IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-2175

ROBERT CONSALVO

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PRELIMINARY STATEMENT

Appellant, Robert Consalvo, was the defendant at trial and will be referred to as "Consalvo". Appellee, the State of Florida, the prosecution below will be referred to as the "State". References to the records will be "ROA" for the direct appeal, "PCR-R" and "PCR-T" for the initial postconviction record and transcripts, "DNA-R" for the postconviction records in the instant appeal, the supplemental records will be designated with an "S" preceding the record type, and "IB" will denote Consalvo's initial brief. Where appropriate, volume and page number(s) will be given.

STATEMENT OF THE CASE AND FACTS

On October 23, 1991, Consalvo was indicted for the first-degree murder[1] of Lorraine Pezza and armed burglary of her residence. (ROA.v22 3343). Trial commenced on January 20, 1993 and the jury returned its verdict on February 11, 1993, convicting Consalvo as charged. (ROA.v17 2719-21; ROA.v23 3646-47). Following the penalty phase, on March 25, 1993, the jury recommended death by a vote of eleven to one. (ROA.v23 3708). On November 17, 1993, the court sentenced Consalvo to death for first-degree murder based upon the felony murder and avoid

[1] This occurred between September 26 and October 3, 1991.

arrest aggravators outweighing two non-statutory mitigators. A consecutive life sentence for the armed burglary was imposed. (ROA.20 3263-3308; ROA.24 3751-68). This Court affirmed. Consalvo v. State, 697 So.2d 805, 809 (Fla. 1996). On May 4, 1998, certiorari review by the United States Supreme Court was denied. Consalvo v. Florida, 523 U.S. 1109 (1998).

This Court found the following facts on direct appeal:

> On September 21, 1991, at 8 p.m. the victim, Ms. Lorraine Pezza, who was accompanied by her neighbor Robert Consalvo, drove to an automatic teller machine and withdrew $200 from her bank account. She placed $140 of that money in the glove compartment of her vehicle and placed the remaining $60 in her purse. At approximately 1:30 a.m. Pezza and Consalvo returned to the former's apartment and, at around 2:30 a.m., Pezza realized that she had left the money in her car and looked for her car keys which she never found. She used a spare key to unlock her car and discovered the $140 missing from the glove box. At this point she called the police.
>
> At around 3 a.m. Officer William Hopper was dispatched to Pezza's apartment. Pezza, with Consalvo present, reported to Hopper that she had lost or somebody had stolen $140 and a set of keys. Hopper asked Consalvo about the missing money and keys and he denied any wrongdoing. As Hopper was writing his report in his patrol car, he was again dispatched to Pezza's apartment. With Consalvo no longer present, Pezza told the officer that she suspected Consalvo of taking her keys and money.
>
> Two days later, on September 24, 1991, Detective Douglas Doethlaff received a phone call from Pezza inquiring how to file charges against Consalvo. Doethlaff advised Pezza that more identifying data was needed on Consalvo and indicated he would contact Consalvo. Doethlaff then contacted Consalvo and told him that Pezza wished to proceed with the case and that it was his word against hers. Consalvo continued

to deny any wrongdoing.

On September 27, 1991, from 10 a.m. to 11 a.m., Pezza employed a locksmith to change the locks on her apartment door and her mailbox. The locksmith subsequently stated that he was also asked to change the locks on the victim's car, but was unable to do so. The locksmith was the last witness to see Pezza alive. At 4:08 p.m. on the same day, Consalvo was documented on videotape using Pezza's ATM card. Consalvo also used Pezza's ATM card on September 29 and 30, 1991. The manager of a motel testified that on September 30, 1991, he saw appellant driving a car "similar" to Pezza's.

On October 3, 1991, at approximately 12:40 a.m., Nancy Murray observed a man wearing a brown towel over his head cut a screen door and enter the residence of Myrna Walker, who lived downstairs from the victim. Murray called the police and Consalvo was apprehended while burglarizing the apartment. Fresh pry marks were found on a sliding glass door along with a cut porch screen. Assorted jewelry was found lying on the bedroom floor with a screwdriver and towel. When police searched Consalvo, they found checkbooks belonging to Pezza, as well as to Walker, and a small pocketknife. Consalvo was arrested and subsequent to his arrest, Consalvo repeatedly asked the police what his bond would be for this burglary offense and how quickly he could be released.

That same day, Detective Doethlaff went to Pezza's apartment to investigate why Consalvo was in possession of her checkbook. Doethlaff observed fresh pry marks on Pezza's front door between the deadbolt and the doorknob. When no one answered the door, which was locked, Doethlaff left a business card at the door requesting Pezza to contact the police. That evening, after Pezza's family had tried unsuccessfully for several days to reach her, Eva Bell, a social worker for the Broward Mental Health Division, went to the victim's apartment to check on herFN1. While at the apartment, Bell encountered Pezza's next-door neighbor, Consalvo's mother, Jeanne Corropolli. Corropolli, who lived with Consalvo, related to Ms. Bell that her son had been arrested earlier that day (for the burglary of Mrs. Walker's apartment). After

receiving no response at Pezza's apartment, Bell contacted the police. At 7:16 p.m. Officer Westberry responded to Bell's request to check on Pezza. He knocked on Pezza's apartment door without getting a response and noticed Doethlaff's business card was still in the door jamb. The officer went back to his patrol car to complete his report. Bell, who was still in Corropolli's apartment, testified that shortly after the officer left the apartment, Corropolli was on the phone. Corropolli hung up the phone and became hysterical. Corropolli told Bell that her son, Robert Consalvo, said that he was "involved in a murder."FN2 Corropolli testified that when she told her son the police were next door, he replied, "Oh, shit." Bell immediately related this information to Officer Westberry, who then forced open Pezza's apartment door and discovered her decomposing body in the apartment. The porch screens of Pezza's apartment were cut.

At 10:10 p.m., Detective Gill of the Broward Sheriff's Office contacted Consalvo at the Pompano Jail Annex. After advising Consalvo of his rights, Gill notified Consalvo that they wanted to speak to him about Pezza's checks being found on his person at the time of his arrest. Consalvo responded by stating: "[Y]ou are not going to pin the stabbing on me." At this time, Gill did not know that Pezza had been stabbed.

At 2:30 a.m. the next day, Detective Gill effectively arrested Consalvo by filing an add charge against him for the murder of Lorraine Pezza. Consalvo had not yet been released on bond for the burglary charge. When a search warrant was executed on Corropolli's apartment, the police found a bloody towel in a dresser in Consalvo's bedroom. Subsequent DNA testing matched the blood on the towel with the victim's blood. In a statement to the police, Consalvo's mother confirmed that her son had in fact called her from the county jail and had advised her that he might be implicated in a homicide. She further informed police that she had found a towel in her son's room with blood on it.

