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 completion of DNA testing of foreign hair evidence found in and on victim's hands and body by crime scene investigators.

REPLY BRIEF OF APPELLANT

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

Ira W. Still, III

IRA W. STILL, III, ESQUIRE
Attorney for Appellant
148 SW 97th Terrace
Coral Springs, FL 33071
OFFICE: (305) 303-0853
FAX: (954) 827-0151
EMAIL: aistill@bellsouth.net
Florida Bar No.: 0169746

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SUMMARY OF REPLY ARGUMENT

The trial court ordered that DNA testing would be done in this case. No DNA testing has been done as the hair evidence was determined not to be amenable to STR DNA testing, the only kind of DNA testing that can be performed by trial court designated lab.

The BSO Crime Lab expert testified to the trial court that mtDNA analysis could be performed on the hair evidence. The trial court then reversed itself and decided no further DNA testing would be permitted. No DNA testing has ever been performed on the hair evidence in this case.

The trial court's final order denying DNA testing is clearly erroneous based upon cases that both the State and appellant have cited and argued in their respective briefs. This Court should reverse the trial court and require that mtDNA testing continue and be performed at an appropriate FBI certified laboratory.

REPLY ARGUMENT

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

1. In its answer brief (pp. 28-30), the State cites ***Knighten [II] v. State***, 927 So.2d 239 (Fla. App. 2DCA, 2006)and says that "it supports the State's position" (p. 28). Actually, ***Knighten [II]*** is very much on point with this case and clearly supports appellant's position.

The *Knighten* case went to the Second DCA twice in regard to the trial court's denial of Knighten's postconviction motion for DNA testing. In ***Knighten [I] v. State***, 829 So.2d 249 (Fla. App. 2DCA, 2002), the trial court held that the motion was facially insufficient. The Second DCA reversed, finding that it was facially sufficient and that it complied with the pleading requirements of rule 3.853(b). It remanded the case to the trial court for DNA testing.

The table on the following page shows the direct similarities between *Knighten* and *Consalvo*:

Knighten	***Consalvo***
1. On remand, the trial court ordered the DNA testing be performed.	1. After full consideration, the trial court ordered the DNA testing be performed.
2. The FDLE laboratory examined the hairs and reported that they	2. The BSO Crime Laboratory examined the hairs and reported

were not suitable for STR DNA analysis.	that they were not suitable for STR DNA analysis.
3. On ***Knighten [II]***, the defendant argued that actually no DNA testing had been performed as previously required by the Second DCA, and that the hairs were suitable for other types of DNA testing such as mtDNA testing.	3. In this case, the defendant argues that actually no DNA testing has been performed as previously required by the trial court's orders, and that the hairs were suitable for other types of DNA testing such as mtDNA testing.
4. Knighten did not challenge the accuracy of the FDLE laboratory's STR DNA test.	4. Appellant does not challenge the accuracy of the BSO Crime Laboratory's STR DNA test.
5. Rather, Knighten complained that no DNA testing had actually been performed.	5. Rather, Consalvo complained that no DNA testing has actually been performed.
6. The 2nd DCA Court noted that the FDLE lab has yet to actually test the DNA and all it had found was that the hairs were not suitable for STR DNA testing.	6. The Florida Supreme Court will note that the BSO Crime Lab has yet to actually test the DNA and all it had found was that the hairs were not suitable for STR DNA testing.

The Second DCA, in ***Knighten [II]***, held that rule 3.853, Fla. R. Crim. P., and §925.11, Fla. Stat., do not delineate which form of DNA testing should be performed. The postconviction court is not limited to just STR DNA testing,

> …particularly when there are other means of DNA testing that have been judicially accepted. See ***Magaletti v. State***, 847 So.2d 523 (Fla. App. 2DCA 2003) ruling that the use of mtDNA testing to prove identity meets the test in ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923). In fact, it is reasonable to conclude that if another, more suitable test could exonerate Knighten, the more suitable test should be performed. [***Knighten [II]***, at 241.]

