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.

REPLY BRIEF OF APPELLANT

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

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SUMMARY OF REPLY ARGUMENT

Appellant replies as to issues I-IV in the first section of his reply brief by recognizing the need for clarification of the Florida law in the area of recantation evidence and suggests a type of three prong test for this Court's consideration. This test incorporates the standard for newly discovered evidence pursuant to

***Armstrong v. State*, 642 So.2d 730 (Fla. 1994)** as the first prong and a balance between credibility of the witnesses, reliability of the evidence and independent corroborating evidence in the record.

Appellant then applies the three prong test to the evidence in this case to show conclusively why he should be granted a new trial (guilt phase and/or penalty phase) based upon newly discovered evidence theory as well as State's clear violations of ***Brady v. Maryland*, 373 U.S. 83 (1963)** and ***Giglio v. United States*, 405 U.S. 150 (1972)**.

Appellant discusses the evidence in relation to response and reply to appellee's answer brief pointing out why this Court should reject the State's theory and accept the Defense theory on the various issues, concluding that that there is no remedy for this defendant other than new trial.

REPLY ARGUMENT

A. REPLY ARGUMENT AS TO ISSUES I, II, III and IV:

Both appellant and appellee agree that the controlling (Florida) authority on the issue of witness recantation in death penalty cases is grounded in ***Armstrong v. State*, 642 So.2d 730 (Fla. 1994)** and ***Spaziano v. State*, 660 So.2d 1363 (Fla. 1995).**

In appellant's main brief in argument as to Issue I (pp. 47-54), appellant discusses *Armstrong*. In appellee's answer brief in argument as to Issue I (p. 27), appellee discusses *Armstrong*. Both parties have cited from this Court's holding in *Armstrong*, the following:

> 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.

This Court noted in *Armstrong*, supra., that if recanting witness Allen's testimony was removed from the record, there remained independent 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 [that is with her recanted testimony]. For this reason the Court denied Armstrong's claim for new trial based upon recanted testimony.

Appellant discusses ***Spaziano v. State*, 660 So.2d 1363 (Fla. 1995)** in his main brief (pp. 53-54), mainly in the context of Justice Kogan's concurring opinion. Appellee, in the answer brief (p. 27), cites *Spaziano*, supra., only as supporting *Armstrong* and cites ***Stano v. State*, 708 So.2d 271, 275 (Fla. 1998)** (p. 27) for the principle that recanted testimony is "exceedingly unreliable."

What is clear from the issues argued in this case, by both parties in relation to the current status of the law regarding recantation evidence, is that further clarification of the law applicable to recantation evidence is necessary. Either there could never be a case where recantation evidence would be considered valid, or a better defined test is necessary such

that the trial court could determine what recantation evidence would satisfy *Armstrong*, supra.

In the past, from the cases cited by both appellant and appellee, it appears that the Court has held that the primary focus should be on the reliability of the recantation including, for the most part, credibility of the recanting witness. This, however, would be logically tantamount to saying that there could never be any case under any circumstances where recantation might be sustained under Florida law. This conclusion follows because whenever a witness who has testified under oath at trial to the truth of a certain set of facts later comes forward to testify that he or she actually had knowingly lied in the former testimony [i.e. the definition of recantation] and he or she is willing now to recant that former testimony under oath in the trial court knowing that would be a confession to perjury, that witness has no credibility in the traditional sense of evidentiary analysis. They have admitted to lying hence, their testimony can always be said to be unreliable.

If it can be added into the mix, as in the case at bar, that the recanting witness has had mental problems in the past, a lengthy criminal history, abused drugs and alcohol, in rebellion to the justice system, given to telling lies all the time, etc.

(see appellee's brief pp. 33-34), then it follows that the trial court could never, under any circumstances, find that the recanting witness is anything but not credible and unreliable. How, then, do we answer the inquiry as to whether that witness was credible at trial when the prosecution presented its case-in-chief? Generally, any recanting "jail snitch" witness whom the prosecution is all too quick to propound in its case in chief as being reliable and credible, comes to the trial court with a myriad of similar credibility issues. The State can't have it both ways. If the witness is a liar now, was he not a liar then? Shouldn't the focus now be on balancing the independent competent corroborating evidence that supports the recantation?

