IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-2175

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 mitochondrial DNA testing a pending claim raised under Rules 3.850 and 3.851.

INITIAL BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

	page
Table of Authorities	2-3
Preliminary Statement	4
Statement of the Case	4-8
Statement of the Facts	9-19
Issues on Appeal	20
Summary of Argument	20-21
Argument	
Issue I:	22-33
Whether the trial court erred, after it had previously ruled that appellant was entitled to DNA testing of the hair/fiber crime scene evidence, by reversing its ruling years later to deny appellant the opportunity to perform mtDNA testing?	
Issue II.	34-39
Whether the trial court erred in applying the wrong standard by requiring the appellant to prove conclusively that the results of DNA testing would exonerate him in light of all of the other evidence in the case as a condition precedent to mtDNA testing?	
Conclusion	40
Certificate of Service	41
Certificate of Compliance	41

TABLE OF AUTHORITIES

page

Federal Authorities:

Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947) 31

Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927) 31

Brady v. Maryland, 373 U.S. 83 (1963) 35, 37

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940) 31

Commissioner v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) 31

Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1897) 31

Federated Department Stores, Inc. v. Motie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) 30, 31

United States v. Bagley, 473 U.S. 667 (1985) 37

Wilson's Executor v. Deen, 121 U.S. 525, 7 S.Ct. 1004, 30 L.Ed. 980 (1887) 31

Florida Authorities:

Consalvo v. State, 697 So.2d 805 (Fla. 1996) 6, 10

Consalvo v. State, 937 So.2d 555 (Fla. 2006) 7, 10

Hoffman v. State, 800 So.2d 174 (Fla. 2001) 35, 36, 37

King v. State, 808 So.2d 1237 (Fla. 2002) 39

Knighten v. State, 927 So.2d 239 (Fla. 2d DCA 2006) 39

Magaletti v. State, 847 So.2d 523
(Fla. 2d DCA 2003) 38

McBride v. State, 848 So.2d 287 (Fla. 2003) 28, 29

Perez v. State, 620 So.2d 1256 (Fla. 1993) 27

Puryear v. State, 810 So.2d 901 (Fla. 2002) 27

Florida Statutes:

§925.11, Florida Statues 20, 23, 32, 35, 39

Florida Rules:

Rule 3.853, Florida Rules of Criminal
Procedure 20, 23, 32, 35, 39

PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol **"ROA"** will be used to designate the record on this appeal, volumes 1 through 7. The symbol **"SOA"** will be used to designate the supplemental record of this collateral appeal, volumes 1 through 5. The symbol **"R"** will be used to designate the original record of the trial and direct appeal. The symbol **"SR"** will be used to designate the original supplemental record of the trial and direct appeal. The symbol **"PCR"** will be used to designate the record of the postconviction first collateral appeal [on all claims except for claim 5 that is the subject of this appeal]. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

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

The length of the sentence imposed on count I (first degree murder) is a death sentence [R 3771-3773] and the length of the sentence imposed on count II (armed burglary) is a habitual

felony offender life sentence imposed consecutive to the sentence in count I [R 3774-3776].

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

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

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

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

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

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

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

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

The appellant then filed a timely petition for writ of certiorari in the Supreme Court of the United States (Case No. 97-8148) which was denied on May 4, 1998. The direct appeal, the petition for writ of certiorari, and the second amended motion for postconviction and/or collateral relief constitute all of the postconviction proceedings filed on behalf of the appellant to date. The subject of this appeal stems from Claim 5 [DNA testing of hair/fiber evidence found on the body of, and foreign to, the victim during the crime scene investigation] of the second amended motion for postconviction and/or collateral relief. Claim 5 was still pending when the appeal was filed and could not be completed in the trial court during the period of ouster of jurisdiction. That has been finally determined by the trial court and is the basis of this appeal.

On the first collateral appeal of the second amended motion for postconviction and/or collateral relief, the Florida Supreme Court entered its mandate in case number SC04-520 on 05/18/2006. See ***Consalvo v. State***, 937 So.2d 555 (Fla. 2006). A petition for writ of certiorari was filed and the Supreme Court of the United States denied it on March 19, 2007.

Thereafter, the issues relating to DNA testing were brought back to the trial court, which entered its final order denying Mitochondrial DNA (hereinafter referred to as "mtDNA") testing on October 17, 2007 [ROA, vol.2, pp. 368-380]. That final order denying mtDNA testing, including all of what was raised under claim 5 of the second amended motion for postconviction and/or collateral relief and the proceedings in the trial court (concerning that one issue arising under claim 5) that stretched from March 7, 2001, to October 17, 2007, is appealed to the Florida Supreme Court by filing appellant's notice of appeal on November 13, 2007 [ROA vol. 3, pp. 434-435].

This appeal concerns only the issues arising under Claim 5 of appellant's second amended motion for postconviction relief and the pleadings, hearings and evidence relating solely to the trial court's granting DNA testing and thereafter its reversal denying mtDNA testing.

The appellant's present court appointed counsel is Ira Still, Esq. who was appointed on July 27, 1998. The appellant was represented at trial by Jeffrey Glass, Esq. (special public defender). He was represented on direct appeal to the Supreme Court of Florida and in the Supreme Court of the United States by

the Hon. Richard L. Jorandby, Public Defender, Fifteenth Judicial Circuit of Florida, and members of his staff including Jeffrey L. Anderson, Esq. No other attorneys have represented the defendant throughout these proceedings, although Linda McDermott, Esq. has recently taken over as counsel for the appellant on his federal habeas corpus claims.