In this case, the trial court determined after several

hearings that the appellant should be permitted to have the hairs in question DNA tested by the BSO Crime Lab. The State was in agreement that any DNA testing should be done through the BSO Crime Lab. Testing was attempted but the BSO Crime Lab was unable to complete any DNA analysis because it was only equipped to perform STR DNA analysis and STR DNA could not extract DNA from the hair samples in evidence. The BSO DNA expert testified that the hairs were not able to be tested in that lab, but that mtDNA testing may indicate the comparison results that were being sought from the DNA testing that had been ordered by the trial court.

It was only after all of that took place that the trial court reversed itself and decided not to permit mtDNA testing on the theory that further testing would require a new motion by the defendant that now would require meeting the requirements of rule 3.853. In that that was not done, the trial court denied the defendant's continuing request for the DNA testing.

Consalvo, like ***Knighten [II]***, actually never had the DNA testing that the trial court was under prior order to be performed. The previous order in ***Knighten [II]*** was from the appellate court whereas the previous order in *Consalvo* was from the trial court's own prior rulings. By analogy, this is the identical situation. In both cases, the defendants were not challenging the accuracy of the STR DNA test, but they were each complaining that no DNA testing had been performed and that mtDNA testing was being sought.

In this case, the State refrains that there was not a sufficient motion under Rule 3.853, Fla. R. Crim. P., and that the

trial court was correct to deny the mtDNA testing. However, the court was considering a motion that had been filed before the effective date of the rule. In addition the trial court granted defendant's motion for DNA testing provided it was done through the State's designated laboratory (BSO Crime Lab). The testing was attempted but the hairs were found not to be amendable to STR DNA testing.

According to the BSO DNA expert, this hair evidence was suggested for mtDNA testing. However, BSO Crime Lab is not equipped to perform mtDNA analysis. That testing would have to be outsourced and performed by an independent FBI certified DNA lab.

When this case came back from the postconviction appeal and was once again properly in front of the trial court, the only determination should have been which lab would do the mtDNA testing on these hairs and which party would be required to contract and pay for that testing. The trial court clearly erred in not permitting mtDNA testing because in so doing it essentially denied any DNA testing for this death row inmate.

The mtDNA testing is simply another means of DNA testing that has been judicially accepted as meeting the ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923) standard. Performing mtDNA testing was the DNA testing that had been previously contemplated and ordered performed by the trial court. It was not additional or new DNA testing. It, therefore, would not require a new motion and a new trial court order.

2. In its answer brief (pp. 28-30), the State cites two cases decided by this Court: ***Hitchcock v. State****,* 866 So.2d 23 (Fla. 2004) [cited at pp. 19, 21, 35, 36 and 38] and ***Van Poyck v. State****,* 908 So.2d 326 (Fla. 2005) [cited at pp.21 and 38]. Both of these cases rest upon facts that have no direct connection to the case at bar.

In ***Hitchcock***, supra, Hitchcock claimed, in his postconviction motion, that the hair comparison evidence that had been admitted at trial had been incompetently analyzed. In the case at bar, there has been no DNA testing results and Consalvo does not claim the analysis was errant or incompetently performed. Consalvo wants the DNA testing to be performed by an appropriate laboratory, and he seeks mtDNA testing of the hairs that were found in the right hand, on or about the left hand, and on body of the deceased victim who was incased and wrapped in sheets at the time of her demise by the killer. In Consalvo there has been no DNA testing done at all.

In ***Hitchcock***, supra, this Court pointed out that the postconviction motion claiming DNA testing believed the results might show that the defendant's brother was the one who strangled the victim. It was noted that the defendant, the suggested perpetrator (defendant's brother) and the victim "all occupied the same house, and all three would have deposited hair, skin, bodily fluid, eyelashes, and nail clippings throughout the house" (at p. 25). Any results would be so speculative that it could not be said that the results would raise a reasonable probability that defendant would be acquitted or received a lesser sentence.