There needs to be a more definitive test for recantation evidence. Such a test should be determined by this Court and applied to this case as well as those that will arise in the future.

It is suggested that a test such as the following be instituted by this Court to guide trial courts in their analysis of recantation evidence:

1. In the light most favorable to the movant, would the suggested recantation evidence (if true) render probable a different result in either the guilt phase

or penalty phase under *Armstrong* and its progeny? If so, then

2. Considering the credibility of the witness in the present testimony as well as the former testimony, and taking into account that the witness was free not to recant and not to come forward in jeopardy of a perjury charge but has freely chosen to recant and that it is a concluded fact that the witness's credibility is in question both in his present testimony and his former testimony, is the recantation reliable under a balance test. Within this balance, there is the underlying question if it cannot be clearly determined which set of facts asserted by the witness is true, the former testimony or the present testimony, then what would the result be if neither the former nor the latter testimony was presented to the jury.

3. Is there independent competent evidence in the record that supports the reliability of the recantation testimony?

As in ***Stano v. State*, 708 So.2d 271 (Fla. 1998)**, the first inquiry the trial court should make is assuming the

proffered recantation is true, would that require a new trial or penalty phase proceeding? and only if answered in the affirmative, would the trial court consider balancing credibility issues as the second prong of the test. If, as in ***Stano***, supra., the first prong fails then there is no need to proceed to credibility balancing. In ***Stano***, supra., this Court held:

> However, we do not reach the issue of the admissibility of Rosenblatt affidavit. Assuming without deciding that this affidavit is admissible newly discovered evidence, we agree with the trial court that there is no reasonable probability that the outcome of the trial would produce an acquittal.
>
> ***
>
> If the proffered evidence meets the first prong, to merit a new trial the evidence must substantially undermine confidence in the outcome of the prior proceeding or the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial [at 275].

In ***Johnson v. State*, 769 So.2d 990, 999 (Fla. 2000)**, this Court reviewed the credibility prong first but said, “Even if the court were to accept Mr. Smith’s testimony as being true, the court is confident that the verdict would not have been different. Evidence of defendant’s guilt was overwhelming.”

In ***Marquard v. State*, 850 So.2d 417, 424 (Fla. 2002)**, this Court said, “The trial court found that Abshire’s most recent

testimony could not constitute ‘newly discovered evidence,’ but was ‘simply the latest version of the events surrounding the homicide which was in direct conflict with Abshire’s prior testimony and other evidence presented at Defendant’s trial. We agree.” This reasoning also indicates that the logical first prong of the test is the determination under “newly discovered evidence” standards.

A. As to the first prong of the test:

Taken in the light most favorable to appellant, the recantation evidence of William Palmer would have rendered a probable different result in the guilt phase and/or the penalty phase.

As argued and cited in appellant’s amended main brief (pp. 50-51), the record clearly shows that the recantation evidence of William Palmer certainly would have produced a different result in that the State did not produce any other evidence at trial that put the defendant inside the victim’s apartment at the time of the murder (appellant’s amended initial brief, p. 50), and there is no other picture of the victim’s last dying minutes other than that painted by William Palmer.

On direct appeal, this Court quoted from the record of Palmer's trial testimony [***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.

Without Palmer's trial testimony there would have been clear reasonable doubt that defendant was the perpetrator of this crime. Furthermore, the admission to a burglary, prima facie avoid arrest aggravator and confession to how the murder took place and that defendant was the murderer would not have been present in the trial record.

The trial court determined at the ***Huff v. State*, 622 So.2d 982 (Fla. 1983)** hearing that Claims I through IV were

meritorious and required an evidentiary hearing (appellant's answer brief, p.2). That conclusion was made on the basis of the pleading itself and the recantation affidavits of William Palmer (Exhibit 12) and Mark DaCosta (Exhibit 7) that were admitted into evidence at the final evidentiary hearing on appellant's second amended motion for postconviction relief.

At the final evidentiary hearing, the trial court's role should have been to determine whether the allegations as pled were supported by competent and substantial evidence and not simply negated by a finding that the recanting witness was not credible. If otherwise, the trial court would have summarily denied Claims I through IV by finding that even if the recanted evidence was assumed true, or taken in the light most favorable to the movant, the outcome of the trial would not have been different in light of the overwhelming evidence that defendant was inside the apartment and murdered the victim and did so to avoid arrest. See *Johnson*, infra., at p. 999.

