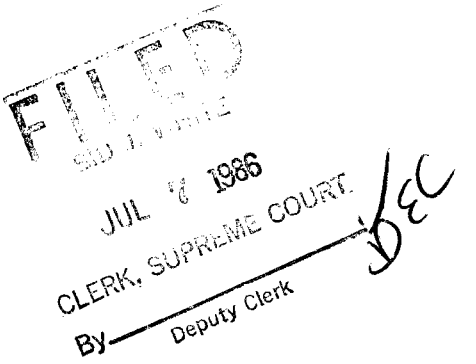
IN THE SUPREME COURT
OF FLORIDA



Case No. 68,664

DAVID GORHAM,

Appellant,

-v-

THE STATE OF FLORIDA,

Appellee.

RELPLY BRIEF OF APPELLANT

LAW OFFICES GREENBERG, TRAURIG, ASKEW, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P. A.
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ARGUMENT

The State of Florida has raised two main points in its Answer to the Initial Appeal Brief of David Gorham:

1. Gorham's appeal raises the same issues as Scott v. State and, therefore, Scott mandates that Gorham's Rule 3.850 motion be verified with the Rule 3.987 form oath.

2. The Rule 3.987 oath does not really require "first hand" knowledge that the facts and matters asserted in a petition are true and correct.

Not one of these points raised by the State is able to pass the muster of judicial scrutiny.

I. THE STATE HAS NOT ARTICULATED A SINGLE REASON WHY BLIND ADHERENCE TO THE FORM OATH IS APPROPRIATE IN THIS CASE

The State's primary argument is that the form oath, and only the form oath, is permitted, because this Court in Scott so held. The State fails to articulate any reason why the form oath is preferable to the oaths and affidavits filed by Gorham. Indeed, the State does not point out a single deficiency in Gorham's oaths and affidavits, other than that they are not identical to the form oath.

The State's inability to find fault with the substance of Gorham's oaths and affidavits serves to underscore how it has misread this Court's opinion in Scott. Scott does not require blind adherence to the Rule 3.987 form oath. The Court in Scott required an oath adequate to assure a truthful 3.850 pleading. Gorham's Rule 3.850 oath, supplemental affidavit and appendix containing third party affidavits and depositions exceed the Scott requirements. Gorham, taking great care to prepare a truthful Rule 3.850 motion supported by ample evidence, has tailored his oaths and affidavits to the specific facts and legal claims of the case and supported every factual allegation with independent evidence attached in the appendix to his Rule 3.850 motion.

The Scott opinion urges truthful pleading practice. Gorham's motion meets the Scott objective. The State's attempt to require a rigid adherence to the form oath and nothing but the form oath elevates form over substance. It also transforms this Court's desire for truthful pleading practice into a requirement that Gorham must sign a false oath before Florida courts will afford him a forum in which to raise his constitutional claims. Surely, this Court in Scott did not intend such an contradictory result.[1/]

1/ In addition to its two primary arguments, the State asserts that the form oath should be required, because it is not (continued)

II. THE STATE'S DEFINITION OF "PERSONAL" KNOWLEDGE MUST BE REJECTED, BECAUSE THIS DEFINITION CONTRADICTS THE RATIONALE OF THIS COURT IN SCOTT, THE STATES OWN ARGUMENTS IN SCOTT, AND THE PLAIN AND ORDINARY MEANING OF THE TERM "PERSONAL KNOWLEDGE."

The State's second argument, that "the Rule 3.987 oath does not require "first hand" knowledge -- only personal knowledge, flies in the fact of reason, contradicts the State's own Answer Brief in Scott v. State, and disregards the plain meaning of "personal knowledge."

According to the State, "personal knowledge" includes hearsay and similar second, third and fourth hand exchanges of information. If that were so, an oath swearing that facts were true based on "personal knowledge" would be no different, as a practical matter, from one swearing facts were true "to the best of my knowledge" -- the very oath condemned by the State in Scott as an inadequate safeguard against perjury. Issues, literally, of life and death should not be made to turn on whatever semantic difference the State finds between these terms. Especialy where the State changes its definition on a case by case basis.