STATEMENT OF THE FACTS

On February 11, 1993, Robert Consalvo was convicted of armed burglary and first-degree murder of Lorraine Pezza [R 2719-2720]. He was thereafter sentenced to death by the trial court on November 17, 1993, following the jury recommendation by a vote of eleven to one [R 3263- 3318].

On September 27, 1991, the victim, Lorraine Pezza, hired a locksmith to change the locks on her apartment. Locksmith Robert Carroll worked at her apartment from approximately 10:00 a.m. to 11:00 a.m. [R 1139]. He was the last person to see the victim alive. Appellant lived with his mother, Jeanne Corropoli, in the apartment next door to the victim, Lorraine Pezza [R 1674 and 1678].

On October 3, 1991, appellant was arrested for the burglary of Myrna Walker's apartment [R 1236] that was situated downstairs from the victim's apartment [R1160-1165]. During the time that appellant was in custody on this charge, Officer Westberry kicked open Lorraine Pezza's apartment door [R 1357] and discovered her decomposing body lying in bed wrapped in several layers of sheets and blankets [R 1358].

The medical examiner, Dr. Wright, testified that the victim had been stabbed three times and sustained an additional five superficial puncture wounds [R 2076-2078]. The fatal wound was

to the left side of victim's chest into the heart. She was lying down when that wound was inflicted [R 2074-2076]. Dr. Wright testified that death had occurred between three to seven days prior to her discovery on October 3, 1991 [R 2067].

This Court has consistently delineated the facts of the case as set forth in ***Consalvo v. State***, 697 So.2d 805 (Fla. 1996) and reiterated in ***Consalvo v. State***, 937 So.2d 555 (Fla. 2006). Only the facts and procedural aspects most helpful to an understanding of the issues presently before the Court on this appeal are addressed below.

The trial court determined that appellant's claim V raised viable issues concerning the testing of certain items of crime scene evidence [PCR vol. 5, pp. 518-577; SOA vol. 3, pp. 1-60].

The police investigators collected certain hairs that were foreign to the victim during their crime scene investigation shortly after the murder in 1991. Detective Sergeant James Kammerer's crime scene investigation report dated 10/16/1991 [ROA vol. 2, p. 99], indicated the collection of items labeled "JK-1 to JK-5." These were hairs collected from the victim's hands, arms and near her feet. In 1991, DNA testing on hair and fiber had not developed scientifically to the point that it is presently. No method for extracting DNA from a hair shaft had been discovered at that time. Today, scientists have developed mitochondrial DNA testing techniques for hair [ROA vol. 4,

p.15].

The facts of this homicide case (as established at trial and set forth by this Court in its previous opinions on this case) appear to point to appellant as the sole culprit and murderer of Lorraine Pezza. However, the hair evidence that was found in and on her hands and wrapped up in the sheets encasing her corpse is highly relevant to the identity of the real murderer. This hair evidence tends to prove recent contact between the victim and a person present in the room at the time of her death and engaged in her final struggle for survival. Appellant raised this issue in Claim V of his second amended motion for postconviction and/or collateral relief [ROA vol. 1, p. 41] and litigated that issue from 03/07/2001 to the present appeal. Facts relating to the progress of that issue are indicated below.

On 10/16/1991, Det. Sgt. James Kammerer of the Broward Sheriff's Office (hereinafter called BSO) conducted "a Laser examination of the body for trace evidence" and collected certain items of hair fiber foreign to the victim and reduced his findings to writing in a police report [ROA vol. 1, p. 99] that indicates:

> After installing auxiliary lighting, the victim was initially examined for hairs and several were collected. The victim was then examined with the use of the portable argon-ion Laser resulting the collection of a single foreign fiber from the left hand.
>
> The following evidence was collected by this investigator:

JK-1 (1) container of hairs from victim's right arm
JK-2 (1) container of hairs from victim's right hand
JK-3 (1) container of hairs from back of victim's left hand
JK-4 (1) container of hairs from bed sheet near victim's feet
JK-5 (1) fiber from victim's left hand in plastic container

Det. Kammerer also directed the photographing of one of the victim's hands [ROA vol. 2, p. 367; and App. item 9] that was submitted into the record of the 08/02/2007 hearing in the trial court at which time argument for continued DNA testing in the form of mtDNA was heard [ROA vol. 2, p. 366; and Appendix item 9].

Appellant filed his second amended motion for postconviction and/or collateral relief on 03/07/2001 [ROA vol. 1, p. 41]. The asserting of Claim V, calling for delivery of the hair/fiber evidence to be tested by modern DNA methods, pre-dated the effective dates of both rule 3.853, Florida Rules of Criminal Procedure (effective date 10/01/01), and Florida Statute 925.11 (effective date 10/01/01).

On 06/26/2001, ASA Carolyn McCann drafted a letter [App. item 2] indicating that the Broward State Attorney's Office was offering to perform DNA testing in appellant's case before the effective date of Florida Statute 925.11 and requested input on what items appellant wanted to have DNA tested. This was part of an overall Law Enforcement Initiative. Counsel for the Defense responded, by letter dated 07/20/2001, that he would travel to death row to confer with appellant as to how he wished to proceed

[App. item 3].