B. The second prong of the test:

In its answer brief, appellee repetitiously argues that William Palmer has no credibility and that his recantation is totally unreliable (pp. 32-35). Appellee does not address the

inherent problem that the prosecution presented Palmer's testimony at trial as reliable and credible. Palmer testified at trial that defendant had confessed to him that he had committed a burglary in victim's apartment, killed her in order to avoid arrest when she attempted to call the police and that he stabbed her repeatedly until she was dead (R. vol. 15, p. 2376). This set paragraph was rehearsed by the prosecution in its opening statement (R. vol. 7, pp. 1071-1073) and closing arguments (R. vol. 16, pp. 2642-2647), quoted by the trial court in its sentencing order (R. vol. 20, pp. 3274-3277), and again quoted by this Court in its opinion on direct appeal (see appellant's amended initial brief pp. 33-35.

All of this witness's baggage of psychiatric problems, extensive drug abuse, fear of reprisal in prison, being easily led by the interrogator to change his version of the facts to suit to the moment, his bizarre and untrustworthy nature, his seeing ghosts and hearing voices, etc., etc., (appellee's answer brief p. 33) affected Palmer in his former testimony as the State's key trial witness to the same extent and degree that it would have affected his recanted testimony. If Palmer is not credible in his recant, he was not credible in his trial testimony either. The State should not have presented Palmer's testimony at trial knowing that he was so unreliable but, having

done so, this Court should remedy this error by requiring a new trial void of the tainted jail snitch testimony.

William Palmer was free not to give recant testimony in the trial court at the postconviction hearing. He could not be found by the defense until the very eve of his testimony when he was located in a hotel room in Dania by the defense counsel and his private investigator. He wouldn't open the door and was not personally served with the subpoena and the subpoena had the wrong number of the courtroom. He voluntarily showed up in court just as the trial court was considering whether to permit more time for the defense to bring him in (PCT vol. 2, pp. 199-202).

On 5-23-05, when Palmer had been deposed by the State and was ready to testify, the State attempted to set up video recording equipment in order to capture Palmer's changed testimony on tape most likely to use in a perjury proceeding or to intimidate him in his testimony. Palmer was scared and frightened. He believed that perjury charges were coming. He wanted to testify anyway (PCT vol. 2, pp. 204-211 and 216-217).

Even though Palmer believed that he would be subject to a perjury charge by the State just for recanting his prior testimony, he freely recanted his former testimony based only upon his notion of telling the truth and for no other

justification, payment, promise, etc.

Both the appellant's view of Palmer's recant and the appellee's view of his recant differ materially. Appellee suggests Palmer's recant cannot be believed and therefore his trial testimony should stand as part of the record supporting the current conviction of Robert Consalvo as proven guilty beyond reasonable doubt as well as determination of the avoid arrest aggravator beyond reasonable doubt (appellee's answer brief p. 25).

Appellant argues that the recant of William Palmer should be given enough credence to at least conclude that his trial testimony was tainted to the extent that it should be stricken from the record as a matter of law. The result would be a new trial where either party would have the choice to bring Palmer and/or DaCosta at their own peril. On the other hand, the State could choose not to present jail snitch testimony and rely on the rest of its evidence that it argues was overwhelmingly sufficient to support the verdict of guilt beyond reasonable doubt and avoid arrest aggravator beyond reasonable doubt.

There needs to be a balance test applied to the credibility determination in the trial court. The court needs to weigh the traditional factors as this Court did in *Johnson*, infra., p. 999, from the standard jury instruction as a guidepost against

the fact that the recanting witness did not desire an opportunity to testify that he had lied previously, given up his freedom and placed himself in jeopardy of perjury charges, being called a liar now by both sides and the court, and a whole laundry list of reasons why a citizen might not assent to coming to court and testifying for what in his heart he believed was the right thing to do. By the very nature of recanting a former position, the witness is or was a liar. That should not be the end of the analysis, unless recantation evidence is always uniformly barred under Florida law.

