. He remembers that Judge Zeidwig presided over his sentencing and was also presiding over the Robert Consalvo case simultaneously [PCT vol. 1, p. 74, l. 6-16]. He testified that his prosecutor, Mr. Tylock, wanted the court to impose a life sentence and that Judge Zeidwig stated that, "he was prepared to sentence me substantially" [PCT vol. 1 p. 75, l. 3-11]. Mr. Marcus was summoned to the courtroom and DaCosta had never spoken to or met Mr. Marcus previously [PCT vol. 1, p. 75, l. 12-22]. DaCosta recalls that his statement to the BSO detectives and grand jury testimony was discussed as a major factor in him getting a guideline sentence of 17 years upon which the court then habitualized him [PCT vol. 1, p. 76, l. 2-11].

The bottom line of DaCosta getting a guideline sentence of 17 years habitual as opposed to what he was really looking at mandatory life was certainly a motivation for cooperating with the State via ASA Brian Cavanagh who had promised him a guideline sentence [PCT vol. 1, p. 45, l. 7-13] when they first met at the State Attorney's Office [PCT vol. 1, p. 41, l. 3-17] sometime between October, 4, 1991 and October 10, 1991 [PCT vol. 1, p. 40, l. 16 to p. 41, l. 2].

DaCosta saw this as an attractive offer, as he was otherwise facing a life sentence, for just saying that Robert Consalvo told him all of these facts and details while Consalvo was in his cell. The only other thing DaCosta did was recruit and teach the details to Palmer.

C. DaCosta instructs William Palmer on false testimony:

DaCosta testified that he met with ASA Brian Cavanagh and then Robert Consalvo was transferred into his pod [6-C-1] at the Broward County Jail. DaCosta testified that everything that he had learned about Consalvo's case was supposed to have been told to him directly by Consalvo, according to ASA Brian Cavanagh [PCT vol. 1, p. 50, l. 10-22]. Furthermore, ASA Cavanagh told DaCosta to recruit another help-oriented inmate who would then discuss the details with DaCosta and be able to independently testify as if Robert Consalvo had been foolish enough to discuss his case with both of these jail inmates. DaCosta did recruit and train another inmate in the same pod by the name of William Palmer [PCT vol. 1, p. 50, l. 23 to p. 51, l. 20].

DaCosta talked to William Palmer every day while they were in the same pod and DaCosta testified at the final hearing [PCT vol. 1, p. 64, l. 12 to p. 65, l. 14] as follows:

> Q. Did you have an opportunity to talk to William Palmer about Robert Consalvo's case?
>
> A. Yes.

Q. How often?

A. Every day.

Q. And what would you talk about?

A. I gave him details about the incident and told him that State Attorney's Office was requesting his assistance or anyone I could find.

Q. Was he facing heavy charges, as far as you know?

A. Yes, sir, he was.

Q. He was--was he willing to work with you and the State on this?

A. Yes, sir.

Q. And to the best of your knowledge, do you know if he did?

A. Yes, sir.

Q. Now, during the time that you were in the pod, did you have or take part in any discussions in which Robert Consalvo told William Palmer or told both of you generally anything about the details of the case?

A. I just know he never told me anything. I don't know what he told William Palmer.

Q. You never heard him discuss anything with William Palmer?

A. No, sir.

DaCosta wrote a letter to the Office of the Governor on September 10, 2000, that was entered into evidence as Exhibit #5 at the final hearing. That letter states that the prosecutor "…told me to find someone else in the jail they could use, to say

this guy killed this woman."

On October 10, 2000, following DaCosta's letter to the Governor, a Department of Corrections Inspector named Tony Pesante interviewed DaCosta and took a recorded statement. The transcript was entered into evidence at the final hearing as defense Exhibit #6 and the tape itself was played at the final hearing, transcribed by the Court Reporter [PCT vol. 1, p. 134-155] and entered into evidence as State's Exhibit #1. In that statement, DaCosta testifies [PCT vol. 1, p. 138, l. 2-17] as follows:

> …they also told me to try to find a couple of other people because the story would be more believable if I had a couple of other people saying the same thing.
>
> The other inmate that I contacted, his name was William Palmer. And what I understand was he was facing 20 years. Another guy's name was--was Tony Benidetto. All three of us got together and we sat down and discussed certain things that the prosecutors told me.
>
> To my knowledge, I went to the Grand Jury, William Palmer went to the Grand Jury, and I'm not sure what happened with Tony Benidetto. But I do know that we were all put in protective confinement after our testimony and we were separated from Robert Consalvo.

D. DaCosta's Recantation:

The defense team traveled to Tallahassee to interview the key State trial witness, William Palmer. Defense Investigator Roy Carr first interviewed William Palmer on April 12, 2000, at which time Palmer freely admitted that he gave trial testimony in the

Robert Consalvo case that was false testimony. He openly and freely stated that Consalvo actually never told him anything about killing the victim by "sticking" her or any other method nor had he inflicted any kind of physical harm upon Lorraine Pezza. He admitted that he had testified untruthfully because he was facing a lengthy prison term and wanted to mitigate his sentence. This information was contained within the recantation Affidavit dated June 8, 2000, and entered into evidence at the final hearing [Defense Exhibit #12].

Thereafter, on June 8, 2000, counsel for Consalvo, his paralegal/notary and the private investigator Roy Carr traveled back to Jefferson Correctional Institution in Monticello, Florida to interview William Palmer and to review his previously prepared Affidavit. During that interview Palmer revealed that the "testimony he gave in February 1993 was derived from information orally given him by another inmate, Mark DaCosta" [Defernse Exhibit #12]. Palmer insisted that this item be added to his Affidavit and it was handwritten in order to avoid returning the great distance to redo the work. He initialed the changes, signed and dated the Affidavit and his signature was notarized indicating it was sworn upon Oath. Following this session with Palmer, the defense team determined to go south to Dade City to discuss the case with Mark DaCosta and get his version of what had occurred.

Investigator Roy Carr was the first to interview Mark DaCosta on August 22, 2000. At that time he stated that the statement

under Oath given to BSO detectives on October 10, 1991, was false testimony and that he had testified similarly to the Grand Jury and that was false testimony also. Based upon that information a time to travel to more fully interview DaCosta was scheduled by the defense team for October 26, 2000. At that time a prepared Affidavit was brought and reviewed with DaCosta who further told of the involvement by the State Attorney's Office to procure his false testimony. This was the beginning of DaCosta's recantation. The Affidavit of Mark DaCosta with attached statement to BSO detectives dated October 10, 1991, was entered into evidence at the final hearing as defense Exhibit #7 [PCT vol. 1, p. 83, l. 16 to p. 85, l. 19].

Between those two interviews of DaCosta, he was so upset about his false testimony leading to the death sentence of Robert Consalvo that he began to take affirmative steps on his own to reveal what he had done. DaCosta contacted the Governor [Defense Exhibit #5 at evidentiary hearing], DOC and eventually the trial court when he came forward to testify at the final hearing. He clearly recanted his testimony. He revealed the nature of the State's clandestine plan to enhance its case and fill in the gaps with procured testimony, all of which was clearly unknown and hidden from Robert Consalvo and his attorneys until Palmer and DaCosta recanted.

The defense filed a motion for certified copies of the grand jury testimony of DaCosta and Palmer [ROA vol. 10, pp. 1619-1621].

That was argued on 4-19-02 in open court [PCT vol. 5, pp. 1-5]. The trial court entered an order on 4-22-02 granting the defense transcripts of DaCosta and Palmer grand jury testimony [ROA vol. 10, pp. 1701-1702]. Thereafter, the defense requested a continuance of the final hearing in order to force the State to turn over these grand jury transcripts prior to the direct testimony of both DaCosta and Palmer [ROA vol. 10, pp. 1706-1708]. The State proffered to the trial court that the grand jury transcripts were lost [ROA vol. 10, pp. 1723-1725]. The trial court denied the defense motion for continuance, in effect cutting off the defense from obtaining the transcripts [PCT vol. 1, pp. 19-22].

The State has continually claimed that it cannot find the Gregg shorthand notes of deceased Grand Jury Reporter Jesse Bruno who was the State Attorney's reporter for Grand Jury proceedings for many, many years. The State claims that Bruno's notes from January 1992 and on are in their possession but her notes from just two months prior cannot be located. Thus, no transcripts of the grand jury testimonies of DaCosta and Palmer were ever made and delivered to the defense.

E. Palmer's false testimony:

William Palmer testified at the final hearing that he lied on his statement given to BSO Detectives, Thomas Gill and Frank Ilarraza, on October 15, 1991 [Defense Exhibit #8], by stating

under oath certain facts as if they had been directly related to him by Robert Consalvo while they were cell mates in 6-C-1 of the Broward County Jail [PCT vol. 3, pp. 326-331]. In fact, Palmer had gotten all of that information directly from Mark DaCosta outside of Consalvo's presence. Palmer did not obtain any of this information from Consalvo at all. This statement was entered into evidence as defense Exhibit #8 at the final hearing [PCT vol. 3, pp. 324-325].

In that statement [10-15-91] on page 2 of 5, Palmer said:

> Yeah, we were both talking about what we were in for and he told me that…that this girl, he had killed her and he was…***he joked about it*** and said it was on TV and in the newspaper about it and he told me he was in her house and she…she caught him in there and she told…said she's gonna call the cops, he's trying to calm her down. She started yelling so he just started sticking her *[emphasis added]*.

Palmer testified at the final hearing [PCT vol. 3, pp. 326, l. 1-6] that Consalvo never joked about it and never told Palmer that directly. Palmer testified that he didn't remember Consalvo pleading with her not to call the police [PCT vol. 3, pp. 326, l. 13-17] and that was an outright lie.

In that statement [10-15-91] on page 3 of 5, Palmer said:

> Yeah, he said he…when she caught him, he told her [unintelligible] if she called on him. But no…when she caught him, she started saying right away she's gonna call the police and get the hell out of her house or something like that and he was trying to calm her down cause she just started yelling and he grabbed her like to tell her to cool it. She just started

> yelling help, help or something and he just stuck her.
>
> And she started really yelling then so he stuck her a couple more times.