While incarcerated in the Broward County Jail, Consalvo made inculpatory statements to a fellow

inmate named William Palmer. Consalvo told Palmer that he killed Pezza after she caught him burglarizing her apartment and said she would call the police. When she started to yell for help, Consalvo stabbed her. Lorraine Pezza was stabbed three times with five additional superficial puncture wounds. The fatal wound was to the left side of the chest. According to the testimony of Dr. Ronald Wright, the medical examiner, this could have occurred only if the victim was lying down at the time. The additional stab wounds were to the right upper chest and the right side of the back. The five superficial puncture wounds were to the back. Dr. Wright classified the manner of death as homicide and estimated that death occurred approximately three to seven days before the body was discovered.

On February 11, 1993, appellant was convicted of armed burglary and the first-degree murder of Lorraine Pezza. The jury recommended the death sentence by a vote of eleven to one. The trial court found two aggravating factors: (1) the capital felony was committed while the defendant was engaged in the commission of a burglary, see § 921.141(5)(d), Fla. Stat. (1995); and (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, see id. § 921.141(5)(e). The court found no statutory mitigating circumstances. As for nonstatutory mitigating circumstances it accorded the following "very little weight": (1) appellant's employment history; and (2) appellant's abusive childhood. Because the "mitigating factors have been given very little weight and they in no way offset the aggravating factors," the trial court found the death sentence "fully supported by the record."

FN1 Pezza's medical and psychological records indicate a history of mental illness.

FN2 Telephone records indicated that at 7:32 p.m. on October 3, 1991 a collect call was made from the Pompano Jail Annex inmates' phone to Ms. Corropolli's apartment. Consalvo, at this time, was being held at the Pompano Jail Annex.

Consalvo, 697 So.2d at 809-11.

Also, in rejecting Consalvo's claim that the court erred in giving an instruction on the inference which may be drawn from possession of recently stolen property, this Court stated:

> The evidence against appellant was overwhelming, and we find no reasonable possibility that the giving of the instruction affected the outcome. Appellant lived with his mother, who lived next door to the victim. Appellant knew the victim and had been in her apartment on several occasions. Appellant also was aware that the victim's live-in boyfriend had recently died, leaving her alone in her apartment. Prior to the victim's body being found, appellant was observed with various items of the victim's personal property. During that time, appellant was filmed on three different days making withdrawals from the victim's bank account using her ATM card and was also observed driving the victim's car. Appellant's mother saw appellant carrying a beach bag that belonged to the victim. Cards found in the victim's bedroom and bathroom matched playing cards found in the beach bag which was ultimately retrieved from a nearby dumpster. Upon the appellant's arrest for burglary, appellant was found in possession of one of the victim's checkbooks.
>
> Appellant also made numerous incriminating statements. When appellant called his mother from jail for the unrelated burglary, he told her he was going to be implicated in a murder. When his mother told him that the police were in the victim's apartment, appellant replied, "Oh, shit." When the police asked appellant about his possession of the victim's checkbook, he responded, "[Y]ou are not going to pin that stabbing on me." At that point, the police did not know that the victim had been stabbed. Appellant told another jail inmate that he went to the victim's apartment and broke in to get drugs knowing the victim was home but unconscious. After he entered the victim's apartment, she awoke and started yelling at him to get out and that she was going to call the police. She reached for the telephone so he grabbed her. She screamed and he stabbed her. When she screamed louder, he stabbed her several more times.

> Finally, pursuant to a search warrant, the police found a towel in appellant's dresser drawer. Blood on the towel, which had been transferred from a hand onto the towel while the blood was still wet, matched the victim's DNA pattern. Based on this evidence, we feel that there is no reasonable possibility that the verdict would have been different had the instruction not been given.

Consalvo, 697 So.2d at 815-17.

Consalvo, on April 9, 1999, filed his initial motion for postconviction relief.[2] (PCR-R.1 71-72; 103-39). A postconviction evidentiary hearing was held on May 22, May 23, and June 4, 2002, and was addressed to recantations of William Palmer and Mark DaCosta. On February 25, 2004, relief was denied upon the trial court's finding the recantations and allegations were not believable and would not result in an acquittal on retrial. (PCR-R.9 1604-07; PCR-R.11 1991-2010). This Court, on May 18, 2006, affirmed the denial of postconviction relief. Consalvo v. State, 937 So.2d 555 (Fla. 2006). Again, on March 19, 2007, the United States Supreme Court denied certiorari review. Consalvo v. Florida, 127 S.Ct. 1821 (2007).

During the original postconviction litigation, on September 13, 2001, Consalvo served a motion referencing the soon to be

[2] On July 12, 1999, Consalvo filed an amended motion for postconviction relief with appendix (PCR-R.1 71-72; 103-39; PCR-R.2-5 207-665). A second amended motion and appendix were filed March 7, 2001 (PCR-R.5 765-806).

effective §925.11, Fla. Stat. (SDNA-R.11-4). However, at the time the Broward Law Enforcement Initiative ("Broward DNA Program") provided DNA testing through the Broward Sheriff's Office Lab ("BSO Lab") for all capital defendants so desiring such testing. The Broward DNA Program was offered to Consalvo. (DNA-R.1 63; SDNA-R.1 5-12; SDNA-R.2 3) The State Attorney's policy was in place before this Court's promulgation of Florida Rule of Criminal Procedure 3.853. The offer contained the caveat that if the testing were not done under the policy, then the defendant would have to comply with Florida Statute §925.11 which was to become effective on October 1, 2001. (SDNA.1 9). Because the parties could not reach an agreement (Consalvo continued to insist that testing be done by a defense lab), the State believed that the offer had been rejected and that Consalvo would then have to file a written motion complying with Rule 3.853.[3] In response to the State's objection that Consalvo

[3] As reported by the State when the DNA issue was address at the Huff hearing, the cigarette butt evidence, per the court's order was returned to Broward County and Consalvo was to proceed however he wished. However, Consalvo's attorney communicated that he would think about the DNA testing. The State noted:

> And at the time, (the State) asked that the results be provided to the State, and Mr. Still (Consalvo's counsel) didn't agree with that, and there was some disagreement.
>
> Be that as it may, approximately in June of 2001, the sheriff of Broward County announced that DNA testing would be conducted on all Broward County

comply with the statute, the trial court asked "Okay. What's the downside? What's the down side if I let him do it? What does it do? It perpetuates? Does it extend anything?" (SDNA-R 3 45). Subsequently, without making any findings or noting compliance with the statute, the trial court granted Consalvo's request and later signed an order requiring the evidence be tested by BSO lab and under their guidelines. (DNA-R.1 63; SDNA-R.1 20-23). Also telling is the colloquy between the trial