C. The third prong of the test:

There is independent evidence in the record that supports the reliability of the recantation evidence of William Palmer and Mark DaCosta.

The State refused to, chose not to, or was unable to produce grand jury records of the testimony of both Palmer and DaCosta. The State in its answer brief (p. 44) said:

> Consalvo was unable to obtain grand jury transcripts, because the court reporter's notes could not be located, even though several attempts were made, and the State assisted Consalvo's counsel in this endeavor. During the May 2002 hearing, it was the trial court's conclusion that there was no basis for continuing the evidentiary hearing, and the court did not believe the grand jury material was so critical.

Appellant could not disagree with appellee's assessment of this smoke screen more vehemently. Clearly, that evidence would have shed light on whether ASA Cavanagh did in fact counsel DaCosta either at the jail or in his office prior to the grand jury proceedings based upon the dialogue between ASA Cavanagh, Palmer, DaCosta and the grand jurors that would be reflected in the grand jury records. Since the State could not produce the records that were lost only for the small window of days or months including this grand jury proceeding, the question lingers as to what was actually said by the recanting witnesses and ASA Cavanagh on the record that would affect these issues.

Since the State has lost its records, the testimony of DaCosta should be given that much more credence. The State cannot disprove the recant by substantive evidence. It can only call DaCosta a liar and have his entire testimony thrown out as being not worthy of belief, incredible. If this procedure is permitted, the State will have carte blanche to act accordingly in future cases. This would be a very bad precedent indeed.

ASA Cavanagh testified at the final evidentiary hearing (PCT vol. 2, pp.238-259). He said that he would never transfer a jail inmate into the cell of a suspect for the purpose of obtaining a confession by way of the jail snitch, as more fully set forth below:

Q. Did you at any time move Robert

> Consalvo into Mark DaCosta's cell or pod?
>
> A. Absolutely not. I took an ultimate mission to the Florida bar, Mr. Still, not to counsel or maintain any suit or proceeding which shall appear to be unjust. I also took an oath not to--
>
> Q. I appreciate that. I didn't ask you that but I appreciate that.
>
> A. --to employ only such means as are consistent with truth and honor. And I believe in that oath, Mr. Still. I did not or would not even think of violating it. (PCT vol. 2, pp. 256-257).

This, ASA Cavanagh said, would be highly unethical and any transfers inmates between cells would have required a prior court order. There is no such trial court order in this case.

However, ASA Cavanagh did have the power to transfer the jail snitches, Palmer and DaCosta, out of Consalvo's cell and into another cell following their grand jury testimony for their protection by his own direction and without any court order. Apparently, he had the power to do that and was not concerned as to whether it was unethical.

> Q. Did you or anyone that you know of following the Grand Jury testimony of Mark DaCosta switch him into protective custody at the jail?
>
> A. That could be. That could be if there were any direct threats. We do that. I don't know if it was done in this case,

but if there was any threats of anybody, we would. And if – and if – for example, often, a lawyer will call us and say, "My client has been threatened," and we call to the jail and have them moved into protective. Absolutely.

Q. Do you remember in this case if this happened with Mr. DaCosta, or do you have any recollection?

A. I don't have any recollection, but it could have happened. (PCT vol.2, pp. 258-259).

This is material as it indicates that the window of opportunity is there for the State to manipulate justice whenever the State deems it necessary or expedient in order to produce a desired result or to accomplish its own agenda.

ASA Cavanagh testified at the final evidentiary hearing that all he did on this case was to stand in for the trial prosecutor, ASA Marcus at the grand jury proceeding. He claimed to have had no involvement prior to that proceeding and no involvement in any way following the grand jury. On his direct testimony the following exchange occurred (PCT vol. 2, pp. 239-240):

Q. Okay. Mr. Cavanagh, I would like to ask you about State versus Consalvo. Are you familiar with the name of that case?

A. Yes, I am.

Q. And how is it that you are familiar

with that case?

A. Well, his name was resurrected recently. I mean, how I had any connection with it?

Q. Yes, sir.

A. A day or two before it went before the Grand Jury, I was asked by one of my colleagues to do them a favor, which we do, to assist each other when we have conflicts in our schedule. He was in the middle of another murder trial and he asked me to present it to the Grand Jury for him, which I did.