Counsel for the Defense wrote to ASA Carolyn McCann on 08/30/2001, indicating that appellant did want to conduct DNA testing with experts selected by him [App. item 4]. On 08/31/2001, the trial court conducted a hearing [PCR vol. 5, pp. 500-508; SOA vol. 2, pp. 1-9] at which time appellant affirmed his definite desire to conduct DNA testing and to move forward in testing the hair/fiber evidence. The trial court determined to address the DNA testing after it determined the *Huff* issues [PCR vol. 5, pp. 506; SOA vol. 2, p. 6].

In ASA Carolyn McCann's second letter On 09/04/2001, [App. item 5], it was affirmatively stated that testing under the Law Enforcement Initiative would only be done through the BSO Crime Lab as the "FDLE designated laboratory."

The trial court conducted a hearing on 12/10/2001 [PCR vol. 5, pp. 518-577; SOA vol. 3, pp. 1-60] at which time the Defense sought to push ahead with DNA testing of hair/fiber evidence arising under Claim V. The trial court did not want to entertain the issue at that time stating "And I'll address the other issue, the other request for the testing as soon as possible." [PCR vol. 5, pp. 574; SOA vol. 3, pp. 57].

The trial court held another hearing in on the DNA testing issue on 02/08/2002 [PCR vol. 5, pp. 578-601; SOA vol. 4, pp. 1-24]. At that hearing the trial court ruled that the Defense should be permitted to raise the issue of DNA testing and conduct that testing independently of the rest of the postconviction issues. The Court decided to go ahead with all of the other

issues raised in Claims I-IV for evidentiary hearing and heard argument on the remaining issues, except for that of the Claim V hair/fiber DNA testing issues. The trial court held that if DNA testing results raised an issue it would be preserved independently of the remaining *Huff* issues that were to be moved ahead without delay [PCR vol. 5, pp. 578; SOA vol. 4, p. 1].

Thereafter, on 03/07/2002, the trial court entered its first order granting defendant's motions for leave to conduct DNA testing on certain items of crime scene evidence including the hair/fiber [ROA vol. 1, p. 63]. The trial court held:

> The Defendant's motion for access to the evidence of: …(b) fiber evidence (hair follicles), … is **GRANTED, with the provision that all evidence must be analyzed and tested under controlled conditions as established by Broward Sheriff's laboratory; and provided that any testing be conducted with representatives of the State and Defendant present** (emphasis appears in the original).

In regard to the DNA testing issue, ASA Susan Bailey wrote a letter (dated 06/13/2002) to counsel for appellant regarding procedures necessary to conduct DNA testing through the BSO Crime Lab as required by the trial court in its order dated 3-11-02 and enclosed a copy of that order for the Defense [App. item 6]. A second letter dated 08/29/2002, from ASA Susan Bailey [App. item 7] suggested that the parties set a hearing in the trial court and subpoena Dr. George Duncan to discuss BSO lab testing on the hair/fiber evidence. That letter prompted the appellant to file a motion (on 09/25/2002) to review the prior ruling of the trial court in its order permitting the Defense to conduct Lab and DNA testing [SOA vol. 1, pp. 5-19]. By that motion, the Defense

requested the trial court to set a hearing to show cause why BSO Crime Lab has failed to comply with the 03/07/2002 order of the trial court (among other suggested remedies).

A hearing was set in the trial court for 11/15/2002 [ROA vol. 4, pp.1-29]. Dr. George Duncan of BSO Crime Lab was present with his counsel and interacted with the trial court and counsel to narrow down the type of STR DNA testing that he would perform and the conditions of overseeing the results [ROA vol. 4, pp.14-23]. BSO lab would conduct STR DNA testing on the hair root, a piece of flesh that might be attached to the collected hair shafts [ROA vol. 4, pp.14-15]. That root would be entirely consumed by BSO testing and none would be left for additional testing in order to check results by a Defense expert [ROA vol. 4, p. 16].

At that hearing, Dr. Duncan informed the trial court that mtDNA testing has been developed which could facilitate testing the hair shafts in this case. However, he advised that BSO Crime Lab is not able to perform mitochondrial DNA testing. Such DNA testing would have to be outsourced [ROA vol. 4, p. 15]. There was at least one suspect other than appellant to whom the Defense sought to compare DNA findings on the hair fibers. This was a person named DeAngelos and he had been convicted of over twenty-five burglaries in the area of victim's apartment during the time period of the murder in this case. The trial court considered him and stated "I will defer on DeAngelos. Let me see what the results (of the DNA testing) are." [ROA vol. 4, p. 25].

On 01/09/2003, the trial court entered its second order

(referred to as "amended order") granting defendant's motion for leave to test evidence by STR DNA testing at BSO labs [ROA vol. 1, pp. 96-98]. ASA Susan Bailey wrote to counsel for appellant on 01/24/2003, concerning arrangements to be made for obtaining "buccal" swabs from appellant on death row for comparison purposes in the DNA testing [App. item 8]. No further progress was made on this issue for a period of one year.