---

> death-row cases. Pursuant to that announcement, the State attorney sent letters to all attorneys on death-penalty cases inviting them to take advantage of any law enforcement initiative of testing any evidence they so wished by the Broward Sheriff's Office.
>
> A letter was sent out from my office on June 26, 2001 by Caroline McCann. On July 20, 2001, Mr. Still responded that he would confer with his client before giving a response. Again, in August, Mr. Still responded that he did, in fact, want cigarette butts and fiber evidence to be tested, but he set forth his parameters for such testing.
>
> And then the State Attorney's Office once again responded on September 4th. This was a law-enforcement initiative to be done gratuitously by law enforcement and Broward Sheriff's Office, and there was to be no restrictions placed on BSO by the defense attorneys. And, therefore, we took Mr. Still's rejection as – objection as a "no." And Ms. McCann, in her letter, said he could proceed under Florida Statute 925.11 which went into effect February of 2001.
>
> The State now believes that we are bound by the statute and Rule 3.853 which has been set forth by the legislature and the Florida Supreme Court to effectuate the statute.

(SDNA-R.3 34-36)

court and the parties during the November 15, 2002 hearing on the logistics of BSO Lab testing the evidence for DNA.

> MR. STILL: (Registry Counsel) There was originally a motion for DNA testing. We litigated that about a year ago. Your Honor, signed an order for the cigarette butts and for some hair follicles and so forth that were collected and to be tested by DNA.
>
> We got into a quagmire – the way I understand it is, when the State offered to do the DNA testing before the Statute went in, and it was going to be done by BSO. The statue came into affect (sic), and then it was to be done by FDLE and your order said BSO.
>
> So maybe I'm over simplifying, but we needed some clarification, so we're back with that.
>
> MS. BAILEY: (Prosecutor) Your Honor, I have spoken with Dr. Duncan at the Sheriff's Office Lab ... They are aware of this Court's order and are ready to comply with this Court's order. However, there are some matters that do need to be clarified, and it's regarding the testing of this evidence that, as you know the State has consistently maintained that none of this is going to be dispositive.
>
> Your Honor's order grants defendant's motion as far as trying to eliminate these items as belonging to the defendant. It is out position that, even if it comes back, any of them come back as not belonging to the defendant, it will still not exonerate him on this case.
>
> However, be that as it may, if it may and you know that the State has argued that time and time again, there are some logistics that we need to contend with.

(DNA-R.4 3-4). Continuing, the record provides:

> MR. STILL: I think we had originally asked for it (DNA testing) to be done by an independent, FBI certified laboratory with the State rep present. Then

based on the development of the argument, Your Honor decided to have it done through BSO.

I think that's what you probably put in the order –

...

MR. STILL: I don't think that there is a problem with the testing itself because of the FBI certification for all of its labs. I don't think the scientific process – provided we can have – we had the opportunity of our experts to look over the results. I don't think that's going to be a problem. BSO will do that.

...

MR. STILL: The other side of it was – we're going back a while, probably a year ago or longer, when we raised this motion. One of the items that was to be tested, the cigarettes butts that had been found in the toilet at the crime scene.

And I remember in the motion the way that I worded is (sic) that, we wanted to – before the item is consumed with DNA testing, we wanted to try to categorize these cigarettes. ...

...

MR. STILL: I think on, the other hand, whoever, if someone was to examine the cigarettes, it needs to be through a microscope or whatever. Not hands on or that type of thing.

THE COURT: Let me tell you this: I can't see, having presided over this case, what the difference would e, whether it was a Marlboro or Camel or Winston. That was never an issue.

MR. STILL: Maybe it is now.

MS. BAILEY: That's why it goes to the State's position that this is not dispositive of this case.

THE COURT: **Right. Obviously, clearly, if**

everything that 's tested doesn't come out to Robert Consalvo, it's the State's position, and I don't want to indicate what the Court's position is, but it's the State's position, so what.

MR. STILL: **I don't think that the Court needs address that issue now**. I believe that it will be relevant later when we see the results. But to try to answer that now would be putting the cart before the horse. To say, well, let's address relevance now, and therefore, we don't need to test. I think that would be error. I think we need to do the testing and give the defense an opportunity to see the results and then see where we're going to go from there. What we can file.

Your Honor has already said that it would have to be by way of a new 3.850 motion if any new issues came up, since the other one is already on its way.[4]

MS. BAILEY: But Your Honor answered the question. If they would ask Your Honor to reconsider that portion of your order, that's the purpose that the Florida Supreme Court has promulgated that the rules involving the testing under the new DNA technology. **If it's not relevant and not dispositive to the case, then why are we going to take time and expense** –

THE COURT: **Well, because I made that decision a year ago that I was going to allow him to do it. To the extent and until it becomes an unreasonable request, and I don't see where the requests of have DNA done on the two items that were found in the household is in fact unreasonable**.

MR. STILL: Part of that was not only two cigarettes, but there were some items of hair and other things, and then possibly follicles that we needed tested as well.

[4] As this Court will recall, the evidentiary hearing was held in May/June, 2002 and the order denying postconviction relief was issued on February 25, 2004 (PCR-R.9 1604-07; PCR-R.11 1991-2010).

THE COURT: Are they going to test that against anybody else other than the defendant?

...

MS. BAILEY: Your Honor, his motion has requested comparison testing to eliminate the defendant in comparison to a limited number of suspects. No others were provided by Mr. Still except regarding the fingerprints. He brought up the locksmith. And in that order, Your Honor denied his motion to compel the locksmith to be fingerprinted.

So we're traveling under – although the orders (sic) does not specify, we're traveling under the premises that this is to eliminate the defendant's DNA from these items, the cigarette butts and in hair follicles....

...

MS. BAILEY: Your Honor, despite the fact that your order does not state that, we would request that Your Honor order the Sheriff's Office Lab to provide written results to the tests to both the State and defense. ...

And there is one other matter that, as long as we're doing testing ... we're considering asking the Court for testing -– doing a luminal test on the defendant's shoes.

If your Honor recalls at trial, the defendant's shoes were introduced into evidence, and they were washed in a washing machine. They were suede shoes. Mr. Marcus argued why would you wash shoes unless you were trying to get presumably the victim's blood out of them.

...

MR. STILL: We would object to that on the basis of relevance....