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unduly harsh or burdensome for a prisoner to sign the Rule 3.987 form oath. This argument completely misses the point at issue. Gorham is not refusing to sign the Rule 3.987 form oath because of personal hardship. Gorham refuses to sign the form oath because it is false. Personal hardship is not relevant to this appeal.

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The State's attempted distinction between "personal" knowledge and "first hand" knowledge is also contradicted by its own arguments before the Court in Scott.[2]/ In Scott, the State argued that the oath requirement of Rule 3.850 should be construed identically to the oath requirement of a sworn motion to dismiss filed under Rule 3.190(c)(4). See Answer Brief, Scott v. State, p. 6-7. In support of this argument, the State cited several cases interpreting Rule 3.190(c)(4). In State v. Upton, 392 So.2d 1013, 1016 (Fla. 5th DCA 1981), for example, the court found that an attorney filing a sworn motion to dismiss must have personal knowledge of each fact, "not that he believes [each fact] to be true, because someone else has told him that it is." (Emphasis added.) See also State v. Moore, 423 So.2d 1010, 1011 (Fla. 4th DCA 1982) ("[w]e see a distinction between a defendant's oath and that of an assistant state attorney who can traverse only in good faith on the basis of the contents of his file, not what he knows of his own knowledge").

Contrary to the State's position in this case, these aforementioned cases stand for the proposition that a sworn motion to dismiss must be based on the personal knowledge of the declarant, not upon the contents of his, or his attorney's, file,

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2/ The State has asked this Court to take judicial notice of the briefs in Scott v. State. We join in that request.

see Moore, 423 So.2d at 1011, or upon what "someone else has told him," see Upton, 392, So.2d at 1016. Thus, Gorham cannot swear to having personal knowledge based upon what his attorney "has told him" or upon his attorney's file.

The State is equally wrong in its attempt to redefine the term "personal knowledge" as not requiring "first hand" knowledge. This Court has repeatedly held that words of common usage contained in a statute should be construed in their plain and ordinary sense. See Citizens of State v. Public Service Com., 425 So.2d 534 (Fla. 1982); State v. Cormier, 375 So.2d 852 (Fla. 1979); Tatzel v. State, 356 So.2d 787 (Fla. 1978); Pedersen v. Green, 105 So.2d 1 (Fla. 1958). The plain and ordinary meaning of "personal knowledge" is not second hand or hearsay knowledge. Personal knowledge is a higher standard of knowledge, one consisting of testimony concerning matters that the deponent personally observed.3/

3/ For example, Webster's Ninth New Collegiate Dictionary, 1985, p. 877, defines the word as "done in person without the intervention of another" and as "proceeding from a single person."
See also, Black's Law Dictionary, 1968, Revised Fourth Edition, pp. 1300, 1301.

CONCLUSION

Gorham seeks a new trial based upon serious and well supported allegations of constitutional violations at both trial and sentencing. Most of these claims are based, not upon Gorham's personal knowledge, but upon facts unearthed by post trial counsel's post conviction investigation. Indeed, one of the significant issues Gorham seeks to raise is the State's knowing use of false testimony at trial and the State's suppression of other exculpatory evidence.

The State's attempt to condition Gorham's ability to raise these claims before Florida courts on his swearing to personal knowledge of facts that, by their very nature, were kept from him by the State's own unconstitutional conduct must be rejected. Falsehoods can be rooted out only by adherence to truth. The goal of truthful pleadings is a desirable one, but not one that should be, or needs to be, transformed into a barrier between the victims of such violations and the Florida courts. David Gorham requests this Court to order the trial judge to permit full discovery and conduct a fair hearing on the serious constitution

violations presented by Gorham, so that the truth can finally emerge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was furnished by mail to Robert Tietler, Esq. and Paul Zacks, Esq. this 3rd day of July, 1986.

Thomas K. Equels