Palmer said he doesn't remember saying that to the police and Consalvo never told him that [PCT vol. 3, pp. 326, l. 17 to p. 327, l. 21]. Palmer testified based upon his conversations with Mark DaCosta. But Palmer did not get it from Consalvo directly. DaCosta told Palmer that Consalvo had said that to him. DaCosta initiated the term "stuck her" for "stabbed her" [PCT vol. 3, pp. 328, l. 1 to p. 329, l. 9].

In his statement [10-15-91] on page 4 of 5, Palmer said:

> Oh yeah. Um, I was on the phone talking to my aunt and I heard him tell his…asking…I heard…the way he was talking to someone, sounded like they was cussing him out on the other end of the phone. But then I heard him say something about so you found the towel and shoes and then he talked for a minute and I heard him say something about well, get rid of them for me, you know, try to get rid of them for me. I think he said burn them. He said well get rid of them, burn them for me, would you.

At the final hearing, Palmer was read that paragraph and said he didn't recall it. He testified that he never directly heard Consalvo saying that and didn't overhear that conversation that he testified to under Oath in his 10-15-91 statement to the BSO Detectives [PCT vol. 3, pp. 330, l. 3 to p. 331, l. 3]. During the early stages of the investigation, the police thought they had found a bloody shoe print on the sheets but that turned out to be

a false lead. Apparently, this part of Palmer's coached statement was directed at that footprint and the connection to Consalvo's shoes.

In fact, Robert Consalvo never talked about his case or any such details directly with William Palmer who actually received those details from Mark DaCosta [PCT vol. 3, p. 328]. Palmer was testifying as to what DaCosta had told him and not Consalvo. Palmer testified in his statement [Defense Exhibit #8 at evidentiary hearing]] as if he had received that information directly from Robert Consalvo during their discussions in the jail, but this was a lie [PCT vol. 3, pp. 330-331].

On October 22, 1991, William Palmer was subpoenaed by ASA Brian Cavanagh to testify at the Grand Jury proceedings on Robert Consalvo's Indictment [PCT vol. 3, p. 331] and that subpoena was entered into evidence as State's Exhibit #3. Palmer did in fact testify at the Grand Jury in the afternoon on October 23, 1991 [PCT vol. 3, p. 332].

William Palmer testified at the final hearing that he lied in his grand jury testimony, on October 23, 1991, by inference in that he testified that he did not remember his Grand Jury testimony but he guessed it was the same as on his statement to the detectives [PCT vol. 3, p. 334]. The defense was precluded from examining this witness on the details of his prior grand jury testimony as there has never been access to the transcripts of those proceedings.

On July 23, 1992, Palmer was subpoenaed for deposition by the defense while he was incarcerated at the Broward County Jail [PCT vol.3, p. 351]. A copy of his pretrial discovery deposition was entered into evidence [PCT vol. 3, p. 351] at the final hearing as Exhibit #11. Palmer testified that he doesn't remember giving that deposition and thought he never did give a deposition but he was mistaken [PCT vol. 3, p. 352, l. 1-6]. William Palmer testified at the final hearing that he lied in his deposition testimony [PCT vol. 3, p. 358].

On page 10 of his deposition [7-23-92], Palmer stated:

> …And he told me he was in there for first degree murder. He proceeded to tell me how it happened.
>
> …He figured she was all messed up on drugs. So he broke into the house so he could get whatever he could get out of there.
>
> While in there, she woke up and started saying she was going to call the cops and get out of her house, and this and that. And he said he was trying to calm her down and went to grab the phone to call the cops. And he grabbed the phone and her at the same time and she started screaming. He said he stuck her.

At the final hearing, Palmer testified that he does not remember Consalvo telling him that he stabbed her [PCT vol. 3, p. 356, l. 2]. He testified "I don't believe so. I think that was from DaCosta" [PCT vol. 3, p. 357, l. 3-4].

On page 14 of his deposition [7-23-92], Palmer stated:

> I believe it was the next day. I heard him talking on the telephone. I was talking on the phone, too, and I heard him saying something about towels and shoes with blood on

> it. Whoever it was talking to him found them and he was saying to them to get rid of them.

Palmer testified at the final hearing that he doesn't remember saying that. To the best of his recollection all of the testimony about overhearing Consalvo's phone calls in his deposition was false as well as in his statement [10-15-91] and Grand Jury testimony [10-23-91] [PCT vol. 3, p. 358, l. 2].

Palmer lied in deposition that Consalvo stabbed her 20 times when in fact Consalvo never told him that he stabbed her at all [PCT vol. 3, p. 412, l. 2-23]. He lied by stating he heard it directly from Consalvo when he actually only heard it from DaCosta [PCT vol. 3, p. 413, l. 1-11].

Palmer testified at the final hearing that his trial testimony was consistent with his statement [10-15-91], his Grand Jury testimony [10-23-91] and his deposition testimony [7-23-92] [PCT vol. 3, p. 362, l. 3-24] and that he lied in his trial testimony. "I remember things DaCosta told me directly, yes, and I can't remember Consalvo ever telling me that he stabbed the girl" [PCT vol. 3, p. 370, l. 12-17]. Consalvo never told Palmer that he stabbed the girl or "stuck" her [PCT vol. 3, p. 379, l. 16 to p. 3380, l. 21]. Palmer lied on the stand at trial when he testified that Consalvo stabbed her [PCT vol. 3, p. 381, l. 9-24]. He lied about the stabbing [PCT vol. 3, p. 382, l. 4-19]. He lied when he testified that Consalvo was joking about killing her [PCT vol. 3, p. 387, l. 24 to p. 388, l.1]. Palmer lied about

overhearing Consalvo during phone conversations [PCT vol. 3, p. 404, l. 1-20]. He lied about the girl having passed out from medication and Consalvo then broke into her apartment [PCT vol. 3, p. 405, l. 25 to p. 406, l. 24]. Palmer outright lied about the victim yelling and screaming as the predicate for stabbing her [PCT vol. 3, p. 406, l. 15 to p. 407, l. 16].

F. Palmer's motivation for providing false testimony:

William Palmer was recruited by Mark DaCosta and became the State's key witness. DaCosta could not testify because he had been briefed directly from ASA Cavanagh and that, obviously, would taint his testimony. DaCosta was told by ASA Cavanagh to find some other guys in the cell who would want to help out.

DaCosta recruited Palmer because Palmer was facing very heavy charges of his own. Palmer had been charged with battery on a law enforcement officer for purposely slamming his hand in a door to avoid arrest on possession of cocaine.

Palmer's felony case was 91-16975-CF10A. Various certified copies of his court documents were placed into evidence at the final hearing [PCT vol. 3, p. 339] as composite Exhibit #9. Palmer was arrested on 7-6-91 according to the probable cause affidavit. The Court denied his motion for bond reduction of 8-16-91, and he was unable to bond out.

ASA Farnsworth, the prosecutor on Palmer's case, filed a notice to declare defendant an habitual offender on 9-16-91. At

that point Palmer was facing an enhanced sentence of 9-12 years in prison as an habitual offender. The court could impose a consecutive sentence up to the statutory maximum for the offenses [see page 5 of Exhibit #10]. Palmer's case was set for trial on 10-28-91. Palmer remained in custody until he met Mark DaCosta in September 1991 and until ASA Cavanagh had Consalvo moved into their pod, 6-C-1 in early October 1991.

Then DaCosta began feeding Palmer information and told the BSO Detectives to pull Palmer out and talk to him. Palmer gave a sworn statement to the detectives on 10-15-91. He testified at the Grand Jury proceedings on 10-23-91. Immediately thereafter, ASA Cavanagh had Palmer moved out of Consalvo's cell [PCT vol. 2, pp. 258-259]; [PCT vol. 3, pp. 298-299].

BSO Detective Gill and Det. Ilarraza, who were not involved in Palmer's litigation at all, took it upon themselves to personally go to Judge Eade on 10-29-91 and seek a resolution of Palmer's charges so that he could get out of jail. A transcript of their discussion with Judge Eade was entered into evidence [PCT vol. 3, p. 348] at the final hearing as Exhibit #10. Following an off the record discussion, the Judge found that "He has valuable information, what might appear to be valuable?" and the prosecutor replied, "Very much so, Your Honor." [See page 9 of Exhibit #10].

They spoke to Judge Eade at side bar and the Judge signed an Order releasing Palmer ROR. Palmer got out but did not contact Det. Gill as the Court order directed him. Notwithstanding, on

11-4-91, ASA Farnsworth nolle prosequi count II and the defendant pled out to a lesser-included offense of simple battery. He received one-year probation with costs of supervision waived.

Palmer testified that Consalvo broke into the victim's apartment [burglary] and killed her to avoid arrest. Without Palmer's testimony, there was no evidence at trial that put Consalvo in the apartment at the time of the murder; there was no evidence of a burglary; and no evidence to support the avoid arrest aggravator. The jury recommended death because of the avoid arrest aggravator that otherwise could not have been proved.

The State started its trial by addressing Palmer's scenario in opening statement [R vol. 7, pp. 1071-1073], as follows:

> The defendant was in jail during this time period after October 3rd during this investigation, and while he was in the jail he began to talk to his fellows in the jail as to what occurred, somewhat bragging and joking about killing this woman.
>
> He said that on this particular day he went in to get more drugs. And that from using this medication she might pass out in the afternoon and that he went in there and she surprised him. She woke up. And she started saying and screaming that she was going to call the police, and she was crying for help. So he said he stabbed her, and then he said that she kept screaming. She was screaming louder, so he stabbed her some more. You will hear that one of the inmates, William Palmer, did not want any favors. He said I have my own case. This is just something I want to do. No promises were made to this guy at all to testify.

In the State's closing argument at trial Palmer's scenario

was addressed [R vol. 16, pp. 2642-2647], as follows:

> Palmer was the 35th out of 36 witnesses presented by the State. He provides an overview of how the murder occurred from the mouth of Consalvo himself. He does provide details of that… [p. 2642].
>
> Well, if you notice, the State didn't have what he said. We didn't know, except for Palmer's testimony. Did you hear anything from anyone else about he stuck her, and she grabbed the phone, she was going to call the police, and then he stuck her some more? There is no other testimony as to that. Who would know that? He would know that. He is the only one who would know that, that kind of detail. [p. 2645].