MS BAILEY: Well, it certainly serves any of the defendant's purposes, and we had requested this testing. **We are not traveling under the rule**. I

don’t –

...

THE COURT: At this juncture, I don’t see it necessary, Let me see what the results are of the testing.

If the hair – it will be interesting if the hair turns out to be his in her hand and if the blood turns out to be hers on his foot.

MR. STILL: I don’t know if I would use the word interesting, but I understand what you’re saying.

THE COURT: At this juncture – I don’t remember, I think there was one person who was another suspect, but I don’t remember his name.

...

THE COURT: It was the guy that had committed other offenses in the same area.

...

THE COURT: What’s your position as far as DeAnglos (phonetic) is examined?

MS. MCCANNIS: (Prosecutor) Well, again, I think we are putting the cart before the horse. The defense in his written motion asks for elimination of the defendant or other suspects. He does not set out who those are or a reason why that it would be dispositive in this case, so I think that at this point it’s totally irrelevant.

THE COURT: I will defer on DeAnglos. Let me see what the results are on these.

(DNA-R.4 7, 9-14, 21-22, 24-25)(emphasis supplied)

Although periodically the parties referred to the DNA report as January, 2004 test results, the DNA testing report was completed on March 9, 2004 as revealed by the notarized

signature. The report provided that STR-DNA testing could not be done, but suggested that mitochondrial testing may be considered for some of the hair evidence. (DNA.1 100-102).

On March 19, 2004, this report[5] was sent to Consalvo, who on the same date appealed the denial of postconviction relief. (PCR-R.11 2011-12; SDNA-R.1 29-32). This was after the trial court's March 7, 2002 order on the December 10, 2001, a Huff v. State, 622 So. 2d 982 (Fla. 1983) hearing (denying Claim V as legally insufficient),[6] the May, 2002 postconviction evidentiary hearing, and February 25, 2004 written order denying collateral relief. (PCR-R.9 1604-07; PCR-R.11 1991-2010; DNA.1 64-67). Although the report was sent to Consalvo on March 19, 2004 (SDNA-R.1 29-32), it was not until April 8, 2004, that he moved for mitochondrial DNA testing ("mt-DMA"), this time specially invoking §925.11 Fla. Stat. (SDNA-R.1 5).

Again, the State objected noting the pleading deficiencies

---

[5] The report was dated January 13, 2004, which appears to be an assignment or start of testing date, given that the report was signed/submitted on March 9, 2004. (SDNA-R.1 32).

[6] In Claim V of his Second Amended Motion for Postconviction Relief, Consalvo alleged the State withheld exculpatory evidence because certain fiber, hair, and cigarette butts were not turned over to the defense for independent testing and were not admitted into evidence, thus, leaving the presumption that such evidence would exonerate the defendant. During the Huff hearing, the State argued that the matter was insufficiently pled, procedurally barred in part and without merit as the evidence was not withheld and no presumption that the evidence is exculpatory arises where the defense is not permitted to do independent testing. (DNA-R 40-43; SDNA-R.3 3-10).

and non-compliance with the statute and Fla. R. Crim. Pro. Rule 3.853 (DNA-R.1 88-105). During a status conference on August 13, 2004, the trial court was reminded that Consalvo had filed his appeal and that the record had been transmitted, thus, divesting the court of jurisdiction of issues related to the postconviction litigation, but if a Rule 3.853 motion were properly filed, the court could consider that. (DNA-R.5 31-34). The other discussions had that day indicate that the original DNA testing was granted, not under Rule 3.853, but as part of the Broward DNA program or as part of a general discovery request as the court noted: "I'm not sure that he (Consalvo) can meet the criteria under 3.853 (DNA-R.5 4); "Before it (Rule 3.853) went into affect, (sic) the State Attorney's Office – I think that it was called law enforcement initiative testify (sic) volunteered to do the DNA testing and that was some three or four months before the effective date of the new rule." (DNA-R.5 35); and "I don't know the fact that 3.853 came into existence after I granted the motion and allowed the examination whether or not that can relate back to requiring you to fulfill the requirements of 3.853, that's my initial reaction." (DNA-R.5 37). On December 2, 2004, the trial court denied the defense request for mt-DNA testing without prejudice as the postconviction appeal case was then pending before this Court. (DNA-R.1 136).

After this Court issued its September 15, 2006, Mandate from the postconviction appeal, as noted above, Consalvo filed a petition for writ of certiorari with the United States Supreme Court. On March 19, 2007, the United States Supreme Court denied certiorari review. Consalvo v. Florida, 127 S.Ct. 1821 (2007). Following this, Consalvo returned to the trial court and renewed his motion for mt-DNA testing by setting down a hearing date. Such hearing was held on August 2, 2007.

The State asserted that Consalvo had failed to meet the pleading requirements of Rule 3.853 and had failed to show that the mt-DNA results would exonerate him. Given the state of the trial evidence and the items Consalvo desired to have tested, the trial court determined that such would not result in an acquittal or mitigation of Consalvo's death sentence, and denied relief. (DNA-R.2 369-73) This appeal follows.

SUMMARY OF THE ARGUMENT

Issues I and II - The trial court properly reviewed Consalvo's request for additional DNA testing, for mt-DNA testing, under Rule 3.853 and determined that the pleading requirements were not met. Further, the record supports the finding that mt-DNA testing would not exonerate Consalvo, thus, the motion was denied properly.

ARGUMENT

ISSUES I and II

THE TRIAL COURT PROPERLY DENIED CONSALVO'S REQUEST FOR mt-DNA TESTING (restated)

It is Consalvo's contention in **Issue I** that he filed his initial motion for DNA testing prior to the effective date of §925.11, Fla. Stat. and Rule 3.853 and that DNA testing was granted. Continuing, he admits that no results from the initial DNA testing were possible, but that his subsequent request for mt-DNA testing should have been exempt from compliance with Rule 3.853. In **Issue II**, Consalvo asserts that the trial court applied the incorrect standard when it denied mt-DNA testing based on the fact that the evidence would not exonerate him. The State disagrees.

Questions of law are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed de novo on appeal). In Hitchcock v. State, 866 So.2d 23 (Fla. 2004), this Court stated:

> This Court adopted Florida Rule of Criminal Procedure 3.853 in 2001, tracking the provisions of section 925.11, Florida Statutes (2001). *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So.2d 633 (Fla. 2001). Under rule 3.853, a motion for postconviction DNA testing must include, among other things, "a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a

statement how the DNA testing will mitigate the sentence received by the movant for that crime." Fla. R.Crim. P. 3.853(b)(3) (emphasis added). After ordering and receiving the State's response, the circuit court "shall ... enter an order on the merits of the motion." Fla. R.Crim. P. 3.853(c)(3). Further:

The court shall make the following findings when ruling on the motion:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
>
> (C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

Fla. R.Crim. P. 3.853(c)(5) (emphasis added).