ASA Cavanagh also issued the grand jury subpoenas for Palmer and DaCosta on 10-22-91 (PCT vol. 2, p. 241) and he says that he had no reason to interview or prepare either Palmer or DaCosta for their testimony to the grand jury or for any other reason because “It wasn’t my case. I was just a pitch hitter for one day” (PCT vol. 2, p. 251). If it is true that ASA Cavanagh had nothing else to do on this case, then why is it that we find him working behind the scenes after the grand jury proceeding with ASA Farnsworth, Det. Gill, Det. Illarazza and Judge Eade to work out a probationary sentence for Palmer on his own case during the several weeks following 10-23-91? Likewise, if ASA Cavanagh’s testimony is true, then why do we find him present at DaCosta’s sentencing hearing in August of 1992 working for him to get a substantially reduced sentence on his own case? Both of these behind the scenes huddles are directly connected with

the Consalvo prosecution that ASA Cavanagh asserts he had no connection with. This is the same witness that the trial court termed "unimpeachable" in the order denying postconviction relief (appellee's answer brief pp. 8, 30, and 47).

In this case, the brother of the victim was a high profile federal prosecutor in Washington, DC who is a regular TV commentator of political and legal issues from Watergate to present. His testimony on victim impact and his continued presence in the courtroom throughout these proceedings was of great impact. The State Attorney's Office knew they needed testimony such as William Palmer's to obtain a conviction and death penalty.

ASA Farnsworth was the prosecutor on the William Palmer case that was assigned to Judge Eade (PCT vol.4, p.438). In his own criminal case, Palmer had been on a no bond hold. His attorney had filed for a bond hearing in August of 1991, a date that preceded the murder of Lorraine Pezza and indictment of Robert Consalvo (PCT vol. 4, p. 440). Thereafter, Palmer was suddenly let out ROR following a sidebar conversation between detectives Gill and Ilarazza, and Judge Eade. This occurred just after Palmer testified at the grand jury. ASA Cavanagh told ASA Farnsworth that he wanted to use Palmer's testimony in the Consalvo case (PCT vol. 4, p. 441). It should be noted that

detectives Gill and Illarazza had nothing to do with Palmer or his charges in that courtroom. They were the lead detectives on the Consalvo case.

Within days, Palmer, who had been facing an enhanced lengthy habitual offender prison sentence (PCT vol. 4, p. 439), received one-year probation on a reduced charge by the plea arrangement for his help in the Consalvo case (PCT vol. 4, p. 441-443). In closing his official case files, ASA Farnsworth penned a memorandum to the State's file stating that ASA Cavanaugh had gone over to the jail to discuss a murder case with Palmer and another inmate (PCT vol. 4, pp. 444-445). This memorandum is crucial independent documentary evidence that is both competent and reliable. It gives credence to the recantation evidence of DaCosta and Palmer.

Mark DaCosta's testimony [see appellant's mail brief pp. 12-25] as independent corroboration of the recantation of William Palmer is further independent and substantial evidence supporting Palmer's recantation. Though the State argues that DaCosta himself is not credible for a myriad of reasons, his recantation testimony in light of ASA Farnsworth's memorandum, the failure to produce grand jury testimony records ordered by the trial court, and the inconsistent testimony of ASA Cavanagh as to his power to move and relocate inmates in the county jail

as that affects the credibility of his other testimony, all support the reliability of the recantation evidence by both Palmer and DaCosta.

For the foregoing reasons, the recantations in this case would support a new trial and/or guilt phase proceeding in this particular case. Just calling a recanting witness does not necessarily entitle the defendant to a new trial [*Armstrong*, at 735]. More is required. It is time for this Court to define the test for how that proof can be made in the area of recantation evidence.

From the discussion above and from appellant's amended initial brief, it is clear that there was newly discovered evidence revealed via the recantation evidence of Palmer and DaCosta that would have materially changed the outcome of the trial (guilt phase and/or penalty phase), that there were behind the scenes dealings going on that were under the control of the Broward County State Attorney's Office and that were manipulating the outcome of the Consalvo case.