The State gave what they called the "top ten list" and at the very top of the list they say as their number one factor proving guilt in this case was "Consalvo's confession to Palmer." [p. 2647]. The State was convinced that Palmer's testimony was pivotal and crucial to their case for the death penalty.

The trial court relied on his testimony in its 11-17-93 sentencing order as to the "Avoid Arrest Aggravator" [R vol. 20, pp. 3274-3277], with excerpts as follows:

> As evidence the prosecution offered the testimony of William Palmer in an effort to establish this aggravator.
>
> Palmer testified regarding a conversation with the defendant while in jail which the defendant told Palmer: While he was in there, she woke up and started yelling she was going to call the cops, and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to stop her from calling the cops; and she started screaming, so he said he stuck her. Then she really started screaming,

> so he stuck her a couple more times. [p. 3276].

On direct appeal, the Florida Supreme Court quoted the same paragraph of Palmer's concocted visualization to affirm the conviction and death penalty [***Consalvo* v. *State*, 697 So.2d 805, 819 (Fla. 1996)**]:

> In this case, a witness testified regarding a conversation he had with appellant while in jail:
>
> He went over there one day, and she didn't answer the door, but he knew she was home. He figured she was passed out. So he broke into the house.
>
> While he was in there, she woke up and started yelling she was going to call the cops, and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to stop her from calling the cops; and she started screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times.
>
> We conclude that this testimony, coupled with the fact that appellant was aware that the victim was pressing charges against him for his prior theft, is sufficient to uphold the trial court's finding of the avoid arrest aggravator.

ASA Cavanagh had never talked to Palmer. He dealt directly with DaCosta who then dealt with Palmer. Until the witnesses recanted, the error could not be determined.

Palmer got the benefit of his bargain right after his Grand Jury testimony. Before his pretrial deposition he had already stuck his neck out sufficiently to require him to testify

identically. If he wavered, he would face perjury charges from the State or jail snitch repercussions in jail.

At trial, Palmer was out but he testified that some men kept coming to him and intimidating him to insure that he testified at trial to put the defendant away, scaring him that he better testify [PCT vol. 3, p. 360, l. 13 to p. 361, l. 18]. He figured it was family of the deceased victim and they always knew where he was [see deposition dated 5-23-02, p. 10, l. 15 to p. 11, l. 21].

Palmer never thought about it again until years later the defense team located him at Jefferson C.I. and informed him that Consalvo was on death row facing the electric chair [PCT vol. 3, p. 365, l. 23 to p. 367, l. 5]. Palmer was grieved because he knew he had lied and he determined, no matter what it took, he wanted to make things right by coming forward and admitting his lies. Palmer led the defense team to DaCosta and the truth has now come out [see Exhibit 12 entered into evidence at trial].

G. Palmer's Recantation:

On June 8, 2000, the defense team traveled to Jefferson Correctional Institution in Monticello, Florida and met with William Palmer. He read and reviewed a previously prepared Affidavit that was based upon information he had given Investigator Roy Carr at the initial investigative interview on April 12, 2000. Palmer desired to add material to the affidavit that was inserted by hand into the affidavit form. He sworn on

Oath and signed the Affidavit in the presence of a notary public and two witnesses [Defense Exhibit #12 at evidentiary hearing].

Palmer brought up for the first time that Mark DaCosta had fed him the factual information that formed the basis of his testimony in his police statement [10-15-91], grand jury testimony [10-23-91], pretrial discovery deposition [7-23-92], and his trial testimony [2-9-93] all of which were basically identical. Palmer had cleverly stuck to the same paragraph over and over again repeating the same paragraph every time he told his story.

The newly discovered evidence to the defense was that Palmer lied all the way through his testimonies. Consalvo had never told him that he burglarized Pezza's apartment at the time of her murder [PCT vol. 3, pp. 319=320]. Nor had he ever said he killed her, stabbed her or stuck her. There was no yelling by the lady. No threats to call the police. That was all made up. There was no avoid arrest basis. It was all lies. DaCosta said it to Palmer but Consalvo never did [PCT vol. 3, p.321]. William Palmer has finally and completely recanted his former testimony.

H. ASA Brian Cavanaugh:

ASA Brian Cavanagh testified at the evidentiary hearing as a State witness. He testified that he stepped in for his colleague, ASA Marcus, to do him a favor by covering the Consalvo Grand Jury proceeding on 10-23-91 [PCT vol. 2, p. 240, l. 2-14]. ASA Marcus was in trial and couldn't handle the matter.

ASA Cavanagh issued two Grand Jury subpoenas for compulsory attendance of Mark DaCosta [Defense Exhibit #2] and William Palmer [State Exhibit #3] [PCT vol. 2, p. 240, l. 15 to p. 241, l. 15]. He signed these subpoenas on 10-22-91 and recruited BSO Detectives Gill and Ilarraza to serve them upon the two inmates [PCT vol. 2, p. 242, l. 20-23].

ASA Cavanagh claimed that when he presented the State's case to the grand jury that he did no preparation, knew nothing about the case and did not attempt to prepare his witnesses prior to their testimony [PCT vol. 2, p. 243, l. 2-10]. He claims that he did not bring Mark DaCosta over to his office for a discussion of case help and that he never went over to the jail to interview him there [PCT vol. 2, p. 243, l. 11-19].

ASA Cavanagh made a point to discredit witness Mark DaCosta as having a big round head [PCT vol. 2, p. 246, l. 9-15] and he termed him "weird" on three separate occasions [PCT vol. 2, p. 246, l. 13; PCT vol. 2, p. 248, l. 9; and PCT vol. 2, p. 251, l. 5]. Cavanagh called DaCosta a "degenerate" [PCT vol. 2, p. 248, l. 11-15]. He claimed he did not promise DaCosta a guideline sentence in his case [PCT vol. II, p. 250, l. 1-9] and that he had no discussions with DaCosta about his own case [PCT vol. 2, p. 249, l. 8-15] or his eventual sentencing based upon any help given in the Consalvo matter.

ASA Cavanagh claimed he received no phone calls from DaCosta in the jail [PCT vol. 2, p. 251, l. 6-8].

On cross-examination, ASA Cavanagh testified that he did have DaCosta's statement to the BSO detectives to review prior to the Grand Jury testimony [PCT vol. 2, p. 253, l. 16-21] but he claimed not to have had any contact with DaCosta prior to the giving of that statement on 10-10-91 [PCT vol. 2, p. 254, l. 2-6]. He again affirmed that he did not bring DaCosta over to his office for a discussion [PCT vol. 2, p. 254, l. 10-13], he did not interview him at the jail, and gave him no details of the Consalvo investigation with the expectation that he would pass it on to a third party [PCT vol. 2, p. 254, l. 14-22].

ASA Cavanagh did admit that he had known DaCosta's and Palmer's prior criminal records before their grand jury appearance [PCT vol. 2, p. 255, l. 6-14]. When asked if he purposely moved Consalvo into DaCosta's and Palmer's cell or pod, ASA Cavanagh became upset stating it would be a Florida Bar violation of ethics [PCT vol. 2, p. 256, l. 20-25] and would take a Court order to move inmates [PCT vol. 2, p. 243, l. 20-23]. Thereafter, he testified that at the conclusion of their Grand Jury testimonies, that he could have them moved out of Consalvo's cell or pod and that he does that all the time as a normal occurrence [PCT vol. 2, p. 258, l. 14-24]. This is not consistent testimony.

At the time of DaCosta's sentencing in front of Judge Zeidwig, the discussion of substantial assistance arose. ASA Marcus was summoned to the courtroom. Defense Exhibit #4 is the certified copy of the sentencing hearing. On page 365, ASA Marcus

said:

> Actually, I never spoke with Mr. DaCosta on this case. At the time of the grand jury another prosecutor handled it, **Mr. Cavanagh**. And he advised me that Mr. DaCosta did testify, and did help. *[emphasis added.]*

Clearly, ASA Cavanagh had the total involvement with witness Mark DaCosta during the Consalvo matter.

I. ASA Kenneth Farnsworth:

The defense called as a witness ASA Kenneth Farnsworth. He was the prosecutor assigned to William Palmer's case [91-16975-CF10A]. He filed the notice to habitualize Palmer and defeated Palmer's attempt to get his bond reduced [Defense Exhibit #9]. He was also privy to the deal between the State and Palmer based upon his favorable testimony in his statement [10-15-91] to BSO detectives and Grand Jury testimony [10-23-91] along with ASA Cavanagh [Defense Exhibit #10].

ASA Farnsworth authenticated his memorandum to file dated 4-20-92, and discusses the negotiated plea in Palmer's case and states:

> Assistant Brian Cavanagh spoke to Defendant PALMER and also another inmate **at the Broward County Jail** who also had information on a murder case. Assistant State Attorney Cavanagh said that PALMER was much more credible than the other inmate and although PALMER does have a criminal history PALMER appeared to be a witness the State wanted to use.

This memorandum was entered into evidence at the final hearing as Exhibit #13.

ASA Farnsworth had his supervisor review and sign his memorandum [Defense Exhibit #13 at evidentiary hearing]. ASA Ken Padowitz, Felony Trial Supervisor, approved the State's offer "based upon the above listed circumstances and desires of the Broward Sheriff's Office." The circumstances alluded to are those stated in the above quoted material. Both Farnsworth and Padowitz knew Cavanagh was the main prosecutor in charge of Palmer and DaCosta and the memo even states he went to the Broward County Jail.

In his cross-examination, ASA Farnsworth who still works for ASA Marcus at the State Attorney's Office, tried to say he had no idea where the meeting took place. He would not say it took place in ASA Cavanagh's office as DaCosta had testified to repeatedly and clearly.

J. Comment on Remaining Witnesses:

The State called **Lisa Gardner**, Executive Secretary to Mike Satz, the elected State's Attorney. Ms. Gardner was called for the purpose of placing into evidence a purported log she kept in 1991 that indicated that ASA Marcus was assigned to the Consalvo case as lead prosecutor on October 8, 1991. The State's argument is that DaCosta could not have been brought over to the office of ASA Cavanagh on October 4, 5, 6, 7 or 8, 1991, because no attorney

was even assigned yet. DaCosta testified that he did meet, not with the later assigned prosecutor ASA Marcus, but with ASA Cavanagh.

The State called **BSO Detective Frank Ilarraza**. His testimony was that he did not feed information to either DaCosta or Palmer. He made them no offers of favor. His statements were not tainted with corruption.