The clear requirement of these provisions is that a movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case. Here, Hitchcock failed to demonstrate such a nexus.

With respect to the items listed in Hitchcock's motion, only a general reference and identification of the type of item was given, without any other relevant information. Rule 3.853 is not intended to be a fishing expedition. Rather, it is intended to provide a defendant with an opportunity for DNA testing of material not previously tested or of previously tested

> material when the results of previous DNA testing were inconclusive and subsequent developments in DNA testing techniques would likely provide a definitive result, and when a motion for such testing provides a basis upon which a trial court can make the findings expressly set forth in subdivision (c)(5) of rule 3.853. It was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, " how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or ... will mitigate the sentence received by the movant for that crime." He has not met that burden. Therefore, we find no error in the circuit court ruling that "the motion fail[ed] to set forth the evidentiary value of the evidence to be tested or explain how the results would exonerate Defendant or mitigate his sentence."

Hitchcock, 866 So.2d at 27-28 (footnotes omitted). See Willacy v. State, 967 So.2d 131, 145 (Fla. 2007) (quoting Hitchcock and reaffirming it is defendant's burden to set forth with specificity how the DNA testing would give rise to a reasonable probability of acquittal or a lesser sentence and demonstrate a nexus between the items to be tested and the issues in the case). In Van Poyck v. State, 908 So.2d 326, 330 (Fla. 2005), this Court noted that the defendant had to show that there was a "reasonable probability" that the test results, if entered into evidence, would produce an acquittal or lesser sentence, and that this was the standard to order DNA testing.

Here, Consalvo's first request for DNA testing was not filed under Rule 3.853. Instead, it was a general request presented before the rule was put into place. Contemporaneously with that request, the Broward DNA Program was in effect *sua*

sponte offered DNA testing to capital defendants, but required that such be done by BSO Labs. Consalvo was offered this, and to an extent he agreed to such testing, except that he wanted an independent lab to do the testing. (DNA-R.1 63; SDNA-R.1 5-12, 20-23; SDNA-R.2 3; SDNA-R.3 34-36, 45). The trial court order testing by BSO Labs.

The trial court's comments during the Huff Hearing are significant given that the court made no findings in its March 7, 2002 permitting DNA testing; testing was order by BSO Labs without the court referencing or making finding consistent with the application of Rule 3.853. During the Huff hearing, the State reported that there had been no agreement by Consalvo to accept the gratuitous DNA testing offered under the Broward program and that Consalvo, now that Rule 3.853 was in effect, should have to comply with the pleading requirements of the rule. The court inquired: "Okay. What's the downside? What's the down side if I let him do it? What does it do? It perpetuates? Does it extend anything?" (SDNA-R.3 45).

The trial court later amended its initial order granting DNA testing by BSO Labs to include specific guidelines and other BSO Lab criteria to be met by the parties. (DNA-R.1 63; SDNA-R.1 20-23). BSO Labs was unable to obtain DNA results under the STR-testing, but suggested mt-DNA may be considered. This finding was obtained after the trial court had ruled on the

postconviction motion. Consalvo appealed that order before he filed a motion for mt-DNA testing; a motion which invoked §925.11, but failed to meet the pleading requirements of the statute or Rule 3.853.

Consalvo argues that he should not have been required to meet the pleading requirements of Rule 3.853, because his initial motion for testing was filed before the rule went into effect. However, this is a procedural rule and as such must be followed when filing a new motion.

The suggestion by Consalvo that collateral estoppel, stare decisis and/or res judicata somehow bar the trial court from applying Rule 3.853 to his motion for mt-DNA testing merely because the court allowed testing under a different theory originally is not persuasive. The United States Supreme Court in Ashe v. Swenson, 397 U.S. 436, 443 (1970), pointed out that "'[c]ollateral estoppel' ... means simply that when an issue of ultimate fact has once been **determined by a valid and final judgment**, that issue cannot again be litigated between the same parties in any future lawsuit." (emphasis supplied).

With respect to stare decisis, this Court has stated:

> This Court adheres to the doctrine of stare decisis. *See, e.g., Muhammad v. State*, 782 So.2d 343, 365 n. 16 (Fla.2001); *see also Tyson v. Mattair*, 8 Fla. 107, 124 (1858) ("It is an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable

> to waver with every new judge's opinion....").FN2 Stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule, *see Weiand v. State*, 732 So.2d 1044, 1055 n. 12 (Fla. 1999), or where there has been an error in legal analysis. *See State v. Gray*, 654 So.2d 552, 554 (Fla.1995); *see also Brown v. State*, 719 So.2d 882, 890 (Fla. 998) (Wells, J., dissenting) ("[I]ntellectual honesty continues to demand that precedent be followed unless there has been a clear showing that the earlier decision was factually or legally erroneous or has not proven acceptable in actual practice.").
>
> _____
>
> FN2. "The doctrine of stare decisis, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So.2d 612, 637 (Fla. 2003).

State v. J.P., 907 So.2d 1101, 1108-09 (Fla. 2004).

This Court recently discussed the doctrine of res judicata in relation to law of the case, stating:

> [T]he doctrines of the law of the case and res judicata differ in two important ways. First, *law of the case applies only to proceedings within the same case, while res judicata applies to proceedings in different cases*. Second, the *law of the case doctrine is narrower in application in that it bars consideration only of those legal issues that were actually considered and decided in a former appeal*, while res judicata bars relitigation in a subsequent case or action not only of claims raised, but also claims that could have been raised.
>
> *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001) (emphasis supplied) (citations omitted). Clearly, law of the case does not apply to Parker's claim in that, as the State admits, the issue of the admissibility of the May 7 statement was never

> actually considered and decided by this Court in Parker's first appeal. Further, even if law of the case applied, "[t]his Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997).

Parker v. State, 873 So.2d 270, 278 (Fla. 2004).

Of these doctrines, none applies to bar the trial court from considering a subsequent motion for a specific type of DNA testing under a rule enacted after the original motion was filed, but before the original order was granted or a subsequent motion referencing the new rule was filed. No appellate court had considered Consalvo's DNA request or reviewed his motion. Likewise, the doctrines do not bar the application of the rule where it was clear that the parties initially were considering this discovery issue outside the rules, if certain parameters could be met. Further, where there had not been an appellate review, as neither party appealed the order granting testing or the non-final order denying without prejudice the request for mt-DNA testing. For these reasons, Puryear v. State, 810 So.2d 901 (Fla. 2002); McBride v. State, 848 So.2d 287 (Fla. 2003); and Federated Department Stores, Inc. v. Motie, 452 U.S. 394 (1981) do not bar the trial court's application of Rule 3.853 to the mt-DNA request. The testing results were not obtained until after Consalvo had appealed. As such, there has been no appellate review of the matter, and the court was permitted to

revisit its rulings on the issue when raised by the parties at later date.