In March of 2004, Dr. George Duncan released his STR DNA written report and findings to the parties. This report was dated 01/24/2004 [ROA vol. 2, pp. 378-380]. In that report, Dr. Duncan states:

> Possible hairs lacking a root were observed on items JK-1, JK-2, JK-3A, JK-3B, JK-3C, JK-3D, JK-3E, JK-3F, and JK-3G. These samples are not suitable for STR (DNA) testing, **but may be suitable for mitochondrial DNA analysis.** Contact the analyst for laboratories that perform this analysis [ROA vol. 2, p. 379].

The Defense filed a renewed motion for mtDNA testing based upon Dr. George Duncan's BSO Lab report findings on 04/08/2004 [SOA vol. 1, pp. 26-32]. The Sate filed its response on 05/06/2004 [ROA vol. 1, pp. 88-105]. A hearing was held 08/13/2004, in the trial court. At that hearing [ROA vol. 5, pp. 30-42], the trial court ruled that it did not have jurisdiction to consider anything further on the issue of DNA testing because the rest of the case was currently on (postconviction) appeal to the Florida Supreme Court. Nothing further could be considered until the high Court completed its proceedings and jurisdiction was once again relinquished to the trial court. On 12/02/2004,

the trial court entered a third order on Defense request for DNA testing that indicated no jurisdiction in the trial court at that time [ROA vol. 1, p. 136].

Once the trial court regained jurisdiction, a status hearing on the issue of mtDNA testing was held on 03/01/2007 [ROA vol. 6, pp. 43-54]. The only item resolved was to set another hearing and for the trial court to order a transcript of the 08/13/2004 hearing.

A hearing was held on 08/02/07 in the trial court [SOA vol. 5, pp. 1-46]. The trial court heard argument of the parties. The State argued that the Defense was not entitled to DNA testing as it had failed to show how the DNA testing results would likely affect the jury verdict of guilt. The Defense argued that the trial court had already granted testing in two prior orders and that a portion of the testing had already taken place but that the only issue was when, and how to proceed with mtDNA testing and to agree on a certified laboratory for outsourcing. Additionally, it is obvious that when two persons are engaged in a life and death struggle who are wrestling and fighting each other violently where the conquered would lay dead at the end, that this clutching and ripping contact between them would lead to the victim ripping arm or other body hair from her assailant such that whatever hairs are later found in her hands and on her body had to belong to the assailant/murderer (unless they were hers) as no one else was present.

By letter of the Defense to the Court, State and Clerk on 08/07/2007, the Defense supplemented the record with a color copy

of a crime scene photo showing the victim's closed hand in which hair/fiber evidence was found by BSO during its crime scene investigation [ROA vol. 2, pp. 366-367; App. item 9].

The trial court issued its order on 10/18/2007 denying the Defense the right to conduct mtDNA testing on the hair/fibers [ROA vol. 2, pp.368-380; App. item 1]. It is that final order, and the proceedings leading up to it, that is currently on appeal.

ISSUES ON APPEAL

Issue I:

Whether the trial court erred, after it had previously ruled that appellant was entitled to DNA testing of the hair/fiber crime scene evidence, by reversing its ruling years later to deny appellant the opportunity to perform mtDNA testing?

Issue II.

Whether the trial court erred in applying the wrong standard by requiring the appellant to prove conclusively that the results of DNA testing would exonerate him in light of all of the other evidence in the case as a condition precedent to mtDNA testing?

SUMMARY OF ARGUMENT

Appellant’s motion for DNA analysis on hair evidence that was foreign to the victim and located in her hands and on her body during the original crime scene investigation was filed and initially heard by the trial court prior to October 1, 2001, the effective date of **§925.11, Florida Statues**, and **Rule 3.853, Florida Rules of Criminal Procedure**. The trial court should have determined the DNA request on the standard existing prior to the effective date of the statute and rule.

The trial court initially entered an order permitting appellant to conduct DNA testing. The State chose not to appeal that order and lived with it for over two years. Initial STR DNA analysis was completed but DNA could not be extracted by that method. The State's DNA expert testified that mitochondrial DNA [mtDNA] testing was available and would be useful in determining the source of the collected hair shaft evidence. Thereafter, the trial court reconsidered its prior ruling and denied mtDNA testing.

Appellant's position is that this violated the doctrines of collateral estoppel, stare decisis and res judicata requiring reversal by this Court.

Additionally appellant's position is that the trial court erred by deciding not to permit further DNA testing of the hair evidence in the form of mtDNA testing since the attempts to extract DNA from hair shafts were not successful from the STR DNA testing procedures alone. The trial court believed that even if mtDNA testing results would have completely excluded appellant as the source that the result at trial would not have led to an acquittal in light of all of the other evidence in the case. However, that conclusion would be plain error and would require reversal by this Court.

ARGUMENT

ISSUE I: Whether the trial court erred, after it had previously ruled that appellant was entitled to DNA testing of the hair/fiber crime scene evidence, by reversing its ruling years later to deny appellant the opportunity to perform mtDNA testing?

Appellant's position is that the trial court entered a final order permitting DNA testing of hair evidence collected at the crime scene in 1991. The parties were acting under that Court order and the preliminary DNA testing was performed. Then, over two and a half years later the trial court changed its mind and ruled that appellant could not conduct DNA testing on that same evidence. This violated the doctrines of collateral estoppel, stare decisis and res judicata requiring reversal by this Court for the following reasons.