In the case at bar, the victim had hairs in the clutches of her right hand, on her left hand and on her body that were not hers. She was wrapped up in sheets and blankets that were left undisturbed from the time of the murder until BSO Crime Scene began their investigation. Clearly those hairs, that were not the victim's, belonged to the murderer. If they were not Consalvo's hairs, there is an inherent reasonable probability that he would have been acquitted at trial.

At the time of trial, mtDNA testing had not been discovered and could not be performed. It can now. The hair evidence sought to be DNA tested is physical evidence that may contain DNA and such test results would be admissible at trial, thus satisfying the first prong of the ***Hitchcock***, supra, test. The hairs collected by crime scene have been adequately preserved, they are authentic and would be admissible at a future hearing, thus satisfying the second prong of the ***Hitchcock***, supra, test.

In ***Hitchcock***, supra, [at p. 2040] this Court held that the trial court must 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.

Either the trial court failed to follow the requirements of ***Hitchcock***, supra, in not first determining that physical evidence that may contain DNA still exists or it was relying upon its previous orders and proceedings that were based upon the agreed foundation that the hair evidence satisfied the first prong of the ***Hitchcock***, supra, test. Likewise, it made no findings required under the second prong of the test that the hair evidence in question was authentic and the DNA analysis results would be admissible in a future hearing. Either the trial court failed to follow ***Hitchcock***, supra, or it was relying upon its previous orders and proceedings that were based upon the agreed foundation that the hair evidence satisfied the second prong of the ***Hitchcock***, supra, test.

In its order under appeal, the trial court rested (and the State argues over and over here) that if the mtDNA evidence would be admitted at trial there is no reasonable probability that Consalvo would be acquitted at trial. The known facts in regard to the hair evidence are:

> (1) the hairs in victim’s right hand, on victim’s left hand, and on the victim’s body were not hers; and
>
> (2) these hairs lay wrapped in the sheets and blankets

undisturbed for several days with victim's body.

If these hairs did not belong to the murderer and come from the final death struggle between the murderer and the victim, as the State contends and the trial court based its final order on, then neither the trial court nor the State have answered the two obvious questions: (1) whose were they? and

(2) how did they get there in the first place?

The analysis under the third prong of ***Hitchcock***, supra is the identical analysis under ***Hoffman v. State***, 800 So.2d 174 (Fla. 2001).

In the second case argued by the State on this point, ***Van Poyck v. State***, it is likewise factually very different from *Consalvo*. In ***Van Poyck,*** this Court found that:

> The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffiths transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination…Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at this head…(and) ordered him to get under the van. Turner saw another person forcing Griffiths to the back of the van; … he heard a series of shots and saw Griffiths fall to the ground. Turner…noted that he did not know where Van Poyck was at the time of the shooting. [at p. 326]

Van Poyck testified at trial denying that he shot Griffiths. "He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan." [at p. 327]. This Court found that there was sufficient evidence to support the

first-degree felony murder conviction and the death penalty.

On postconviction, Van Poyck sought DNA testing of all of the clothing worn by Van Poyck and Valdez at the time of the murder. He alleged that DNA testing could establish that Valdez (not Van Poyck) was the triggerman and that this evidence would mitigate his sentence. This Court held that since he was convicted of felony murder and sentenced to death on that crime, none of the aggravators found by the trial court were based on Van Poyck's triggerman status. In addition this Court held on the direct appeal that the record did not establish that Van Poyck was the triggerman but that it did establish that he was the instigator and the primary participant in this crime of felony murder.

Van Poyck, supra, is clearly distinguishable from Consalvo because it is not a choice between who actually launched the death blow between two co-defendants in a first-degree felony murder case. In *Consalvo*, there was only one perpetrator and that person left the hair evidence that was found in areas that point to the last struggle between the victim and her killer. The murderer then wrapped the dead body of the victim in layers of sheets and blankets. The body remained in that condition for several days until it was uncovered by BSO Crime Scene investigators. The murder scene remained undisturbed for all that time. If these hairs do not belong to Consalvo, then clearly he is not the murderer [notwithstanding the other evidence that has been attacked individually and affirmed independently of each other evidentiary

factor].