This is not an issue of failing to follow a valid and final judgment, failing to apply appellate precedent, or failing to follow an appellate decision made in the same case or between the same parties. The issue is whether a trial court can reconsider a discovery issue and apply a rule of procedure promulgated after the initial request was granted, but before an additional, modified request is made. Clearly, the trial court was well within is power to apply Rule 3.853 to the mt-DNA request when it had the motion before it once again, and there had been no appellate decision on the matter.

Contrary to Consalvo's representation, the State's May 6, 2004 objection to mt-DNA testing was not the first time that the State challenged the pleading sufficiency of the DNA request. Not only during the Huff hearing, but during the November 15, 2002 hearing the State objected that Consalvo had not shown that the DNA results would exonerate him. (DNA-R.4 3-4, 7, 9-14, 21-22, 24-25; SDNA-R.3 34-36) However, it is clear from Consalvo's initial motion, his argument at the November 15, 2002 hearing that the court need not question whether the DNA results would be exonerating, and his arguments here, that the rules were not applied to his initial DNA request.

The court's decision to grant DNA testing as a preliminary

discovery tool, or under the Broward DNA Program instead of under Rule 3.853 is even clearer, when considered in light of the fact the court's order granting testing is devoid of any findings regarding the exonerating nature of the items to be tested as well as the court's question during the Huff hearing in response to the State's argument that there was no showing of exoneration and required by the rules, asking "Okay. What's the downside? What's the down side if I let him do it? What does it do? It perpetuates? Does it extend anything?" (SDNA-R 3 45). Also, when these comments are coupled with the discourse at the November 15, 2002 hearing and the court's admission that the DNA testing was granted without regard to whether the results would exonerate Consalvo, it is clear the court was not requiring compliance with the Rule. The court admitted that the testing was granted "Well, because I made that decision a year ago that I was going to allow him to do it. To the extent and until it becomes an unreasonable request, and I don't see where the requests of have DNA done on the two items that were found in the household is in fact unreasonable."[7] (DNA-R.4 13). In fact, the court recalled that he ruled based on the Broward DNA

[7] Initially it appears that the trial court was under the mis-impression that Consalvo had asked for DNA testing only on the two cigarette butts found in the victim's toilet. This was immediately corrected by the parties who noted Consalvo was seeking testing of several hairs found in and around Pezza's body. (DNA-R.4 13-15).

program and was not considering Rule 3.853 at that time. (DNA-R.5 35). Given that Consalvo's postconviction motion had been denied by the time the initial testing proved unfruitful, and there was no motion pending when the appeal was filed, the trial court could require that Consalvo establish a need for further testing under the then existing Rule 3.853. Merely because the court believed that there was no need to comply with Rule 3.853 when the motion was granted initially, does not foreclose the court from revisiting the issue and requiring compliance with the law when the matter is presented at a later date. Consalvo has not been deprived of anything to which he was entitled.

Although not cited by Consalvo in his **Issue I**, Knighten v. State, 927 So.2d 239 (Fla. 2d DCA 2006) sheds light on the instant matter, and supports the State's position. In Knighten, the defendant filed a Rule 3.853 motion and the trial court denied it summarily finding it facially insufficient. Id. at 240. On appeal, the District Court reversed finding that the claim was pled sufficiently. Id. Subsequently, the trial court granted DNA testing, but as it turned out that the hair evidence was not suitable for STR-DNA testing. Id. When the defendant sought to compel mt-DNA testing, because there was in essence, no DNA testing done on those hairs, the trial court treated it as a successive motion and denied it summarily finding the motion was insufficiently pled and that there was statute or

rule requiring additional DNA testing. Id. Once again on appeal, the District Court found error with respect to the trial judge's conclusion that matter was insufficiently pled. The District Court held that its initial determination of sufficiency relieved the defendant of the burned of have to re-prove/re-assert the Rule 3.853 pleadings in order to compel DNA testing. Id. Further, it distinguished King v. State, 808 So.2d 1237, 1249 (Fla. 2002), relied upon by the trial court, noting that in King, there had never been a finding of legal sufficiency at that trial or appellate level, thus, there had been no showing of a "reasonable probability" of an acquittal or lesser sentence and the trial court could summarily deny the testing request. Id. at 240-41. Continuing, the District Court reasoned that the lab had yet to accurately test the hair "since it only attempted STR DNA testing, for which the hairs were not suitable." Id. at 241. It was further determined that a trial court is not limited to only STR-DNA testing, especially where mt-DNA testing has been accepted judicially. Id.

By analogy then, Consalvo, who has yet to fully and properly plead his request for DNA testing, yet was granted DNA testing, has not obtained a ruling that his motion was legally sufficient or that he has shown a "reasonable probability" that the tests results would exonerate. Rather, he was granted a free opportunity to test the materials, and the trial court was

free to require Consalvo to comply with the rules when he asked for mt-DNA testing. As noted above, Consalvo has not been deprived of anything to which he was entitled. There has been no appellate court review on Consalvo's DNA request, nor a decision assessing the legal sufficiency of the motion. Based upon the factual and procedural posture of that case, it is clear that the instant trial court was permitted to revisit the need for DNA testing, and require compliance with Rule 3.853.

Unlike his request for DNA testing, Claim V of Consalvo's motion has been decided, and the denial of relief affirmed on appeal. See, Consalvo, 937 So.2d at 558, n.4 (affirming the summary denial of Postconviction Claim V (Brady issue) opining "We find no error in the trial court's summary resolution of claims V through XV. Claims V through XV were either insufficiently pled, procedurally barred because they could have been or were raised on direct appeal, or meritless on their face. Claim V was insufficiently pled and was raised and resolved on direct appeal"). A review of that claim establishes no need for DNA testing. It was a straight forward claim of a Brady violation. Consalvo argued that the State had failed to turn over evidence to it for independent testing, therefore, there was a presumption that such evidence was exonerating. This Court rejected such a claim. It may not now be used to bootstrap a DNA testing issue and circumvent the requirements of

Rule 3.853.