The trial court entered a written order on March 7, 2002 [ROA vol. 1, p. 63] granting appellant the right to conduct DNA testing on the hair evidence collected from the victim's hands feet and arm during the original crime scene investigation by Det. Sgt. James Kammerer [ROA vol. 1, p. 99]. Appellant had raised the issue (that the hair and fiber evidence had never been adequately tested) in claim 5 of his second amended motion for postconviction relief that was filed in the trial court on March 7, 2001 [ROA vol. 1, p. 41].

The trial court's written order related back to the hearing on August 31, 2001, at which time appellant affirmed his desire to have DNA testing of the hair evidence [PCR vol. 5, pp. 500-508; SOA vol. 2, pp. 1-9]. The order also related back to the hearing on December 10, 2002, at which time the trial court postponed decision on the requested DNA testing until after the *Huff* hearing [PCR vol. 5, pp. 518-577; SOA vol. 3, pp. 1-60]. It was the hearing on February 2, 2002, when the trial court affirmatively ruled that appellant should be permitted to raise the issue of DNA testing and conduct that testing independent of the remaining postconviction issues [PCR vol. 5, pp. 578-601; SOA vol. 4, pp. 1-24].

It is important to understand that appellant raised the issue of DNA testing and had this procedure in the works prior to October 1, 2001, the effective date of **§925.11, Florida Statues**, and the rule promulgated to implement the procedure **Rule 3.853, Florida Rules of Criminal Procedure**. Since appellant's request for DNA testing predated the effective date of the statute and the rule, the trial court believed that appellant was not required to refile his motion under the statute and the rule after the effective date. This can be further understood from a series of correspondence between the assistant state's attorney heading up the law enforcement initiative for the Broward County State Attorney's office,

Carolyn McCann, and counsel for the appellant. See the McCann letter dated June 26, 2001 [App. item 2], counsel's letters of response dated July 20, 2001 [App. item 3] and August 30, 2001 [App. item 4], and McCann's letter dated September 4, 2001 [App. item 5] indicating that the State wanted the testing performed by the Broward Sheriff's Office Crime Laboratory only. These all predated the effective date of the statute and rule.

The State chose not to appeal the February 2, 2002, final order of the trial court permitting DNA testing despite the fact that it could have appealed it directly or by cross appeal along with the appeal of the denial of appellant's motion for postconviction relief. Instead the State complied with the trial court's order for a period of two years and two months, from the date of the written order on March 7, 2002 [ROA vol. 1, p. 63] until the date that the State filed its response to the defense request for mtDNA follow-up testing which was May 6, 2004 [SOA vol. 1, pp. 88-105]. This can be better understood from the State's letter dated June 13, 2002 [App. item 6] regarding the procedures for conducting DNA testing through BSO Crime Lab as required by the trial court's or dated March 11, 2002, and the State's letter dated August 29, 2002 [App. item 7] suggesting that a hearing be set to discuss the BSO DNA testing pursuant to the trial court's order.

On September 25, 2002, appellant filed a motion to permit

the defense to conduct lab and DNA testing [SOA vol. 1, pp. 5-19]. On November 15, 2002, Dr. Duncan of the BSO Crime Lab testified at the trial court hearing concerning the viability of mtDNA testing, a recent advance in DNA testing that would permit extraction of DNA from the hair shafts even without follicles attached [ROA vol. 4, pp. 1-29]. The trial court entered what it called an "amended order" granting appellant's motion to conduct DNA testing by BSO [ROA vol. 1, pp. 96-98].

Thereafter, on January 24, 2003, the State wrote a letter to counsel concerning the arrangements for collecting buccal swabs from appellant on death row [App. item 8] which was conducted shortly thereafter. The State did nothing on the issue until approximately a year later when the BSO Crime Lab analysis report on DNA testing was issued on January 13, 2004 [ROA vol. 2, pp. 378-380]. This report indicated that JK-1, JK-2 and JK3A through G may be suitable for mtDNA testing but BSO labs cannot perform those tests and would have to be outsourced.

In the interim, on March 9, 2004, appellant filed his notice of appeal to this Court on the trial court's denial of his motion for postconviction relief.

Appellant filed a renewed motion on April 8, 2004, requesting that mtDNA testing be conducted pursuant to the BSO lab report findings [SOA vol. 1, pp. 26-32] and the State filed its response on May 6, 2004 [ROA vol. 1, pp. 88-105] that raised

objections for the first time that the motion failed to comply with Rule 3.853, Florida Rules of Criminal Procedure and §925.11, Florida Statutes.

Thereafter, on August 13, 2004, the trial court determined that it was without jurisdiction to decide the issue of mtDNA testing since appellant's case was on appeal to the Florida Supreme Court on the motion for postconviction relief [ROA vol.5, pp. 30-32]. However, the trial court did not enter a written order until December 2, 2004 [ROA vol. 1, p. 136].

After the postconviction appeal was concluded, a hearing was held on March 1, 2007 [ROA vol. 6, pp. 43-54] on the status of the mtDNA testing and another hearing on August 2, 2007 [SOA vol. 5, pp. 1-46]. At that hearing the trial court heard argument on the motion for mtDNA testing failing to comply with Rule 3.853, Florida Rules of Criminal Procedure and §925.11, Florida Statutes and took the case under advisement. On October 18, 2007, the trial court entered its order denying appellant the right to conduct DNA testing on the hairs found by crime scene investigators in the hands and on the body of the victim [ROA vol. 2, pp. 368-380; App. item 1].

The trial court clearly entered a final order permitting DNA testing of the hair evidence on March 7, 2002 [ROA vol. 1, p.63]; the State could have appealed but chose not to and fully complied with that order continuously until it filed a response

on May 6, 2004 [ROA vol. 1, pp. 88-105]; the trial court changed its prior final order on October 18, 2007 [ROA vol. 2, pp. 368-380; App. item 1] when it reversed itself and denied appellant the right to conduct DNA testing on the evidence. This was clear error by the trial court.

In ***Puryear v. State*, 810 So.2d 901 (Fla. 2002),** this court addressed the doctrine of *stare decisis* and cited the decent of Justice Shaw in ***Perez v. State,* 620 So.2d 1256, 1267 (Fla. 1993):**

> Justice Shaw has aptly explained the underlying principle of stare decisis:
>
> [A] court when deciding a particular legal issue will pay due deference to its own past decisions on the same point of law. This is a judge-made rule created to assist courts in … fostering stability in the law, and promoting public respect for the law as an objective, impersonal set of principles.

The trial court in this case made a ruling that was acted on by the parties for over two years that DNA testing was allowed and the testing was actually progressing and being performed pursuant to that final order. The State could have appealed that final order but chose not to. When the BSO crime lab expert brought to light that STR DNA testing could not extract DNA from the hair evidence but that a newer method known as mtDNA testing was available to extract the DNA from the hair shafts, the trial court reversed its prior ruling and barred

appellant from completing its testing. That reversal violated the doctrine of *stare decisis*. The trial court order permitted DNA testing for the purpose of excluding appellant as the murderer, but required that the testing could only be performed by the Broward Sheriff's crime lab locally and not by any other FBI approved DNA lab. When BSO revealed its inability to perform the further DNA testing, the trial court decided not to allow DNA testing at all, even though the Defense offered to pay for the testing out of its allotted funds for this case.

It should be noted that when this murder occurred in 1991, DNA testing was in its infancy stages. By the time the DNA testing was conducted in this case further advances had been made such that DNA can now be extracted from a hair shaft that was not previously possible back at the time of the trial. DNA testing means DNA is extracted for comparison to known standards for forensic purposes. The trial court ruled that DNA testing would be permitted under the guidelines established prior to the effective date of the DNA statute and rule. Nowhere in the statute or rule does it state that only STR DNA is permitted and not mtDNA. Thus, the trial court reversed itself on its DNA rulings and this reversal by the trial court was clear error.

In ***McBride v. State*, 848 So.2d 287 (Fla. 2003),** this Court considered whether the doctrines of *res judicata* and *collateral estoppel* apply to a criminal rule of procedure. At page 290 of

the opinion, the Court discussed the common law doctrine of *res judicata*: "Thus, under res judicata, a judgment on the merits bars a subsequent action between the same parties on the same cause of action." The Court stated that *res judicata* may not apply to motions filed under a rule of procedure,

> … the similar, but more narrow, doctrine of collateral estoppel, or issue preclusion, does apply.1 We have explained that doctrine as follows:
>
> "Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." [citation omitted] Under Florida law, collateral estoppel, or issue preclusion, applies when "the identical issue has been litigated between the same parties or their privies." [citation omitted]

In accordance with ***McBride***, collateral estoppel precludes a party from re-arguing the same issue that had been decided by previous ruling on the original motion. That is precisely the case here. The trial court ordered that DNA testing would be conducted under the criteria existent prior to Rule 3.853 and that appellant was entitled to have the hair evidence tested by DNA. There was no specification that it had to only be STR DNA testing, but that DNA generally would be extracted from the hair, if possible, for forensic comparison purposes to rule out the appellant as the source of that hair. STR DNA and mtDNA are both scientific methods of extracting DNA from a piece of evidence. However, DNA is DNA. It is not affected by the type

of procedure that extracts it. Therefore, the State should have been precluded from arguing that mtDNA testing that was suggested by its own expert should subject appellant to a new standard under Rule 3.853 that had gone into effect while the original trial court order permitting testing was being implemented. That reversal by the trial court had the affect of precluding the issue of DNA testing for appellant, altogether.

In a civil case, ***Federated Department Stores, Inc. v. Motie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981),** the Supreme Court of the United States reviewed this case involving seven private antitrust actions by plaintiffs/respondents representing classes of retail purchasers against several department store defendants/petitioners on price fixing allegations. Five plaintiffs appealed an adverse order but the other two plaintiffs chose not to appeal but to refile their action in state court. The Ninth Circuit Court of Appeals held that "because respondents position was 'closely interwoven' with that of the successfully appealing parties, the doctrine of res judicata must give way to 'public policy' and 'simple justice.'"

The Supreme Court overruled the Ninth Circuit holding that there is no such exception to the doctrine of res judicata and held:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of

> an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. ***Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, 24 L.Ed. 195 (1897).** Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. ***Angel v. Bullington*, 330 U.S. 183, 187, 67 S.Ct. 657, 659, 91 L.Ed. 832 (1947); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534, 7 S.Ct. 1004, 1007, 30 L.Ed. 980 (1887).** As this Court explained in ***Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 604, 71 L.Ed. 1069 (1927),** an "erroneous conclusion" reached by a court in the first suit does not deprive the defendants in the second action "on their right to rely upon the plea of res judicata … A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments.

Although the above cite arises from civil litigation, the concept is most applicable to the criminal case at bar because if the State would have its way by cutting off appellant's right to continue with the DNA testing until DNA could actually be extracted from the hair shafts found in and on victims hands arms and body so that the DNA could be compared to appellant to rule him out as the murderer in this case or to a short list of

other Defense proffered suspects, then this appellant would stand alone as the only resident of death row who is not entitled to have the evidence of his case analyzed by modern DNA methods. In such an instance the State would have been successful in side-stepping the clear import of **§925.11, Florida Statues**, and **Rule 3.853, Florida Rules of Criminal Procedure** as well as the common law that preceded it.

Appellant is not receding from his position that his motion began the process of seeking DNA testing prior to the effective date of the statute and rule. Appellant is proceeding under the common law in effect prior to the statute and rule and upon the ruling of the trial court permitting DNA testing that was based thereon. It is appellant's position that once the trial court ruled in favor of DNA testing, and the State chose not to appeal that final order but, rather, acted under the final order to accomplish the DNA extraction procedure and testing for such a long period of time, that it was error for the trial court to reverse its prior final order. Appellant's motion for that mtDNA testing was not a new request necessitating compliance with **§925.11, Florida Statues**, and **Rule 3.853, Florida Rules of Criminal Procedure**. Rather it was a procedural mechanism for moving the case along. By reversing itself in its new order (under appeal), the trial court violated the doctrine of *res judicata*, and that was clear error.

If it is that *res judicata* requires a complete judgment on the merits of an issue in dispute between the parties and does not include final orders in opposition in the same litigation, and technically does not apply, then it is the doctrine of *collateral estoppel*, precluding the relitigating of issues previously resolved within the same action between the same parties and same trial court, that does apply. Either way, the trial court erred by taking away appellant's right to DNA testing after the parties had been struggling under the lengthy testing processes for so long.

This Court should reverse the trial court's order (currently under appeal) and remand the case to the trial court such that appellant may indeed have the mtDNA testing completed by an independent FBI certified DNA testing lab agreed upon by the parties and to move this phase of the case along without any further delay. Any other result would have the affect of singling out this death row inmate for special treatment by not permitting his evidence to be DNA tested at all, clearly an unconstitutional result.

ISSUE II: Whether the trial court erred in applying the wrong standard by requiring the appellant to prove conclusively that the results of DNA testing would exonerate him in light of all of the other evidence in the case as a condition precedent to mtDNA testing?

Appellant's position is that the trial court erred by deciding not to permit further DNA testing of the hair evidence in the form of mtDNA testing since the attempt to extract DNA from hair shafts was not successful from the STR DNA testing procedures alone. Perhaps the fact that the BSO lab is not able to conduct mtDNA testing and the evidence would have to be outsourced to another FBI certified lab entered into the trial court's equation to some degree. The trial court believed that even if mtDNA testing results would have completely excluded appellant as the source that the result at trial would not tend toward acquittal in light of all of the other evidence in the case. However, that conclusion would be plain error and would require reversal by this Court for the following reasons.

The evidence in this case shows that the victim and her assailant were engaged in hand-to-hand combat that resulted in her being stabbed three times [R 2076-2078]. One of those wounds was into her chest and through the heart. This stab wound had to have been inflicted while she was lying down on the

bed [R 2074-2076]. Whether during the struggle she was thrown on the bed or she fell down, we cannot be certain. According to the ME's testimony, that was the stab wound that killed her [R 2074-2076]. It is clear from the crime scene evidence that the hairs that were collected from her hands and arm and about her body were not hers. The only logical conclusion to be drawn is that those hairs belonged to her assailant and were ripped from the murderer during the final struggle. The victim was then wrapped in layers of sheets and blankets and left for several days in that same condition [R 1358]. Appellant contends that those hairs are not his but are those of the real murderer and he seeks to prove that via mtDNA testing.

This Court decided ***Hoffman v. State*, 800 So.2d 174 (Fla. 2001)** before October 1, 2001, the effective date of **§925.11, Florida Statues**, and the rule promulgated to implement the procedure **Rule 3.853, Florida Rules of Criminal Procedure**. Barry Hoffman was said to have committed a murder for hire. At the scene of the crime was a pack of cigarettes with Hoffman's fingerprint. At the time of his arrest, Hoffman gave a full confession to FBI agents and Jacksonville Beach police. This Court reversed Hoffman's conviction and death sentence based upon *Brady* violations. See ***Brady v. Maryland*, 373 U.S. 83 (1963).**

In the case at bar, hair evidence was known to the Defense

at trial. However, DNA testing was in its infancy and mtDNA testing was still some ten years off in the future. This form of DNA analysis was completely unknown at the time of trial in this case. Today mtDNA is a present laboratory testing technique that is known and available to determine: (1) whether the hairs were appellant's or someone other than appellant; and (2) provided known standards can be provided of a limited number of alternative suspects, to whom those hairs belonged. Clearly, the person whose hairs they are is the actual and true murderer of Lorraine Pezza. This testing is just that crucial to a fair and just determination of this case. Notwithstanding the other evidence in this case, all of which is circumstantial or comes from the jail witness, William Palmer, a witness who has since been found to be unreliable and utterly not credible, if the donor of hairs in the victim's hands during her last clutching efforts to stave off her attacker are not hairs belonging to Robert Consalvo, then the State has convicted the wrong man.

***Hoffman v. State*, supra, at 803,** this Court said:

> Whether Hoffman was in fact in that motel room was an important issue that the jury had to resolve. Therefore, any evidence tending to either prove or disprove this fact would be highly probative. Hair evidence found in the victim's clutched hand could tend to prove recent contact between the victim and a person present in that room at the time of her death. With the evidence excluding Hoffman as the source of the clutched hair, defense counsel could have strenuously argued that the victim

> was clutching the hair of her assailant, but that assailant was not Hoffman.
>
> Given the circumstances of this case, there is a reasonable probability, had the evidence been disclosed, that the outcome would have been different. See ***United States v. Bagley*, 473 U.S. 667, 682 (1985).** Therefore, the defendant is entitled to a new trial based upon this Brady violation.

Hoffman is on point with the Consalvo case (except that ***Hoffman*** had a *Brady* violation and Consalvo has a potential *newly discovered evidence* claim. Whether or not Robert Consalvo was in the victim's bedroom at the time of her murder alone with her there at the time of the final struggle and her demise was the essential question that the jury had to resolve at trial. For that reason, the identity of the hair evidence tending to prove or disprove Consalvo being there at that time would be highly probative. If the mtDNA testing proves that those hairs did not come from Consalvo, then Defense counsel could have strenuously argued at trial that, "Yes, the victim clutched the hair, and was wrapped in sheets encasing the hair, of her murderer but that person was clearly not Robert Consalvo."

Unlike ***Hoffman,*** this is not a case where the State failed to disclose the hair evidence under ***Brady,*** but there was no ability for the defense to have mtDNA testing performed on those hairs at that point in the evolving history of DNA techniques. This testing method of DNA analysis is known and is available

today. DNA extraction analysis from hair shafts is currently something that can be performed and is becoming quite common. Results that rule of appellant as the donor of the hair will form the basis of a *newly discovered evidence* claim.

The trial court was correct in permitting the defense to have DNA testing performed in the first place. If the testing revealed that the hairs were not Consalvo's but were someone elses, it would have been the only direct forensic evidence of identity in this case. That certainly and necessarily would have shed light on who the actual killer was or, at the very least, that the Consalvo was not the murderer.

The Second DCA, in ***Magaletti v. State,*** **847 So.2d 523 (Fla. 2d DCA 2003),** considered the admissibility of mtDNA analysis which was at that time "… an issue of first impression in Florida appellate courts." The trial court conducted a *Frye* test and the results of that evidentiary hearing were on appeal. The Second DCA held that "… the method of mtDNA analysis, as well as the statistical calculations used to determine a rate of exclusion in this case, satisfy *Frye*." The mtDNA testing is accepted as scientific evidence in the courts of Florida and would be accepted in the trial court below as a valid and scientific method for extracting DNA and statistical comparison analysis. The trial court erred in not permitting appellant to have the mtDNA testing completed after which appellant would

have the burden to show that the results were newly discovered evidence and would likely change the outcome of the case at trial.

See also ***Knighten v. State,*** **927 So.2d 239 (Fla. 2d DCA 2006)***;* and ***King v. State*****, 808 So.2d 1237 (Fla. 2002). §925.11, Florida Statues**, and **Rule 3.853, Florida Rules of Criminal Procedure** do not limit the type of DNA testing that should be used to satisfy the statute and rule. That is not to limit DNA testing only to STR DNA since other methods of DNA extraction have been judicially accepted. Where STR DNA testing cannot be performed on hair shafts, there is only one method currently in use and accepted by the Florida courts for extracting DNA and that is mtDNA testing. This is an acceptable test within the purview of the statute and rule.

The trial court erred in refusing to permit mtDNA testing in this case on the hair evidence. This Court should reverse the trial court and remand for mtDNA testing of the hair shaft evidence collected by crime scene investigators in 1991.

CONCLUSION

Appellant must be permitted to continue the previously ordered DNA testing of hair evidence collected from the crime scene by being permitted to outsource the mtDNA testing to a certified FBI laboratory agreed upon by the parties. This Court should reverse the ruling of the trial court that denied mtDNA testing and to remand the case to the trial court to monitor the procedural aspects of mtDNA testing. At the conclusion of the DNA testing, appellant should be given the opportunity to amend Claim 5 of his motion for postconviction relief and the trial court should conduct a *Huff* hearing to determine if there is any newly discovered evidence relating to the DNA results that would significantly change the outcome of the trial, guilt phase or penalty phase and any other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Initial Brief was served by mail upon Susan Bailey, Esq., Assistant State's Attorney, at the Broward County Courthouse, 201 SE 6th Street, Room 655, Fort Lauderdale, FL 33301, and by mail upon Leslie T. Campbell, Esq., Assistant Attorney General, at 1515 North Flagler Drive; Suite 900, West Palm Beach, FL 33401, this 21st day of July 2008.

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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

IRA W. STILL, III, ESQUIRE