DaCosta testified that he met with ASA Cavanagh separately and before meeting with the police at the jail. No crime scene detectives are present, just an unwary jail guard and ASA Cavanagh. Crime scene photos are spread out in plain view on the table. Details as they were early on known are discussed such as it was a key entry and there was blood on Consalvo's shoes. [These facts show up on the early statement of DaCosta but are later determined to be errant.]

Other key details are discussed with DaCosta as well as the need to bring in a third party witness who will have no meetings with any prosecutor in order to insulate his testimony. Finally, DaCosta is given a phone number to use if needed to privately discuss details before the Grand Jury proceedings.

The State called **FDLE Agent Audrey Jones**. Once Mark DaCosta went public with his whistle blowing information by not only privately informing the defense but also writing it to the Governor of Florida, a full-blown investigation began by DOC and eventually FDLE.

The only line brought out of this witness at the final hearing was to show that Palmer did not want to voluntarily come forward to be a recanting witness at the evidentiary hearing. Palmer could not be located by the defense until the second day of trial despite two years of looking for him. Palmer was afraid of perjury charges. He was afraid of the men whom he believed to be family of the deceased who were after him. He was afraid of meeting "jail snitch justice" in a dark alley or in prison. He was truly afraid.

The State spent most of its litigation time attempting to discredit the credibility of Mark DaCosta and William Palmer. They tried to show that they were lying about details, Palmer was an eighteen time felon, lied about his name to police, had severe mental problems, paranoid schizophrenic, uses drugs and alcohol, etc. and etc.

They tried to show that DaCosta had a motive of wanting to be in protective custody and that is why he is lying now. DaCosta is disabled and has mental problems, and on and on.

These are recanting witnesses. They are basically saying that they lied in their prior testimony under Oath at trial, depositions, police statements, etc. Recant witnesses are by definition liars.

ISSUES ON APPEAL

Issue I: WHETHER THE TRIAL COURT ERRED IN COMPLETELY REJECTING THE RECANTATION EVIDENCE OF TWO "JAIL-SNITCH" WITNESSES BASED UPON ITS FINDING THAT THESE WITNESSES WERE NOT CREDIBLE AND THEREBY APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING RECANTATION EVIDENCE?

Issue II: WHETHER THE TRIAL COURT ERRED BY NOT CONSIDERING THE RECANTED TESTIMONY OF WILLIAM PALMER AS NEWLY DISCOVERED EVIDENCE AS IT RELATED TO THE "AVOID ARREST" AGGRAVATOR?

Issue III: WHETHER THE TRIAL COURT ERRED IN NOT FINDING FROM THE RECANTED TESTIMONY [NEWLY DISCOVERED EVIDENCE] THAT THE STATE HAD EXCULPATORY EVIDENCE FROM MARK DaCOSTA AND WILLIAM PALMER THAT IT HAD WITHHELD FROM THE DEFENSE DURING TRIAL AND DIRECT APPEAL?

Issue IV: WHETHER THE TRIAL COURT ERRED IN NOT FINDING FROM THE RECANTED TESTIMONY [NEWLY DISCOVERED EVIDENCE] THAT THE STATE KNOWINGLY USED MISLEADING TESTIMONY OF WILLIAM PALMER AT TRIAL?

Issue V: WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIMS V THROUGH XV, RAISED IN THE SECOND AMENDED MOTION FOR POSTCONVICTION AND/OR COLLATERAL RELIEF, WITHOUT DETERMINING SUFFICIENCY OF THE PLEADING ON ITS FACE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?

Issue VI: WHETHER THE TRIAL COURT ERRED IN ADDRESSING APPELLANT'S CLAIMS V THROUGH XV, RAISED IN THE FIRST AMENDED MOTION FOR POSTCONVICTION AND/OR COLLATERAL RELIEF, SEPARATELY AND INDIVIDUALLY WITHOUT ANY REGARD TO THE INTERACTIVE OR CUMMULATIVE EFFECT OF SOME OR ALL OF THESE CLAIMS TAKEN TOGETHER AS A WHOLE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?

SUMMARY OF ARGUMENT

Most of the discussion of the six issues that follow centers around the recanted testimony of the prosecution's key trial witness, jail inmate William Palmer. When Palmer decided to come forward and come clean, he suggested that another jail inmate, Mark DaCosta, be located (if possible) to interview independently on these matters.

DaCosta related a shocking claim that he had been used behind the scenes to recruit and train Palmer so that Palmer could then be the witness to testify to a concocted confession. The testimony of Palmer was crucial to the prosecution's case.

Further investigation turned up a memorandum by another prosecutor assigned to Palmer's own case. This revealed that ASA Brian Cavanagh did in fact go to the Broward County Jail to discuss with Palmer and DaCosta their roles in helping to prosecute the murder case. Cavanagh denied being able to put DaCosta into Consalvo's cell for the purpose of getting a confession, but admitted having the power acting independently to take both DaCosta and Palmer out of Consalvo's cell and place them in another cell for protection following their Grand Jury testimony.

The State has at all times material not given transcripts of the Grand Jury proceedings to the defense despite a trial court order to do so.

Appellant presents Issues I, II, III, and IV that relate to the recantation, newly discovered evidence, the avoid arrest aggravator, exculpatory evidence withheld and use of misleading testimony.

Issues V and VI present argument on the remaining claims [V through XV] in appellant's postconviction motion that the trial court refused to permit a final evidentiary hearing.

ARGUMENT

ISSUE I:	**WHETHER THE TRIAL COURT ERRED IN COMPLETELY REJECTING THE RECANTATION EVIDENCE OF TWO "JAIL-SNITCH" WITNESSES BASED UPON ITS FINDING THAT THESE WITNESSES WERE NOT CREDIBLE AND THEREBY APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING RECANTATION EVIDENCE?**

The trial court granted appellant a final evidentiary hearing to determine whether a crucial prosecution witness recanted his prior testimony and the legal effect of this recantation.

In ***Armstrong v. State*, 642 So.2d 730 (Fla. 1994)**, the Florida Supreme Court considered the issue of a new trial would be warranted where a prosecution witness changed her trial testimony. The case was on direct appeal from a death sentence for first degree murder.

Armstrong's girlfriend, Kay Allen, testified at trial that she was sitting in the car with Armstrong when he told her he was going to rob her restaurant. He showed her his gun and even threatened to kill her if he had to. They went inside the restaurant. She pushed the silent alarm and she remained inside for the remainder of the incident with the co-defendant Coleman. Armstrong went back out to the car and the police arrived. One officer was shot to death by Armstrong and the other was seriously wounded three times.

According to Allen, when Coleman noticed the

> officers outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallusto was shot three times, but still managed to run from Armstrong and radio for assistance. When the other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant. Coleman and Armstrong had fled. *Armstrong*; 642 So.2d at 733.

Ballistics indicated clearly that someone near the car had fired a nine-millimeter, semi-automatic weapon that had wounded Sallustio and killed Greenway. The weapon fired from inside the restaurant was not a nine-millimeter, semi-automatic.

The prosecution called Kay Allen as a witness at trial.

> During the course of the trial, Kay Allen mentioned that she became pregnant with twins during the time that she was dating Armstrong but that he was not the father of the twins. She also stated that, when she was in the car with him outside the restaurant on the night of the incident, he showed her the nine-millimeter, semi-automatic machine gun and threatened her with the gun. *Armstrong*; 642 So.2d at 735.

After the trial, the girlfriend, Allen, learned that Armstrong was the father of her twins. At the motion for new trial, Allen testified that she had lied at trial about this. She testified (at the motion hearing) that she thought Armstrong was innocent. He had actually never threatened her. She really had not seen the gun that night but she knew he kept one under his seat and she heard the shots.

Armstrong sought a new trial based upon the material misstatement of the prosecution witness.

On the issue of witness recantation, the Court held:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. *Brown v. State*, 381 So. 2d 690 (Fla. 1980), *cert. denied* (citations omitted); *Bell v. State*, 90 So. 2d 704 (Fla. 1956). In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all of the circumstances of the case, including the testimony of the witnesses submitted on the motion for new trial. *Bell*. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where recantation involves a confession of perjury. (citations omitted). **Only when it appears that, on a new trial, the witness testimony will change to such an extent as to render probable a different verdict will a new trial be granted**. (emphasis added). *Armstrong*; 642 So.2d at 735.

The Court noted from this record that Allen's testimony was removed from the record, that there was sufficient evidence to convict Armstrong beyond a reasonable doubt. It would not be probable that a different verdict would result if Allen testified as she did on the motion for new trial. For this reason the Court denied his claim for new trial based upon recanted testimony.

The crucial and pivotal testimony at the Consalvo trial came from a prosecution witness by the name of William Palmer who was an inmate in the Broward County jail. Palmer testified to having a conversation (while housed in the same pod of the jail) with the

appellant who had told him:

1. That he had broken into decedent's apartment (admission to burglary);

2. That the victim "woke up and started yelling she was going to call the cops" [R vol. 20, p. 3276] (avoid arrest aggravator);

3. That as she went for the phone to call the police he stabbed her to death (confession to murder).

Not only had this one-paragraph of descriptive testimony locked in the crucial details of the murder as outlined above, it also created a visual image in the minds of the jury [as well as the trial court and anyone else who reads these transcripts] that can never be erased, but it also provided a key piece of evidence that appellant was inside the apartment at the time of the murder. Without Palmer's testimony, there was no other evidence that put appellant there at that time.

Palmer was called out of his cell to give a sworn statement to the police [Exhibit 8 in evidence; PCT vol. III, pp. 324-325]. He gave sworn testimony to the grand jury and likely was the key determining factor in bringing the indictment against appellant. He lied [PCT vol. III, p.334]. He testified under oath at his deposition and he testified under oath at the guilt phase of the trial [Exhibit 11 in evidence; PCT vol. III, pp. 351-352]. Palmer lied in his trial testimony [PCT vol. III, p. 370]. At every point, Palmer stayed with the identical short description of what appellant supposedly had confessed to him. The prosecutor

hammered this testimony in his opening statement [R vol. 07, pp. 1071-1073]. He also hammered it in his closing argument [R vol. 16, pp. 2642-2647]. Palmer's testimony was on the prosecutions "top ten list" as item number one in his closing argument. He reiterated Palmer again throughout the penalty phase, at the sentencing hearing to the trial court and in his written argument to the court. It was relied on heavily on the direct appeal and this Court relied mainly on this testimony in weighing the sufficiency of the evidence for affirming the "avoid arrest aggravator." The effect of having created a mental visual image of how she died, her last minutes of life that was painted by the testimony of William Palmer clearly had a direct and overwhelming impact on the verdict of guilt. It cannot be said that this testimony of Palmer was anything less than crucial and pivotal for the prosecution.

There is no doubt that **if** Palmer's testimony was excised from the record of this case, that the outcome probably would have been different. Pursuant to *Armstrong* standards, a new trial would have to be granted to the appellant in this case.

Ten years after the trial William Palmer came clean. He admitted that he had lied in his testimony and signed the affidavit that focused the postconviction process on this crucial issue. In a prison in northern Florida, Palmer revealed how another inmate named Mark DaCosta had fed him all the information on which he had based his testimony. Palmer revealed that

Consalvo never discussed his case at all with him. Palmer directed the defense team to look for DaCosta and talk to him to see if he would admit the truth as well.

Housed way down in Dade City in South Florida, DaCosta indicated that the ASA Cavanagh promised him appellant would not get the death penalty. He could not permit the appellant to get death while he kept his lies locked in his heart. At two distant ends of the State of Florida, two men who hadn't seen each other or spoken together since October of 1991, revealed the identical scenario of behind the scenes wrong doing.

Palmer having testified, his recantation directly impacts the case. DaCosta's recantation and testimony support's the recantation of Palmer. ASA Ken Farnsworth's written memorandum [Exhibit 13 in evidence at the final hearing] to the file of Palmer explaining why Palmer, who had been facing a twelve year sentence as a habitual offender and whose motion for bond had been denied by his court was immediately released ROR and a week or two later given a short probationary sentence. ASA Farnsworth wrote that ASA Cavanagh had gone to the Broward County jail to work with Palmer and another inmate [DaCosta] on a murder case.

DaCosta tells of how he was used by ASA Cavanagh to learn certain details that he was recruit another jail inmate to become the actual testifying witness [see statement of facts that details these facts]. He describes the Grand Jury testimony that led to the Indictment. He describes how his own case ended in a 17 year

sentence when his own prosecutor wanted mandatory life because he had helped in the prosecution of appellant and as a direct result of his work he would again experience liberty.

Both Palmer and DaCosta had to count the costs. They came and testified to set the record right even though they knew they would open themselves up to possible perjury charges and they believed they would be in danger from the State Attorney's Office and police. But, their own personal belief of coming clean was paramount.

The trial court erred in applying the Armstrong standard. The trial court found that both DaCosta and Palmer were not credible an unworthy of belief because of multiple and numerous felony convictions, mental health and psychiatric problems, extensive drug use history, institutionalized most of their lives, notorious liars. The trial court then rejected their testimony, not on the veracity of the substance of it, but simply because they had credibility problems and they could not be believed under any circumstances. Then the trial court held that the appellant failed to prove its case and denied the postconviction motion.

The correct legal standard is set forth in *Armstrong*,

> **Only when it appears that, on a new trial, the witness testimony will change to such an extent as to render probable a different verdict will a new trial be granted.** *Armstrong*; 642 So.2d at 735.

The trial court, having become convinced that Palmer was not worthy of belief on any matter did not address the question of

"How then can we believe his testimony during the trial?" The trial court simply applied the wrong legal standard. Clearly, at a new trial should one be granted, Palmer would not be permitted to testify. The prosecution wouldn't call him for obvious reasons. The defense would be fully armed to cross-examine him and utterly destroy the value of his purported testimony should the prosecution present him. He likely couldn't be found for another trial.

Under the *Armstrong* standard the witness testimony would in fact change from crucial and pivotal in the first trial to none existent at the new trial. Viewing the record of the trial and direct appeal, there is no question that the outcome of the trial would "render probable a different verdict." A new trial must be granted in this case.

Furthermore, in ***Spaziano v. State*, 660 So.2d 1363 (Fla. 1995)**, the Court held that when a postconviction motion raises "newly discovered evidence of recant testimony of a significant witness, the motion must be remanded" to the trial court for an evidentiary hearing. The prosecution witness testified how Spaziano bragged about the girls he had mutilated and murdered and he even took the witness to the dump site to show him two bloody corpses that Spaziano claimed that he had killed.

In the Court's opinion on the direct appeal in *Spaziano*, it focused in on this witness, Dilisio, when it said:

> With reference to the contention that the

> evidence is insufficient, the appellant asks us to reject in totality the testimony of Dilisio. Dilisio led authorities to the dump where the bodies were found two years after he observed them with the appellant. Both the jury and the trial judge had a superior vantage point to weigh the credibility of Dilisio's testimony. We find the evidence in this record was sufficient to sustain the jury's verdict. *Spaziano*; 660 So.2d at 1367.

In Justice Kogan's concurring opinion, he stated that the Court had "pegged its *entire* analysis of the evidence's sufficiency on DiLisio's testimony." *Spaziano*; 660 So.2d at 1367. This witness had filed affidavits swearing that he had given false testimony at trial and the Court was understandably disturbed in that it had relied on the veracity of that testimony in determining the sufficiency of the trial evidence. Justice Kogan called this a "grossly disturbing scenario" and said "And today, when the credibility of that testimony has been called into question in the strongest possible manner--from DiLisio's own mouth—I think there is only one reasonable conclusion: This conviction bears a possible taint that must be investigated and explained before Spaziano can be electrocuted." *Spaziano*; 660 So.2d at 1367.

Just as in *Spaziano*, this Court wrote about Palmer's testimony in its opinion on *Consalvo*. Both cases touch the same apple in the same eye. Palmer lied, the Court relied. The wrong must be made right by the grant of a new trial.

Issue II: THE	**WHETHER THE TRIAL COURT ERRED BY NOT CONSIDERING RECANTED TESTIMONY OF WILLIAM PALMER AS NEWLY DISCOVERED EVIDENCE AS IT RELATED TO THE "AVOID ARREST" AGGRAVATOR?**

A. Section 921.141(5)(e), Florida Statutes:

The pertinent portion of section 921.141(5)(e) of the Florida Statutes reads as follows:

> **(5) Aggravating Circumstances.** Aggravating circumstances shall be limited to the following:
>
> ***
>
> "(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

In its early decisions dealing with the "avoid arrest" aggravator, the Florida Supreme Court concerned itself primarily with those cases in which the murder victim was a law enforcement officer and the murder was committed either in the context of avoiding the officer's arrest or in an attempt to escape from his custody. That line of cases does not apply to this case.

However, as time passed through the 1970's and into the early 1980's, the Florida Supreme Court opinions concerned whether the murder of a witness who was not a law enforcement officer could give rise, under any set of facts, to the application of the 921.141(5)(e) aggravating circumstance commonly referred to as the "avoid arrest aggravator."

B. The Development of Florida Law in Relation to the "Avoid Arrest Aggravator" when the Victim is not a Law Enforcement Officer:

It should be noted at the outset that essentially all of the cases reported on this issue (and all of those cited herein), are Florida Supreme Court opinions rendered on direct appeal and not on postconviction relief. Thus, the analysis in these cases was made by taking the facts as they were adduced at trial from the record alone. In postconviction proceedings where the trial record is challenged by a recanting witness, the entire analysis would be radically different since the challenged facts, if true, would no longer support the "avoid arrest aggravator." For this reason a review of the developing law in this area is instructive.

In ***Menendez v. State*, 368 So.2d 1278 (Fla.1979)**, the defendant was convicted of robbing a jewelry store and murdering the owner. He was sentenced to death for the murder and life for the robbery. The Florida Supreme Court, considering the "avoid arrest aggravator," said:

> There is also considerable doubt that this murder was committed for the purpose of avoiding arrest within the contemplation of our statute. The state urges (with some logic) that any murder committed by means of a pistol fitted with a silencer indicates a motivation to avoid arrest and detection. The presumption accorded the instrument of murder by this reasoning, however, carries us too far. Were this argument accepted, then the perpetration of murder with a knife would similarly add an aggravating circumstance to the life-or-death equation, since it is less detectable than a firearm. This mechanical application of the statute would divert the

> life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require. In *Riley v. State*, 366 So.2d 19 (Fla. 1978), we held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Here, unlike *Riley*, we do not know what events preceded the actual killing; we only know that a weapon was brought to the scene which, if used, would minimize detection. We cannot assume Menendez's motive; the burden was on the state to prove it. *Menendez*; 368 So.2d at 1282.

The *Menendez* Court held that the trial court improperly applied the aggravating factor and remanded for re-sentencing.

In the case at bar, the murder was committed with a knife that was never found. Thus, it was never determined whether the knife was brought into the victim's apartment by the perpetrator or if it was the victim’s utensil to begin with. That fact alone cannot support the use of the "avoid arrest aggravator." Under *Menendez*, it is not a question of the instrument used to cause the killing, but the motive of the killer. Likewise, whether it was found at the scene or carried there by the perpetrator would be irrelevant unless further facts relate the weapon to motive. It is the dominant or sole motive of the murderer being to avoid arrest or eliminate a witness that is determinative.

The State produced only one shred of evidence at trial that it relied upon to support the “avoid arrest aggravator.” That evidence was the very short descriptive paragraph of William Palmer that purportedly was confessed to him in the jail cell by

the appellant. It was this description that was clearly recanted by Palmer during the final evidentiary hearing.

Furthermore, the development of the Florida law (concerning the murder of a witness who was not a law enforcement officer) in the early 1980's, appears to have been centered on those fact situations where the perpetrator abducted the victim from the scene of the robbery and was usually associated with kidnapping. In *Routly v. State*, 440 So.2d 1257 (Fla. 1983), the Florida Supreme Court cited several early 1980's cases in which the "avoid arrest aggravator" was upheld.

In ***Bolender v. State*, 422 So.2d 833 (Fla. 1982)**, the defendants robbed the victims of drugs. They tortured them for hours to death and set fire to their car to dispose of the bodies. The Florida Supreme Court found from the record that the defendant's *intent* in killing them was to prevent them from identifying the killers and to destroy the evidence.

In ***Martin v. State*, 420 So.2d 583 (Fla. 1982)**, the defendant robbed the store clerk, kidnapped her, and raped her. He drove her to a dump and there stabbed her to death. The aggravator was upheld based on these facts (including the abduction) indicating his sole motive was to avoid detection.

In ***Griffin v. State*, 414 So.2d 1025 (Fla. 1982)**, the defendants abducted a bystander witness to a robbery and dragged him into the woods where they shot and killed him.

In ***Adams v. State*, 412 So.2d 850 (Fla. 1982)**, the defendant

abducted an 8-year-old girl, sexually assaulted her, then strangled her and left the body in a desolate area.

In all of these cases, the facts and circumstances associated with the murder tend to indicate that the predominant or sole motive for the murder was to eliminate the witness. The common thread in these cases is the additional serious criminal activity, which apparently motivated the killers to eliminate witnesses. The common thread in these cases is abduction, kidnapping, sexual assault or torture, all of which evidence the motive for killing. None of those are present in the case at bar. Aside from Palmer's very short statement, there was no evidence whatsoever that the murder was committed for the sole purpose of avoiding detection. In fact, aside from Palmer's statement there is no evidence that appellant was the perpetrator.

In ***Doyle v. State*, 460 So.2d 353 (Fla. 1984)**, the defendant was convicted of first-degree murder and sexual battery. The Florida Supreme Court held that the state did not prove the "avoid arrest aggravator" beyond reasonable doubt and stated:

> As for the remaining aggravating factor, the court based its finding that the murder was committed to avoid lawful arrest on its finding of fact: The victim knew her attacker and would report the rape. In a prior case, Doyle had been given a suspended five-year sentence which would be imposed if he were convicted of any crime. The trial court therefore inferred that the murder was committed to prevent the report of the rape. We have consistently held that where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt

> that the dominant motive for the murder was the elimination of witnesses. *Menendez v. State*, 368 So.2d 1278 (Fla.1979); *Riley v. State*, 366 So.2d 19 (Fla. 1978), *cert. denied* 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 985 (1982). It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection. Based on the facts in the record before this Court, we hold that the state has not proven this aggravating factor beyond a reasonable doubt. *Doyle;* 460 So.2d at 358.

In ***Bates v. State*, 465 So.2d 490 (Fla. 1985)**, the defendant abducted a woman form her office. He took her into the woods behind the building, attempted to rape her and then robbed her and stabbed her to death. The Florida Supreme Court, quoting from its opinion in ***Riley v. State*, 366 So.2d 19, 22 (Fla. 1978)**, said:

> …the mere fact of death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

What may have seemed exceeding strong evidence from Palmer at trial and on direct appeal is not strong at all in light of his recent recantation and in hindsight. Whether or not the recantation is fully believed, the very fact that the witness now attempts to recant also reflects on the very strength of the proof of the requisite intent to avoid arrest. It no longer seems strong, convincing or clear. It certainly brings into question the avoid arrest aggravator as it applies to the evidence in this case.

In ***Bruno v. State*, 574 So.2d 76 (Fla. 1991)**, the defendant knew the victim and he confessed to the murder. The Court held:

> Standing alone, the fact that the victim could identify the murderer does not prove beyond a reasonable doubt that the elimination of a witness was a dominant motive for the killing. *Bruno;* 574 So.2d at 82.

The elderly victim was found dead in the foyer of her home with twenty-one stab wounds. Defendant's fingerprints were found in the house and inside her car. ***Davis v. State*, 604 So.2d 794 (Fla. 1992)**. The trial court determined that the victim knew the defendant and could identify him and drew the inference that he killed her to avoid arrest. The Florida Supreme Court reversed and remanded for a new sentencing proceeding because there were no other facts argued to the jury in support of the "avoid arrest aggravator" except that the victim knew him.

In this case, without Palmer’s testimony all that can be determined is that the Lorraine Pezza knew Robert Consalvo very well. She would have been able to identify him. Without Palmer’s statement, there is no other evidence in the record that places appellant in her apartment at the time of her demise.

Since, by its very nature, murder always does away with a witness to essential facts, what safeguards are there to keep the affect of the law in this area from applying to essentially every murder case? The Florida Supreme Court's mandate that the state has the burden to prove that the primary or sole motive for the murder was to eliminate a witness must be strictly applied in each

case, especially in this case where the only witness to any facts that would support this aggravator have been brought into question by competent evidence at the final hearing (i.e.: the recantations of DaCosta and Palmer).

C. The Doctrine of Newly Discovered Evidence Applied to the Avoid Arrest Aggravator:

Finally, the law on the "avoid arrest aggravator" was clearly delineated in ***Consalvo v. State,* 697 So.2d 805 (Fla. 1996)**. The Florida Supreme Court held:

> In this case, a witness testified regarding a conversation he had with appellant while in jail:
>
> He went over there one day, and she didn't answer the door, but he knew she was home. He figured she was passed out. So he broke into the house.
>
> While he was in there, she woke up and started yelling she was going to call the cops and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to stop her from calling the cops; and she started screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times.
>
> We conclude that this testimony, coupled with the fact that appellant and victim knew each other, and the appellant was aware that the victim was pressing charges against him for his prior theft, is sufficient to uphold the trial court's finding of the avoid arrest aggravator. *Consalvo;* 697 So.2d at 819.

The Florida Supreme Court further stated:

> In the instant case, however, the victim

> threatened to call the police and reached for the phone while appellant was attacking her. *Consalvo;* 697 So.2d at 820.

Assuming that Palmer was telling the truth at trial, this point was valid. However, whether Palmer had falsified his trial testimony has been squarely brought into question.

And the high Court also pointed out:

> In this case, the victim's screaming was contemporaneous with her threat and actions to call the police. *Consalvo;* 697 So.2d at 820.

If Palmer had lied in his trial testimony on this point and if he was telling the truth on his recant, there is absolutely no evidence that this occurred in the entire rest of the record.

Although the doctrine of the law on "avoid arrest aggravators" is sound, the foundation upon which it rests in the *Consalvo* matter is shifting sand in light of the postconviction final hearing testimony of Mark DaCosta and William Palmer. The recanted testimony of both of these witnesses is that Consalvo never breathed a word about any of the facts of his case to DaCosta and never discussed his case at all with Palmer. Palmer testified that Consalvo told him these things when in fact it was solely DaCosta who had informed him of the facts that he testified to. Palmer states now that he lied in his testimony and that he cannot live with the fact that his testimony led to the death penalty of Robert Consalvo when he had lied. He testified that the detectives helped to hone down the details of his eventual

trial testimony that was so condemning and that he was found several times by two huge thugs who threatened his well being if he failed to testify at trial against Consalvo. Palmer is adamant that Consalvo never talked to him about his case and that all he knew had come from DaCosta with the exception of honing the details that was provided by the detectives.

Recanting witness DaCosta testified that he, too, had never heard any of the details of the case directly from Robert Consalvo. DaCosta claims that he was fed information such as crime scene photos and intimate crime scene investigation facts. He was told to get one or two additional guys in the cell to repeat these facts and that acting under that charge, DaCosta conscripted William Palmer and taught him whatever he knew about the case. Both recanting witnesses confirm that they each lied in their police statement and Grand Jury testimony. Additionally, Palmer testified that he lied on his pretrial deposition and in his crucial trial testimony. It must be borne in mind that DaCosta and Palmer went their separate ways after ASA Brian Cavanagh had them removed from Consalvo's cell and placed in protective custody following their Grand Jury testimony on October 21, 1991. Palmer was set free on ROR bond and shortly thereafter given probation. From there his life sent him in and out of various prisons and jails until he was located at Jefferson Correctional Institute in North Florida. Dacosta went to trial, was convicted and began serving his reduced sentence of 17 years. He was found way down

in Dade City.

During the final evidentiary hearing DaCosta was in the Broward Main Jail and Palmer was living on the streets in Dania. Neither had seen, spoke or communicated with the other for eleven years. Yet the details of their respective recants matched up sufficiently to indicate reliability.

Palmer's testimony was not true and now stands as recanted. Therefore the Florida Supreme Court's holding cannot stand. Clearly without Palmer's testimony, the mere fact that the victim and the Consalvo knew each other and even in light of the victim threatening to bring a misdemeanor charge of petit theft against Consalvo would not be sufficient to sustain the state's burden of proving beyond reasonable doubt that the sole or predominant motive for the killing was to avoid arrest or detection.

At the very least the death penalty would have no legal basis in this case and could not stand. Additionally, without Palmer's paragraph of trial testimony, the very outcome of the trial would have been different, as the jury would not have had the mental image of Consalvo in the victim's apartment stabbing her to death. In fact, there would be no evidence placing him in her apartment at the time of her death and he is entitled to a new trial.

Issue III:	**WHETHER THE TRIAL COURT ERRED IN NOT FINDING FROM THE RECANTED TESTIMONY [NEWLY DISCOVERED EVIDENCE] THAT THE STATE HAD EXCULPATORY EVIDENCE FROM MARK DaCOSTA AND WILLIAM PALMER THAT IT HAD WITHHELD FROM THE DEFENSE DURING TRIAL AND DIRECT APPEAL?**

Discussion of this issue is subdivided into two topics: newly discovered evidence standard and exculpatory evidence withheld.

A. Newly Discovered Evidence:

The Florida Supreme Court, in ***Jones v. State*, 591 So.2d 911 (Fla. 1991)**, reviewed the trial court's summary denial of defendant's second motion for postconviction relief. The Court remanded for an evidentiary hearing on the *newly discovered evidence* claim.

The *newly discovered evidence* arises in several affidavits of nine new witnesses that were attached to Jones' 3.850 motion. These affidavits point to the supposed real murderer, Glen Schofield, who allegedly confessed to a prison cellmate and a CCR investigator.

The *Jones* Court reviewed the standard previously set in *Hallman* for review of *newly discovered evidence* issues and stated:

> The seminal case on attempting to set aside a conviction because of newly discovered evidence is *Hallman v. State*, 371 So.2d 482, 485 (Fla.1979), in which this Court said: 'The general rule repeatedly employed by this Court to establish the sufficiency of an application for writ of error coram nobis is

> that the alleged facts must be of such a vital nature that had they been known to the trial court, they *conclusively* would have prevented the entry of the judgment. *Williams v. Yelvington*, 103 Fla. 145, 137 So. 156 (1931); *House v. State*, 130 Fla. 400, 177 So.705 (1937); *Baker v. State*, 150 Fla. 446, 7 So.2d 792 (1942); *Cayson v. State*, 139 So.2d 719 (Fla. 1st DCA), *appeal dismissed*, 146 So.2d 749 (Fla.1962).
>
> ***
>
> In *Preston v. State*, 531 So. 2d 154 (Fla.1988), we explained that under the H*allman* standard, if the sole prosecution witness recanted his testimony, a petition for coram nobis could be granted. However, if the newly discovered evidence did not refute an element of the State's case but rather only contradicted evidence that had been introduced at trial, the petition must be denied. *Jones*; 591 So.2d at 915.

The Supreme Court here ruled that the *Hallman* standard was too strict requiring a next-to-impossible burden of proof. It held that the *newly discovered evidence* "must be of such a nature that it would *probably* produce an acquittal on retrial." *Jones*; 591 So.2d at 915. The Court further held that the same standard applies to penalty phase proceedings, this being the same standard applied by the federal courts.

In analyzing the *newly discovered evidence* claim, the court must examine the proffered evidence to see if it qualifies as *newly discovered* under the *Hallman* definition:

> That is, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. *Hallman*, 371 So.2d at 485.' *Jones*, 591 So.2d at 916.

The facts of the Palmer and DaCosta recantation evidence along with the ASA Farnsworth memorandum indicating that ASA Cavanagh had in fact gone over to the jail and discussed the case and testimony of Palmer and another inmate concerning a murder prosecution and the inconsistency of ASA Cavanagh's testimony regarding placing inmates into certain cells as he wished, coupled with the State's refusal to turn over Grand Jury testimony of DaCosta and Palmer have been been discussed in the statement of facts and on issue I discussion thoroughly.

It is clear that these asserted facts were not known to the defense attorney or to the trial court until the clandestine secret dealings were brought to light during the investigation of this postconviction proceeding. It is just as clear that neither the appellant nor his trial counsel could have figured out this scheme by any due diligence back in 1991 and 1992. These asserted facts certainly qualify as *newly discovered evidence* under the *Hallman* definition.

Reiterating argument previously made on the other issues, it also seems clear that had Palmer never testified that there is a good probability that the verdict in the guilt phase would have been different as the prosecution would not have proven guilt beyond a reasonable doubt and the penalty phase recommendation of the jury and the trial court's sentence would have been life rather than death.

Therefore, the asserted facts qualify as *newly discovered evidence*. The question remains whether the State knew or should have known of such asserted facts and it withheld this from the defense before and during trial.

B. Exculpatory Evidence Withheld:

1. The trial court denied the death-sentenced defendant's motion for postconviction relief, following an evidentiary hearing, in ***Routly v. State*, 590 So.2d 397 (Fla. 1991)**. Routly claimed that the state suppressed critical exculpatory and impeachment evidence relating to the accomplice's immunity contract. The Supreme Court reflected that the state is required to disclose favorable evidence to the defense (whether it relates to guilt or punishment) pursuant to ***Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)**, and stated:

> In order to establish a *Brady* violation, one must prove: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant did not possess the evidence, nor could he obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *Routly*; 590 So.2d at 399.

In that counsel was aware of the immunity contract before trial and he spoke of it in his opening statement at trial, there was no *Brady* violation in this case. Furthermore, there was no reasonable probability that if the evidence had been disclosed the

outcome would have been different. For these reasons, the Supreme Court denied the claim in *Routly*.

Applying the same principle to the case at bar, the State did not disclose the above asserted facts at any time, let alone before or during trial. No one had any idea that the scheme had taken place until Palmer and DaCosta revealed the shocking facts during their recantations.

In *Scott v. State*, 657 So.2d 1129 (Fla.1995), the Florida Supreme Court reviewed the summary denial of defendant's third motion for postconviction relief concerning an alleged *Brady* violation and remanded the case for evidentiary hearing.

Scott claims that the state committed a *Brady* violation by not disclosing:

> (1) a statement of the co-defendant's cellmate who now claims the co-defendant admitted killing the victim;
>
> (2) a statement by another person who allegedly told police that the co-defendant was mad at Scott for running out on him; and
>
> (3) a medical examiner photograph suggests that the deathblow came when the co-defendant hit the victim in the head with a wine bottle.

The Court carefully reviewed the affidavits and its own prior decision in ***Garcia v. State*, 622 So.2d 1325 (Fla. 1993)** in which it reviewed ***Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984)**. The *Williams* Court held "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is

enough that the State itself fails to disclose.

In this case, the "State" includes more than simply the trial prosecutor Jeff Marcus, Esq. who was likely on the outside of what was taking place with Palmer and DaCosta and he was not privy to the Grand Jury proceedings. But the term the "State" also includes other assistant state attorneys such ASA Brian Cavanagh and ASA Ken Farnsworth. It includes the police detectives that involved themselves in going over to the jail and taking taped statements from DaCosta and then Palmer, on different days. It involves those who could not locate the court reporter's notes of the Grand Jury proceedings. They found notes from January 1992 onward but those of October 21, 1991, a couple months earlier have been lost and cannot be recovered. They are, therefore, unavailable for review by appellant and must be presumed to be so damning to the State's position that they could not be revealed.

The Florida Supreme Court, in ***Mills v. State*, 684 So.2d 801 (Fla. 1996)**, also dealt with a postconviction claim that the State failed to disclose exculpatory evidence in violation of *Brady, supra.* Although *Mills* was affirmed (indicating the claims did not meet the standard in this case), the re-statement of the law is quite helpful:

> The test for determining the effect of the State's failure to disclose exculpatory evidence is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See United States v. Bagley*, 473 U.S. 667, 682,

> 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (Blackmun, J., plurality opinion); *id.* at 685, 105 S.Ct. 3385 (White, J., concurring in part and concurring in judgment). In other words, Mills must show the following: (1) that the State possessed evidence favorable to him; (2) that the evidence was suppressed; (3) that he did not possess the favorable evidence, nor could he obtain it with any reasonable diligence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *See Cherry v. State*, 659 So. 2d 1069, 1073 (Fla.1995). *Mills*; 684 So.2d at 805-806.

In this case, there can be no doubt that the only remedy for this wrong is to grant the appellant a new trial.

Issue IV:	**WHETHER THE TRIAL COURT ERRED IN NOT FINDING FROM THE RECANTED TESTIMONY [NEWLY DISCOVERED EVIDENCE] THAT THE STATE KNOWINGLY USED MISLEADING TESTIMONY OF WILLIAM PALMER AT TRIAL?**

In ***Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)**, the case arose on a defense motion for new trial based on a *newly discovered evidence* claim. The defendant alleged that the government made a promise of leniency to its key witness in return for his testimony to the grand jury and failed to disclose that to the defense. At the hearing on the motion the prosecutor who tried the case testified that he was unaware of the promise made by the grand jury prosecutor, when he said in closing argument that "[Taliento] received no promises that he would not be indicted." *Giglio*; 92 S.Ct. at 765.

The Supreme Court of the United States held that neither the grand jury prosecutor's lack of authority, nor his failure to inform his superiors or replacement prosecutor is controlling over this issue. The prosecutor's duty to offer all material evidence to the jury was not fulfilled violating due process and requiring that the case be remanded for a new trial.

The high Court stated:

> In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the

> prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.
>
> ***
>
> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it. ***Giglio***; 92 S.Ct. at 766.

Incorporating by reference all of the facts and arguments made in this brief without the burden of restating them all, there certainly was a ***Giglio*** violation in this case. ASA Brian Cavanagh who conducted the Grand Jury proceedings that chose to bring an indictment against appellant and Cavanagh's meeting(s) with Dacosta either at the jail or in his office were never disclosed by the State and, in fact, were denied at the final hearing and this amounts to a ***Giglio*** violation. DaCosta's and Palmer's testimonies at the final hearing were independent [Palmer was on the streets and DaCosta in jail and neither had seen or communicated with the other since October 1991] and corroborative as were their affidavits given to defense counsel and entered into evidence. The State refused to disclose the Grand Jury transcripts to appellant for the final hearing. The independent memorandum of ASA Farnsworth documenting Palmer's own litigation file memorializes ASA Cavanagh's trip to the jail to discuss the

murder case with Palmer and another inmate [DaCosta].

With these behind the scenes, clandestine activities and tactics designed to set up Robert Consalvo for a conviction and death penalty that were being conducted by the State, there is an obvious and clear due process violation as the prosecution failed to offer all material and competent evidence to the jury. A new trial must be granted.

ISSUE V:	**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIMS V THROUGH XV, RAISED IN THE SECOND AMENDED MOTION FOR POSTCONVICTION AND/OR COLLATERAL RELIEF, WITHOUT DETERMINING SUFFICIENCY OF THE PLEADING ON ITS FACE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?**

The trial court summarily denied each and every one of claims V through XV raised by Appellant in his 2nd amended motion for postconviction relief in its "Order Re: *Huff* Hearing" dated 03-01-02 [ROA vol. 9, pp. 1604-1607]. The trial court erred in that it failed to consider whether any of the issues raised in these claims were legally or factually sufficient, and it failed to demonstrate clearly and objectively from the files and records in the case why each of these claims ought to be summarily denied without any opportunity for evidentiary hearing.

In ***Lawrence v. State*, 831 So.2d 121 (Fla. 2002)** the defendant filed a motion for post-conviction relief, the trial court summarily denied his claims and the Florida Supreme Court per curiam affirmed. This decision expresses the clear statement of the Florida law [*Lawrence*; at 127]:

> This Court has held on numerous occasions that a defendant is entitled to an evidentiary hearing on his motion for post-conviction relief unless (1) the motion, files and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or the particular claim is facially invalid. *See Cook v. State*, 792 So.2d 1197, 1201-1202 (Fla.2001); *Maharaj v. State*, 684 So.2d 726 (Fla.1996). The defendant carries the burden of establishing a

> prima facie case based upon a legally valid claim. This Court has held the following:
>
> A motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.
>
> *Kennedy v. State*, 547 So.2d 912, 913 (Fla.1989) (citations omitted); see also *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000).

Although the *Lawrence* opinion directly speaks of ineffective assistance of counsel issues [and there are no ineffective assistance of counsel issues raised in this case], its principle applies to any postconviction issue.

In ***Atwater v. State*, 788 So.2d 223 (Fla. 2001)**, the issues raised were also ineffective assistance but the Supreme Court spoke in more generalized terms delineating the identical principal applicable to all postconviction motions [*Atwater*; at 229]:

> We begin our analysis with the general proposition that a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. *See, e.g., Maharaj v. State*,

> 684 So.2d 726(Fla. 1996); *Andersonv. State*, 627 So.2d 1170(Fla.1993); *Hoffman v. State*, 571 So. 2d 449(Fla. 1990); *Holland v. State*, 503 So.2d 1250(Fla.1987); *Lemon v. State*, 498 So.2d 923(Fla.1986); Fla.R.Crim.Pro 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. *See Kennedy v. State*, 547 So.2d 912(Fla. 1989). However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. (citations omitted). We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

Applying these principles to this case, the trial court should have conducted the *Huff* hearing under the presumption that Appellant is entitled to a full evidentiary hearing on all of his factual claims. The trial court should have determined whether the motion was timely and legally sufficient on its face. In this case, the trial court failed to properly determine that Appellant's motion, the files and records in the case conclusively show that he was not entitled to relief as a matter of law on claims V through XV. The trial court erred in summarily denying claims V through XV without any evidentiary hearing. Since there was no evidentiary hearing in the trial court on these claims, this Court must accept appellant's factual allegations as pled because they are completely consistent with the record and legally sufficient on their face. As a result, the case should be remanded for evidentiary hearing on claims V through XV.

The trial court failed to attach record portions to its order along with written findings so that the reviewing court could make its determination as to whether the trial court's decision is valid under *Atwater* and *Lawrence.*

This is Appellant's first stage of postconviction litigation. The issues Appellant has raised on this postconviction motion have not been raised before and they have not been litigated before. Appellant should be given an opportunity to present proof of facts on the issues raised so that the trial court would have a complete record before it prior to making an informed decision and the reviewing courts would have the complete factual record on which to rule. Death cases deserve special attention and attention means to record facts and not mere pleadings alone.

Whenever the trial court improperly denies relief that is later overturned on appeal, valuable time is lost both to the court process and to the liberty interest of the person who must remain on "Death Row" if he is later determined to have been wrongly convicted. It would be a better practice for the trial court to liberally grant evidentiary hearings on a timely basis. This would give the defendant a full and fair opportunity to prepare and present proof on his properly pled claims.

Under Florida law, an evidentiary hearing on a postconviction motion is required provided the motion is legally sufficient and the claims are properly pled alleging a factual basis under the law for the relief sought, or unless the files and records

conclusively demonstrate that the defendant is not entitled to relief. If the motion is sufficient on its face to allege a claim [for ineffective assistance, newly discovered evidence, a *Brady* violation, *Giglio* claim, etc.] as a matter of law and if the files and records do not conclusively refute the claim, the trial court must grant an evidentiary hearing.

In this case, the trial court did not make a finding that Appellant's second amended motion for postconviction relief was either legally sufficient or legally insufficient. Nor did the trial court enter any findings on "timeliness" of this motion. The trial court did adopt all of the State's arguments in its response to all of the claims and incorporated the State's response [ROA vol. 6, pp. 817-888] and the State's appendix [ROA vol. 6, p.889 through vol. 9, p. 1483] into its final "Order Re: Huff Hearing" [ROA vol. 9, pp. 1604-1607] summarily denying each and every one of claims V through XV. The trial court made no findings in regard to the legal sufficiency of the pleading as to any of Appellant's claims V through XV on the face of these claims. The trial court erred in not applying the proper legal standard to grant a final evidentiary hearing on these claims.

In Appellant's case, where there are two recanting witnesses calling pivotal record evidence into question and without this evidence there was no basis for conviction and certainly no basis for the avoid arrest aggravator to support the death penalty, a full hearing on all issues is necessary. Without a full and fair

hearing the conviction and death sentence cannot stand.

ISSUE VI:	**WHETHER THE TRIAL COURT ERRED IN ADDRESSING APPELLANT'S CLAIMS V THROUGH XV, RAISED IN THE FIRST AMENDED MOTION FOR POSTCONVICTION AND/OR COLLATERAL RELIEF, SEPARATELY AND INDIVIDUALLY WITHOUT ANY REGARD TO THE INTERACTIVE OR CUMMULATIVE EFFECT OF SOME OR ALL OF THESE CLAIMS TAKEN TOGETHER AS A WHOLE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?**

In its "Order Re: *Huff* Hearing" dated 03-01-02 [ROA vol. 9, pp. 1604-1607], the trial court addressed each of Appellant's claims separately and individually. The trial court gave no regard to the interrelation of the claims.

In his second amended motion for post-conviction relief [ROA vol. 5, pp. 765-806], the Appellant attempted to separate out his claims in order to focus on certain key points. Most of these emanate from the errant testimony of William Palmer who had been coached behind the scenes by Mark DaCosta who testified at the evidentiary hearing that the prosecutors coached him. Without the testimony of William Palmer in this case, the State would not be able to connect the Appellant with the crime scene at the time of the murder. With that testimony, the State was able to paint a picture of how the murder was committed and that it was committed for the purpose of avoiding arrest. The testimony of William Palmer was crucial to obtaining the guilty verdict and also in securing the death penalty for Robert Consalvo. It was pivotal testimony in this litigation.

This argument was raised in claims I through IV that were

tried at the final evidentiary hearing to the trial court. Several of the remaining claims are necessarily interactive with claims I through IV.

In Claim VIII of Appellant's second amended motion for postconviction relief, William Palmer's testimony was addressed. Palmer's testimony was focused on by the Florida Supreme Court in its opinion on the direct appeal from the guilt and penalty phases of the trial. In ***Consalvo v. State of*** **Florida**, Supreme Court of Florida, No. 82,780, October 3, 1996, at p. 11, the Court said:

> In this case, a witness testified regarding a conversation he had with appellant while in jail.
>
> He went over there one day, and she didn't answer the door, but he knew she was home. He figured she was passed out. So he broke into the house.
>
> While he was in there, she woke up and started yelling she was going to call the cops and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to stop her from calling the cops; and she started screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times.
>
> We conclude that this testimony, coupled with the fact that appellant and victim knew each other, and the appellant was aware that the victim was pressing charges against him for his prior theft, is sufficient to uphold the trial court's finding of the avoid arrest aggravator."

A clear pronouncement of the law on the avoid arrest aggravator was set out in this opinion.

Where it can be proved that this testimony was recanted and was not the truth, not only was the jury duped but the court was as well. Be that as it may, William Palmer's recant means there was no evidence in the record to support the avoid arrest aggravator so the death penalty cannot stand. In addition it brings the entire guilt phase proceeding into question so that a new trial would be required.

Claim VIII raised the issue of William Palmer's recant as it affected the avoid arrest aggravator. This claim also addresses Appellant's right to testify at trial that he never adequately waived. Furthermore, defendant was never even given the opportunity by the trial court to testify at the penalty phase. This necessarily means that claims VI, VII and VIII were interrelated and needed to be tried together with claims I through IV. The trial court determined not to consider claims VI, VII and VIII at all and summarily denied each of them without evidentiary hearing.

Claim V was disallowed by the trial court. It relates to significant evidentiary issues. The defendant is still trying to secure adequate mitochondrial DNA testing on hairs and other fibers that were clutched into the hands of the victim at her death presumably belonging to the murderer and not belonging to Robert Consalvo. This testing has been delayed so long by the State that the trial court lost jurisdiction of the issue because of the filing of this appeal. The trial court wouldn't permit the

defense to test this evidence and then summarily denied claim V. This is clear error requiring further investigation and a final evidentiary hearing in the trial court.

Claim IX is admittedly novel but raises interesting issues regarding violation of equal protection and due process as to this particular defendant and as opposed to others convicted of first degree murder by not creating a reviewable record on the issue of proportionality. Hearing time was requested to attempt to make proof on this issue so that it could be adequately argued in the Florida Supreme Court but this too was summarily denied by the trial court.

Claim X raises new and different mitigation evidence and argues that there is no forum for presenting this information that arose after conviction save the postconviction motion. The trial court determined not to permit an opportunity for the defendant to be heard on these items and summarily denied the claim with evidentiary hearing. This effectively denies the defendant due process and is error.

Claim XI raises a very important issue concerning the victim's brother, a renowned prosecutor and TV commentator. It was because of this man's status that his out-of-control antics at trial were permitted by the trial court. Then, at the penalty phase, he was permitted to testify as to victim impact evidence. This claim deserves to be heard and the Appellant permitted an opportunity to make an evidentiary record for review by this

Court.

Claim XII raises the ever present issue of the Court getting involved in the State's plea offers and thereafter sentencing the Appellant to a far more harsh sentence. In this case the State offered to waive the death penalty and agree to a life sentence. The defendant demanded his Sixth Amendment right to trial. When the trial did not go his way, the trial court sentenced him to death. If the proper penalty before trial was determined to be life but following trial it becomes nothing less than death, the only changed circumstance was that the Appellant demanded his constitutional right to trial. Thus, he was being punished for exercising his constitutional right to trial and that is clear error.

Claims XIII, XIV and XV are pled sufficiently to require an evidentiary hearing in the trial court.

All of the claims are interactive. All of the claims need to be considered as to legal sufficiency in the pleading and, once determined to be legally sufficient, the Appellant deserves to have a full and fair opportunity to try his case through an evidentiary hearing on the issues raised so that he can establish an adequate record for his appellate process.

CONCLUSION

Appellant seeks a new trial in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Initial Brief was served by mail upon Susan Bailey, Esq., Assistant State's Attorney, at the Broward County Courthouse, 201 SE 6th Street, Room 655, Fort Lauderdale, FL 33301, and by mail upon Leslie T. Campbell, Esq., Assistant Attorney General, at 1515 North Flagler Drive; Suite 900, West Palm Beach, FL 33401, this 20th day of October 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) in that it is Courier New 12-point font, except that headings and subheadings are Courier New 14-point.

IRA W. STILL, III, ESQUIRE