Consalvo charges that he will be the only death row inmate not permitted modern DNA testing methods, and that the State will be "successful in side-stepping the clear import of §925.11, Florida Statutes, and Rule 3.853, Florida Rules of Criminal Procedure as well as common law that preceded it." (IB at 32) At no time has the State tried to "side-step" the law or rule. Instead, at each juncture, the State tried to educate the trial court that Rule 3.853 applied and that Consalvo should be required to carry his burden under the rule. Of the parties, it was and continues to be Consalvo who seeks to circumvent the rule and its strict pleading and proof requirements including proving that the DNA test results would "reasonably lead" to an acquittal or reduced sentence. Moreover, absent a specific rule, a trial court has inherent authority" to permit limited postconviction discovery. See Lewis v. State, 656 So.2d 1248, 1249 (Fla. 1994) (finding "it is within the trial judge's inherent authority, rather than any express authority found in the Rules of Criminal Procedure, to allow limited [postconviction] discovery" into matters which are relevant and material). Merely because Consalvo was the beneficiary of court ruling which was not incompliance with the law, does not mean that he should continue to reap these windfall benefits.

Moreover, the court determined that even if the mt-DNA

results proved that the hairs found on and around the victim, Loraine Pezza ("Pezza") excluded him as a source, the result of the trial would not have been different. As such, under either a limited postconviction discovery basis or under Rule 3.853, there was no need to do the mt-DNA testing, because the trial court assumed that the DNA evidence excluded Consalvo.

Turning to **Issue II**, Consalvo pleads that the trial court erred when it required proof that the DNA results would exonerate him before mt-DNA[8] testing was permitted. He points to Hoffman v. State, 800 So.2d 174 (Fla. 2001) and claims that hair was found in Pezza hand, and if such were not his, then he could not be the assailant. Consalvo read too much into the evidence. First he has not shown that hair was clutched in Pezza hand. At trial, hairs were reported being collected "from victim's right arm" (lab evidence item JK1), "from victim's right hand" (lab evidence item JK2), "form back of victim's left hand" (lab evidence item JK3, and "from bed sheet near victim's feet" (lab evidence item JK4). (DNA-R.1 99). Detective Kammerer testified at trial that he did not recall and did not "specifically mark

[8] Consalvo points to Magaletti v. State, 847 So.2d 523 (Fla. 2d DCA 2003) for the proposition that mt-DNA testing is a valid accepted science which meets the Frye test. This does not further Consalvo's position as the State never asserted that mt-DNA testing was not be admissible evidence. The State's argument was that even if the testing proved the hairs came from someone other than Consalvo, such would neither lead to an acquittal or a reduced sentence under Rule 3.853.

down" whether the hairs collected "from" the victim's right hand was from her grip, and with respect to the left hand, although "most likely" the hairs came from her grip, he did not record it and could not recall. (ROA.14 20-22). However, the report does indicate that the hairs from the left hand were collected from the "**back**" of Pezza's hand. (DNA-R.1 99). It is Consalvo's contention at the August 2, 2007 hearing that the hairs were collected from the grasp of the right hand, and for support, he filed a crime scene photograph (DNA-R.2 366-67; SDNA-R.5 37-41, 44). Unfortunately for Consalvo, that picture depicts the victim's left hand, where hairs were found only on the back of the hand, and the picture fails to show hairs within the victim's left hand grasp. He has yet to point to record evidence for either hand showing that hairs were actually found in Pezza's grasp. As such, the picture, and record evidence fail to establish Pezza was grasping any hairs, let alone those of her attacker. Instead, the record shows that she was found under several layers of blankets and there were hairs in the bed around and on her hands and feet. Hair evidence from this location and under the facts of this case is insignificant evidence and such would not exonerate Consalvo as the trial court reasoned preliminarily during the August 2, 2007 hearing.

> -- Basically. You know we're talking about the crime scene is – quote, unquote – "a bed." You know it there's one thing that's in a bed it's – dependent

upon the person – all kinds of body hair. We would have to know when the last time the sheet was changed. That body hair could be there for a significant period of time.

The victim was stabbed. I'm sure there was a struggle inside the bed. God only knows what the victim suffered before she died and where her hands may have moved in and out and throughout that bed. So I have a difficult time concluding that the only way the hair could have made it to her body would have been as a result of the – quote, unquote – "perpetrator."

I recognize that, assuming for the sake of argument, that the perpetrator was somebody else other than Consalvo. That's certainly a possibility. But there's all kinds of ways that that hair could have met parts of her body, depending upon, like I said, the length of time the sheets were on the bed, the amount of people that had been in the bed in addition to her, and the nature of the struggle that ensued; that certainly there were no eyewitnesses or videotape from a victim who's stabbed on multiple occasions. I mean, like I said, God only knows the amount of times her hands could have moved in and out and around that bed as this slight woman was stabbed to death.

So that's why I'm struggling with the idea that even if there were significant amounts of hair found that did not belong to the defendant, how is that being a reasonable probability that he would be acquitted?

(SDNA-R.5 42-43).

In its written order, the trial court concluded:

Upon a review of defendant's motion, this Court finds that it does not satisfy the pleading requirements of rule 3.853 in that it is not under oath, nor does the motion demonstrate how the DNA testing will exonerate defendant or mitigate his sentence. The motion merely states that "Should the hairs found clutched in the victim's hands or on her body, clothing or in the immediate surrounding are (sic) and the two cigarette butts contain DNA that is

not that of the defendant, the evidence would tend to exonerate the defendant. Should DNA prove to be one or more of the alternate suspects that would not only exonerate the defendant but would prove conclusively who murdered the victim in this case." The motion does not specify how this evidence would exonerate defendant or who the "alternate suspects" are. However, even if this Court were to find that the motion did satisfy the requirements of rule 3.853, defendant had failed to show a reasonable probability that he would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

The clear requirement of the provisions of rule 3.853 is that a movant must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. *Hitchcock v. State*, 866 So.2d 23, 27 (Fla. 2004). "In order for the trial [court] to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." *Id*.

At the hearing, defendant asserted that hairs "clutched in the victim's hand, and also the fingernails, if they can be tested mitochondrially (sic) for DNA then that would ... tend to show who the final struggle was with as the victim grabbed for the hairs and possible (sic) scratched the skin." Defendant argued that if DNA would reflect the final struggle and clearly absolve the defendant in this case, then the outcome would probably have been different if that was able to be argued at the trial. Defendant relies on the case of *Hoffman v. State*, 800 So.2d 174 (Fla. 2001), in support of his motion. ...