3. In its answer brief (pp. 29 and 36, citing its use in the trial court's order), the State cites ***King v. State***, 808 So.2d 1237 (Fla. 2002). The facts are clearly distinguishable from this case under consideration here.

King sought mtDNA testing of a hair fragment found on the victim's nightgown and 3 hairs found in pubic combing of the victim. In ***King***, supra, the house had been set on fire. The raped and wounded victim crawled from the bedroom to the back door where she died. She was then dragged outside by firemen in an attempt to save or revive her. This Court held that the hair fragment that was found on the nightgown of the victim could have been

> transferred from anyone's hair that was on victim's floor as she crawled from her bedroom to the back door, from anyone's hair that was on the porch area where she expired, from anyone's hair that was on the ground outside her house where she was dragged away from the fire, from the perpetrator of the rape and murder, from one of the men who dragged her away from the burning house, from the medical examiner, from one of those who identified her, from any other fire or police personnel present, or from [the victim]. [at page 1243]

Thus, even if mtDNA testing concluded that it was not from the victim or the defendant, it cannot be said that there exists a reasonable probability that the defendant would be acquitted or receive a life sentence if re-testing were permitted by the Court.

The FBI lab concluded that the 3 hairs that were located from the pubic combing belonged to the victim. Therefore, the movant

could not show any reasonable probability that he would be acquitted or receive a life sentence if the requested re-testing was allowed.

In the case at bar, the hairs have not already been tested and conclusively determined to have been the victim's. No DNA testing has been done whatsoever. *Consalvo* is not a case where the defendant seeks re-testing of the same evidence. Appellant in this case has shown that mtDNA would provide the DNA analysis that the trial court previously ruled to be performed. Therefore, ***King***, supra, does not directly apply to the facts of this case.

4. Factually, the case at bar is squarely within the parameters of ***Hoffman v. State***, 800 So.2d 174 (Fla. 2001). In his initial brief in this case [at pp. 36-37], appellant argues that at the time of trial mtDNA was undiscovered and not available for DNA testing and analysis. Today mtDNA testing is known and recognized as scientific under the ***Frye***, supra, standard. "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. [I]f 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."

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

> 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**,* supra, is on point with the Consalvo case. Although ***Hoffman**,* supra, was decided on a *Brady* violation and Consalvo has a potential *newly discovered evidence* claim, the standard of each analysis is whether there is a reasonable probability that the outcome of the trial would have been different. If the hair evidence is tested for mtDNA and it clearly excludes Consalvo as the donor, the only conclusion that can be drawn is that Consalvo could not have been the murderer.

Notwithstanding the circumstantial evidence adduced at trial, including the purported jail conversation with William Palmer who has since been determined to have been totally incredible and unbelievable (a severely mentally ill person, lifelong drug addict who was convicted over and over again of serious felonies), the direct mtDNA evidence conclusively will show that Consalvo could

not have murdered the victim as has been argued over and over again by the State throughout the many years of this litigation.

This Court should permit the mtDNA testing at this time.

CONCLUSION

This Court should order that the DNA testing requested in this case be completed pursuant to the trial court's prior orders and that mtDNA testing be performed. The case should be remanded to the trial court to select the FBI certified laboratory for the mtDNA testing and to determine which party will pay for the cost of testing the hair evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Reply Brief was served by mail upon Susan Bailey, Esq., Assistant State's Attorney, at the Broward County Courthouse, 201 SE 6th Street, Room 655, Fort Lauderdale, FL 33301, and by mail upon Leslie T. Campbell, Esq., Assistant Attorney General, at 1515 North Flagler Drive; Suite 900, West Palm Beach, FL 33401, this 23rd day of September 2008.

Ira W. Still, III

IRA W. STILL, III, ESQUIRE
Attorney for Appellant
148 SW 97th Terrace
Coral Springs, FL 33071
OFFICE: (305) 303-0853
FAX: (954) 827-0151
EMAIL: aistill@bellsouth.net
Florida Bar No.: 0169746

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