In addition, all of the information that has been uncovered during these postconviction proceedings was in the possession of the State and was exculpatory evidence that should have been revealed to the defense pre-trial because it was ***Brady v. Maryland*, 373 U.S. 83 (1963)** material. Until Palmer recanted

and led the defense to DaCosta who also recanted, the clandestine activity of the State was not revealed and, short of being revealed by the jail snitch witnesses, it never would have come to light at all.

Furthermore, if only one prosecutor of the homicide division of the Broward County State Attorney's Office was acting behind the scenes to set up jail snitch evidence and manipulate the outcome of the Consalvo case, then that activity is must be attributed to the entity known as the State. The facts and circumstances discussed give rise to the conclusion that the State itself was generating the malfeasance in violation of ***Giglio v. United States*, 405 U.S. 150 (1972)**.

The only remedy is to award a new trial to the defendant. One that will be a fair prosecution where due process will be afforded to this defendant.

B. RESPONSE AND REBUTTAL OF STATE'S ANSWER BRIEF ARGUMENT:

On page 25 of appellee's brief, the State agrees that if William Palmer's trial testimony stands unscathed by his recantation which is the subject of this appeal, that the avoid arrest aggravator would also stand. Appellee gives no argument as to whether the entire guilt phase of the trial would be

unsupported without Palmer's trial testimony. Appellant argues that it would and that a new trial is warranted. It was only through Palmer's testimony that the record reflects a description of how the murder took place, that Consalvo supposedly also confessed to being the murderer, that it occurred during the commission of a burglary to the victim's apartment, and that the primary motivation was to avoid arrest. For the State, Palmer's trial testimony is essential and crucial. Palmer's recanted testimony should be the basis for removing his trial testimony from the record. The clear result is that the foundation of the conviction and death penalty crumbles.

Appellee cites three cases decided by this Court that are important to the discussion of recantation evidence. The first is ***Marquard v. State*, 850 So.2d 417 (Fla. 2002).** While this case was previously cited as excellent law, it is here distinguished on its facts from the case at bar. In *Marquard*, supra., the incriminating statements were made to the co-defendant rather than jail snitch witnesses. There was no team effort between recanting witnesses and a member of the trial prosecutor's office. The co-defendant, prior to leaving North Carolina, had "discussed killing Stacey for her car and money" and when they stopped in South Carolina "Marquard told Abshire

that he was going to kill her because he was tired of arguing with her" and thereafter, "[i]n St. Augustine, Marquard and Abshire formulated a plot to kill Stacey the night after luring her into the woods." [*Marquard*; 850 So.2d 422]. In addition, the substance of the recanted testimony did not constitute newly discovered evidence [*Marquard*; 850 So.2d 424].

In this case, the recanted testimony is that of a jail snitch witness, Palmer, and is supported by independent evidence (to wit.: the recantation of DaCosta; the Farnsworth memorandum; inconsistent testimony of ASA Cavanagh; and the State's failure to provide grand jury records). Additionally, if Palmer's testimony was removed from the trial record, it would unquestionably change the outcome of this case.

The second case cited by appellee, ***Johnson v. State*, 769 So.2d 990 (Fla. 2000)**, did concern a jail snitch witness who attempted to recant his testimony during the evidentiary hearing of a postconviction motion. In that case the defendant was tried three separate times. The witness had his deposition taken on two separate occasions and he testified at a motion to suppress. This all occurred over a seven year span from 1981 through 1988. There was also an averment by the recanting witness that the police had instructed him as to what to discuss with Johnson in order to get him to confess to the crime. The

State helped the witness receive a probationary sentence for his help in convicting Johnson.

While many of the circumstances in *Johnson*, supra., are also present in this case, this Court held that even if the recantation evidence was accepted as true, the outcome of the case would not have been different. Therefore, in *Johnson*, supra., the recantation evidence did not meet the newly discovered evidence standard and could not have formed the basis for a new trial. The analysis in *Johnson*, supra., indicates that the first prong of the suggested test could not be established.

In the case at bar, the recantation of Palmer would require a new trial and/or penalty phase and, as such, *Johnson*, supra., is distinguished from this case.

The third case cited by appellee and discussed here is ***Stano v. State*, 708 So.2d 271 (Fla. 1998)**. The jail snitch witness, Zacke, purportedly recanted his trial testimony during a telephone discussion with a free-lance writer named Rosenblatt. Rosenblatt executed an affidavit that Zacke had told him that Stano never confessed to killing the victim and that prosecutors had coached him as to how he should testify. At his evidentiary hearing on the postconviction motion, the Rosenblatt affidavit was sought to be introduced. This Court found that even if the

affidavit could be introduced, there is no reasonable probability that the outcome of the trial would have been different. Again, *Stano*, supra., failed on the first prong of the suggested test.

Stano, supra., is clearly distinguishable from the case at bar. Palmer and DaCosta actually testified at the hearing in person and not by way of affidavit by a third person. They testified that Consalvo had never discussed with them that he had broken into the victim's apartment and stabbed her to avoid arrest, the scenario that Palmer described in his trial testimony. This case contains direct recantation and the outcome would have been different had Palmer not testified.

On pages 29, 43-44, and 51 of appellee's brief, the State asserts that ASA Farnsworth's memorandum to his official file, which the State cites as "Assistant Brian Cavanagh spoke to the Defendant Palmer and also another inmate at the Broward County Jail…" (see page 43-44 of appellee's brief), that ASA Farnsworth didn't really mean that Cavanagh spoke to them at the jail but that they were housed at the jail and he only spoke to them just before the grand jury testimony. This assertion is erroneous as it is not in accord with the plain meaning of the words. As cited in appellant's amended main brief at page 40, the memorandum of ASA Farnsworth 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.

Only after the issue was raised and the memorandum located and placed into the postconviction record did the current interpretation become the position of the State. The State would like for all of the independent corroborating evidence to be swept away by the self-serving testimony of the two ASA witnesses Farnsworth and Cavanagh.

Appellee's argument through its answer brief, as to ASA Cavanagh, DaCosta and Palmer's testimony, boils down to the argument that the trial court found DaCosta and Palmer not credible and Cavanagh to be unimpeachable. This is due primarily to the trial court applying an erroneous legal standard to recantation evidence and shows the need for this Court to clarify the test requirements for recantation evidence as previously addressed in this reply brief. The issue of recanting witness credibility must be balanced against the independent corroborating evidence in this case, which was:

1. The State would not provide grand jury records as ordered by the trial court;
2. The Farnsworth memorandum recording that ASA Cavanagh had talked to DaCosta and Palmer at the jail;
3. DaCosta's independent recantation testimony in support of Palmer's recantation; and
4. ASA Cavanagh changing his testimony in regard to him not having the power to take inmates out of jail cells or placing them into jail cells without first obtaining a court order; later changed testimony to be that he does have the power (absent court order) to take the witnesses out of their respective cells and place them in other cells after their grand jury testimony.

On page 55 of appellee's brief, the State asserts that Palmer received no help by the State in his own criminal case because of his testimony to be given in the Consalvo case. The Court is re-directed to appellant's brief pages 31-36 where this is adequately addressed with record citations.

As to claims V-XV of the second amended motion for postconviction relief and the argument set forth in appellee's answer brief pp. 52-80, appellant holds to his position that the trial court erred in summarily denying these claims without

evidentiary hearing. This was not a successive postconviction proceeding and, without evidentiary hearing, there is no record for this Court to adequately address. These claims ought to be sent back for evidentiary hearing in the trial court. See appellant's amended initial brief pp. 77-87.

CONCLUSION

This Court should clarify and define the test for trial courts to apply in determining whether recantation evidence and recanting witness testimony will require a new trial and/or penalty phase. Once the test is established by this Court, an analysis should be made as to whether Robert Consalvo should receive a new trial (guilt phase and/or penalty phase).

It is strongly urged, based upon the problems that have surfaced during this postconviction litigation concerning the wrongful acts of the Broward County State Attorney's Office, that Robert Consalvo be granted a new trial, one in which the State produces these jail snitch witnesses at its own peril. If the State, in a fair trial, can get a conviction against this defendant, so be it. If they cannot prove their case beyond a reasonable doubt, then so be that.

However, Robert Consalvo deserves a new and fair trial. Appellant seeks just that, a new trial (guilt phase and/or penalty phase).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Reply 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 --- day of August 2005.

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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