Unlike the facts of Hoffman, in this case there was no indication at trial that the hairs necessarily came as the result of a struggle. As this Court stated at the hearing: "There was hair all over the bed; hairs on the back of her hand. It is equally probable that the hairs could have been put there another time as well as during the time of the incident." (Tr., p15, lines 12-20) The crime scene photos, while showing the victim's clutched hand, do

not support defendant's argument that hair was "clutched in the victim's hand."FN1

> FN1 At the hearing, defendant also moved to have the victim's fingernail clippings tested, although no reference to fingernail clippings was made in defendant's motion. While defendant alleged at the hearing that there may have been skin underneath the fingernail, there is no indication that there was anything recovered from underneath the fingernail other than the fingernail, which would justify mitochondrial DNA testing.

"Rule 3.853 is not intended to be a fishing expedition." Hitchcock, 866 So.2d at 27. "On the issue of whether the defendant's allegations are facially sufficient requires consideration of the facts of the crime itself and other available evidence. Cases addressing this issue have uniformly held DNA testing will not be permitted if the requested DNA testing would shed no light on the defendant's guilt or innocence." *Id*. at 28 (citations omitted)

In the case of *Sireci v. State*, 908 So.2d 321 (Fla. 2005, the defendant also sought mitochondrial testing of hair, which he stated would "eliminate all physical evidence of [his] presence at the carlot." *Sireci* at 325. The Court found that "in light of the other evidence of guilt, there is no reasonably (sic) probability that Sireci would have been acquitted or received a lesser sentence if the State had introduced into evidence the hair on Poteet's sock. As we have noted, seven witnesses testified that Sireci admitted to them that he killed Poteet." *Id*., *see also Thompkins v. State*, 872 So.2d 230 (Fla. 2005) (affirming denial of defendant's motion for mitochondrial DNA testing where given the evidence presented at trial, even if the DNA analysis indicated a source other than the victim or defendant, there was no reasonable probability that defendant would have been acquitted or received a life sentence); *King v. State*, 808 So.2d 1237, 1257-49 (Fla. 2002) (affirming denial of defendant's motion for mitochondrial DNA testing where trial court found that even if test

showed that hair found on victim's body did not come from victim or defendant, there was no reasonable probability that defendant would have been acquitted or hade his sentence mitigated.)

In this case, even if the hairs came back to be someone other than the defendant, in light of the overwhelming evidence, there is no reasonable probability that defendant would have been acquitted or been given a lesser sentence. The Florida Supreme Court in Consalvo v. State, 697 So.2d 805 (Fla. 1996) affirmed defendant's conviction and sentence on direct appeal and specifically found:

> The evidence against appellant was overwhelming, and we find no reasonable possibility that the giving of the instruction affected the outcome. Appellant lived with his mother, who lived next door to the victim. Appellant knew the victim and had been in her apartment on several occasions. Appellant also was aware that the victim's live-in boyfriend had recently died, leaving her alone in her apartment. Prior to the victim's body being found, appellant was observed with various items of the victim's personal property. During that time, appellant was filmed on three different days making withdrawals from the victim's bank account using her ATM card and was also observed driving the victim's car. Appellant's mother saw appellant carrying a beach bag that belonged to the victim. Cards found in the victim's bedroom and bathroom matched playing cards found in the beach bag which was ultimately retrieved from a nearby dumpster. Upon the appellant's arrest for burglary, appellant was found in possession of one of the victim's checkbooks.
>
> Appellant also made numerous incriminating statements. When appellant called his mother from jail for the unrelated burglary, he told her he was going to be implicated in a murder. When his mother told him that the police were in the victim's apartment, appellant replied, "Oh,

> shit." When the police asked appellant about his possession of the victim's checkbook, he responded, "[Y]ou are not going to pin that stabbing on me." At that point, the police did not know that the victim had been stabbed. Appellant told another jail inmate that he went to the victim's apartment and broke in to get drugs knowing the victim was home but unconscious. After he entered the victim's apartment, she awoke and started yelling at him to get out and that she was going to call the police. She reached for the telephone so he grabbed her. She screamed and he stabbed her. When she screamed louder, he stabbed her several more times.
>
> Finally, pursuant to a search warrant, the police found a towel in appellant's dresser drawer. Blood on the towel, which had been transferred from a hand onto the towel while the blood was still wet, matched the victim's DNA pattern. Based on this evidence, we feel that there is no reasonable possibility that the verdict would have been different had the instruction not been given.
>
> Consalvo, at 816.
>
> Based on the foregoing, this Court finds that defendant has failed to meet his burden under the requirements of section 925.11 Florida Statutes, and Fla. R. Crim. P. 3.853.

(DNA-R.2 369-73).

The court's ruling is in compliance with the case law which has developed since the promulgation of the statute and rule. See Hitchcock, 866 So.2d at 27; Tompkins v. State, 872 So.2d 230 (Fla. 2005); Van Poyck, 908 So.2d at 328-29. Each require a showing that the test results would be exonerating. Consalvo is

unable to make such a showing. This leaves Consalvo with nothing to offer as a basis for DNA testing except to say that initially he was permitted to do DNA testing without having to meet any pleading or proof requirements, thus, the law as it exists now should not be imposed upon him and he should be allowed to continue to test without restriction. Yet, he is faced with the overwhelming evidence of his guilt. Hence under the Lewis standard, permitting limited postconviction discovery of relevant and material matters, or Rule 3.853, requiring a showing that the DNA testing will establish a reasonable probability that the results will produce an acquittal or mitigate the sentence, Consalvo is unable to show entitlement to the requested testing. Further, the results of mt-DNA testing, while potentially interesting from a scientific testing basis, would have no impact on Consalvo's guilt or sentence. As such, it would be an exercise in futility[9] as it would not change the fact that Consalvo had a towel with the victim's blood on it in his room, was found in possession of her old checkbook, was captured on tape using her ATM card after she was last seen alive, and made incriminating admission to his mother and police

[9] Given that exoneration or a lesser sentence could not be proven, even if the hairs were not from Consalvo or Pezza, the mt-DNA testing also would be an unnecessary expense during these difficult budget times without any benefit to the defendant.

detectives, and a chilling confession to William Palmer.[10] See Consalvo, 697 So.2d at 809-11, 815-17 This Court should affirm.

[10] Consalvo may reply that Palmer's testimony has been undermined based upon the postconviction litigation and his attempted recantation. However, this Court agreed with the trial court that the recantation was not credible, thus, leaving the original testimony intact. See Consalvo v. State, 937 So.2d 555 (Fla. 2006)

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the decision denying mt-DNA testing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Ira W. Still, III, Esq., 148 SW 97th Terrace, Coral Springs, FL 33071 this 4th day of September, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

S/Leslie T. Campbell____ __
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE